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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-355

IN THE MATTER OF :
D. VINCENT LAZZARO, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: January 8, 1992

Decided: March 9, 1992

Paula T. Granuzzo appeared on behalf of the Office of Attorney Ethics.

Frank W. Thatcher appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter is before the Board based upon a recommendation for public discipline filed by the Office of Attorney Ethics ("OAE").

D. Vincent Lazzaro, the respondent herein, was admitted to the New Jersey bar in 1960. His office is located at 10 North Black Horse Pike, Blackwood, New Jersey. Respondent, a sole practitioner, was charged in an amended complaint, dated March 7, 1991, with one count of failing to maintain required records, in violation of R.1:21-6 et seq., RPC 1.15(a) and (d) and DR 9-102. Respondent was also charged with four counts of knowing misappropriation of funds.

This case resulted from a random audit of respondent's records conducted by the OAE. On February 29, 1988 an initial investigation was commenced by Samuel J. Gerard, Esq., Auditor-in-Charge of the Random Audit Program of the OAE. Mr. Gerard's investigation covered the period from February 28, 1986 to June 29, 1988.

Respondent maintained several accounts, including an attorney trust account, an attorney business account, and a personal account, which was referred to as the "rent trust account." The rent trust account had been established to hold security deposits for rental property owned by respondent in Wildwood, New Jersey. The account was a separate interest-bearing account.

Mr. Gerard's review revealed that respondent maintained his clients' trust ledger on three-inch by five-inch index cards. A reconciliation of respondent's attorney trust account showed that, as of February 29, 1988, he had a shortage in his trust account of \$8,700.80. Respondent corrected the shortage on March 25, 1988 by transferring \$7,636.08 from his personal rent trust account and \$354.27 from his attorney business account. On March 28, 1988, he transferred an additional \$710.45, which corrected the entire shortage. Attachment 1 to amended complaint.

The OAE had forwarded a letter to respondent dated March 4, 1988, advising him of an OAE audit scheduled for March 22, 1988. Respondent thereafter requested a postponement, which was granted, until March 28, 1988. Mr. Gerard believed that the extension had given respondent sufficient time in which to update his records and

correct any shortages appearing therein. Based upon the entries contained in respondent's client ledger cards, Mr. Gerard concluded that respondent had knowingly misused his trust account funds. He, therefore, recommended that the matter be assigned for further investigation and prosecutorial involvement. Id.

Based on Mr. Gerard's recommendation, a further investigation was conducted by Gerald Smith, Chief Auditor. Mr. Smith reviewed respondent's client ledger cards, bank statements, canceled checks and deposit tickets. T13.¹ At the DEC hearing,² Mr. Smith testified that the client ledger cards failed to include descriptive information regarding the source of any deposits or receipts. The disbursements, for the most part, did not contain any descriptions. The disbursements that did contain descriptions were extremely minimal in nature. T16. Respondent did not provide cash receipts or cash disbursements for the OAE's review. Moreover, there was no evidence that respondent reconciled his trust account bank statement or trust ledger cards. Id. Mr. Smith determined that there were negative balances in several of respondent's client accounts. The negative balances appeared on respondent's client ledger accounts as follows: 1.) L. Geria - \$5,026.03; 2.) D. Bernardo (respondent's daughter) - \$1,602.30; 3.) N. Lazzaro (respondent's brother) \$1,007.75; 4.) D. Vincent Lazzaro - \$6,266; and 5.) eight other accounts totalling \$710.45.

¹ T denotes the transcript of the June 13, 1991 District Ethics Committee (DEC) hearing.

² Special Master Bonnie Goldman presided at the DEC hearing.

The negative balances appearing on the client ledger cards totalled \$14,612.53.

When respondent learned of the impending audit, he attempted to reconcile his records and made paper transfers on his books totalling \$6,300. He also transferred money from his other accounts in the amount of \$8,346.53. These transfers left respondent with a positive balance of approximately \$34 in his own client account.

Mr. Smith determined that, as of February 29, 1988, respondent was out of trust in the "gross amount" of \$14,612.53. T21. Mr. Smith, however, gave respondent credit for various items including: a positive balance of \$5,000 in respondent's personal account known as the "Barbara Corporation"; \$1,300 from fees in the Braunstein matter, which he purportedly failed to remove; and \$5,026.03 from the Geria matter, which involved funds erroneously deposited into respondent's personal business account. Giving respondent the benefit of these credits, Mr. Smith determined that respondent was only out of trust in the amount of \$3,286.50. Attachment 2 to amended complaint.

During the course of his investigation, Mr. Smith questioned respondent regarding each relevant client ledger card. Testimony regarding same was also presented at the DEC hearing by both Mr. Smith and respondent.

The relevant matters are as follows:

THE GERIA MATTER

Respondent represented the Gerias in a real estate transaction. As settlement agent for the transaction, respondent received \$5,000, which he deposited on January 30, 1985. Because a delay in settlement had been expected, the parties wanted the money deposited into an interest-bearing account. Rather than open a separate account, respondent deposited the Geria funds into the rent trust account, which was purportedly his only interest-bearing account. Settlement occurred earlier than anticipated, on February 28, 1985. At that time, respondent disbursed a check from his attorney trust account in the amount of \$5,026.03, representing the \$5,000 escrow, together with one month's interest in the amount of \$26.03. Respondent, however, failed to transfer the \$5,026.03 of the Geria funds from his rent trust account to his attorney trust account until February 1988. Respondent testified at the DEC hearing that the money from the rent trust account was never transferred into his attorney trust account and that he did not realize the mistake until sometime in 1985, when he learned that his trust account was \$5,000 short. He testified that, although he had assumed that a mathematical error had caused the \$5,000 deficiency, he never took the time to reconcile his accounts. It is not disputed that the \$5,000 remained in respondent's rent trust account.

THE BERNARDO MATTER

Deborah Bernardo is respondent's daughter. On or about June 20, 1983, respondent established a client ledger card for her and deposited an initial amount of \$5,000 into his attorney trust account. The monies were being used for expenses in connection with the construction of a house for Bernardo. Subsequently, disbursements were recorded on the ledger card for those expenses. Negative balances were recorded on Bernardo's client ledger card from December 16, 1983 to May 29, 1984, at which time the negative balance was \$1,602.30. A negative balance remained on the client ledger card until February 29, 1988. On May 29, 1984, the ledger card showed a negative balance of \$2,102.30. At that time, respondent deposited only \$500 into the account, thereby leaving a debit balance of \$1,602.30 until February 29, 1988. Respondent did not deny the existence of the shortage. He claimed, however, that, due to poor office help, inactivity of the account and an inability to reconcile the trust account with the bank statement, the trust account had remained unbalanced. Respondent testified at the hearing -- and also alleged in his answer to the complaint -- that he believed he always had sufficient funds in the trust account or other accounts to avoid any substantial deficiencies.

THE NICHOLAS LAZZARO MATTER

Respondent purportedly established the initial ledger card for this account prior to September 17, 1985. Respondent used the funds for this matter to pay for household-related expenses on

property owned by his brother. Respondent testified that he periodically sought reimbursement from his brother for the disbursements. Respondent admitted that the ledger cards for this matter carried negative balances. The negative balances existed, in varying amounts, from January 1986 through April 8, 1988. The cards also reflected the fact that the deposits made only partially reduced the existing negative balances.

Respondent testified that "we would give [Nicholas Lazzaro] a call when the account got low or when my daughter or whoever is there will bring to my attention that it was deficient and I would give him a call." T91.

THE D. VINCENT LAZZARO MATTER

On or about June 25, 1987, respondent established a client ledger card for himself to build a house. He made an initial deposit of personal funds in the amount of \$4,500 into his attorney trust account. The ledger card reflected a disbursement made by respondent on June 23, 1987, in the amount of \$6,138, two days prior to the noted date of the \$4,500 deposit. A negative balance was carried on this card from June 23, 1987 until February 29, 1988, at which time the negative balance was \$6,266. Respondent explained to Mr. Smith that he had been involved in building a modular house for himself and that the funds utilized to make expenditures for this house were being run through his trust account.

Respondent claimed that the \$4,500 deposit had been inadvertently placed under his name and that it should have been placed in an existing account known as Barbara Corporation. That corporation was owned by respondent and his wife and had a balance of \$5,000 at that time. It is not disputed that the Barbara Corporation client ledger card reflected a \$5,000 balance from November 1985 to February 29, 1988. Respondent, however, disbursed the \$6,138 two days before depositing the \$4,500. Because the Barbara Corporation account had a balance of only \$5,000, the withdrawal of \$6,138 would have nevertheless left that account in a negative status, pending the deposit of the \$4,500 that was purportedly misdeposited.

Respondent admitted during cross-examination that the notations on the ledger card were made by him personally and that he presumed that the dates reflected on that ledger card represented the dates on the checks. He indicated that the entries might not have been made on those precise dates, but a week or two later or whenever time permitted. When asked whether he would have ended up with a negative balance on July 23, 1987, he replied.

Maybe so if the cards reflect that but there were other accounts that were, as I say, in excess that I had left that would take care of any deficiency. T119.

THE BRAUNSTEIN MATTER

This client ledger card carried a positive balance of \$1,300 from May 10, 1985 to February 29, 1988. Respondent explained that he represented Braunstein in a divorce matter and had received \$2,000 in 1982 from his client. In May 1985, \$700 was paid out on

behalf of his client; the remaining \$1,300 represented his fee. Respondent testified that he never took his earned fee and, therefore, the positive balance remained on the Braunstein ledger card until respondent attempted to reconcile the trust account shortages in 1988.

THE BARBARA CORPORATION MATTER

Barbara Corporation was a corporation wholly owned by respondent and his wife. The ledger card showed a positive balance of \$5,000 from November 18, 1985 until February 29, 1988. Respondent testified that he had left \$5,000 on deposit in another account to offset a deficiency that was discovered in 1985, when his then secretary, Rose Shannon, tried to reconcile the accounts. T87, 89. Respondent claimed that he knew that he could not be \$5,000 short, that he assumed that there had been a mathematical error made and that he would have to go over the ledger cards himself. He knew that it would take a good deal of time to do so. Rather than reconcile the account himself or hire someone to do it, he left the \$5,000 in that account to cover the purported deficiency. T129. Respondent eventually discovered that the \$5000 shortage related to the Geria account monies, which had been placed in his rent trust account prior to that closing and which remained undisturbed in that account. Respondent testified that he made that discovery at about the same time that he opened the D. Vincent Lazzaro account in 1987 and, therefore, in his opinion, the \$5,000 that had remained in the Barbara Corporation account was freed up.

T131. He did not, however, transfer the \$5,000 Geria monies from the rent trust account to the attorney trust account. At the DEC hearing he admitted that

[t]here was a \$5,000 short [sic] there but \$5,000 on the other side to take care of it. I waited so we could do it all at once. We wanted to complete the entire account, I just didn't bother transferring it because it wasn't being used there. So it didn't do any me [sic] good in the rent trust account where it was but it wasn't done."

[T132]

He claimed it was his conscious decision not to transfer the Geria money from the rent trust account and place it into the attorney trust account because he did not want to start doing things piecemeal. "If I did that it would be a mass confusion so I decided I should wait until we do it and do it right and get it straightened out." T133.

* * *

Respondent corrected the negative balances in his accounts in the following manner:

\$ 5,000.00	Paper transfer of \$5,000 positive balance from <u>Barbara Corporation</u> client ledger card.
7,636.08	Transfer from rent trust account to regular trust account on March 25, 1988.
1,300.00	Paper transfer of \$1,300 fee due and reflected as positive balance on <u>Braunstein</u> ledger card.
710.45	Transfer from business account on March 28, 1988.
<u>\$14,646.53</u>	
34.00	Positive balance created on ledger card of D. Vincent Lazzaro
<u>\$14,612.53</u>	

As noted above, Mr. Smith gave respondent the benefit of the doubt and gave him credit for the \$5,000 positive balance that remained in the Barbara Corporation and the \$1,300 Braunstein earned fee, already in the attorney trust account. These credits reduced the out of trust amount from \$14,612.53 to \$8,312.53. Mr. Smith further allowed for the fact that the Geria funds in the amount of \$5,000 remained in the rent trust account for the entire period that respondent carried a negative balance on the attorney trust account Geria ledger card. Thus, the out of trust balance was further reduced to \$3,286.50. Respondent did not submit evidence of any other specific fees or other monies that he considered to be due and owing that would further offset the negative balances. He testified, however, that he had fees from other accounts that were due to him, but that he probably did not use them to offset any negative balances. T124-125.

Barbara Byers, respondent's daughter, testified at the DEC hearing that, from 1978 to 1983, she had been employed by respondent as a legal secretary and bookkeeper. T70. She returned to work for her father in 1986, on a part-time basis. Ms. Byers testified that she maintained the client ledger cards, a disbursement book, and a receipts book, and that she reconciled accounts on a monthly basis. She claimed that if a negative balance occurred, she advised her father of same. T73.

Respondent testified in his own behalf that his bookkeeping problems resulted from the poor and inconsistent office help that he had had since 1985. He testified that he discussed the

discovery of the \$5,000 deficiency in 1985 with Rose Shannon, his secretary/bookkeeper, and told her to "forget the reconciliation" because she had gone over it several times and it still would not come out right. He testified that, a few months later after a couple of unsuccessful attempts to determine the source of the deficiency, he just left \$5,000 in the Barbara Corporation account to offset the deficiency until he could discover the reason therefore. He testified that, from 1985 to 1988, he had about six secretaries, one worse than the next, each of whom would stay just a couple of months. He admitted knowing of the existence of negative balances on the various ledger cards and further admitted that no bank reconciliations were performed from March 1985 until the time of the audit.

Respondent also testified that he never looked at the bank statements. When asked, at the DEC hearing, whether he had any idea if there were any negative balances on the bank statements, he replied that if there were, he thought that he would have heard from the bank. He claimed that

just knowing my accounts that there's -- if there's negative balances they're small and there was enough in there to keep it. I wasn't concerned too much with it. I was familiar with the accounts by name and I knew they were normally -- something came in, something went out, we knew the money came in and shortly it went out. I was familiar with that.

[T148]

Respondent contended that he knew where his fees were and what fees were due to him, and that he allowed earned fees to remain in the trust account to give him "a buffer". Respondent claimed

repeatedly that he was convinced that there were always sufficient funds in the trust account or other accounts to cover any negative balances. He, however, failed to provide any records to substantiate which fees, other than those in the Braunstein matter, had accrued to create the "buffer".

* * *

At the conclusion of the DEC hearing, the special master found that respondent failed to maintain his trust account in accordance with R.1:21-6. No trust account disbursement journal was located, client trust ledger sheets were not fully descriptive, as required by the rule, the trust account bank statements were not reconciled from 1985 to the time of the audit and inactive trust ledger balances remained in the trust account for extended periods of time. Several client ledger cards were found with debit balances, in violation of R.1:21-6(c). Many negative balance entries were made by respondent himself. The special master found that the allegations of Count I had all been proven by clear and convincing evidence.

With regard to the Geria matter, the special master found that respondent had not intentionally failed to transfer the funds into his attorney trust account. Rather, the failure to transfer the funds resulted from his negligence and inattentiveness to the status of his accounts. As to the remaining counts of knowing misappropriation, the special master found that respondent honestly believed that he had sufficient overall funds to cover any shortages reflected on any specific attorney trust account ledger

card. She found, however, that his belief was not necessarily reasonable, because he never attempted to determine the exact amount of his negative balances, or kept a tally of the fees that he claimed were earned and kept in his account as "buffers".

There was no evidence that any client suffered injury or lost monies as a result of respondent's misuse of funds. No checks were returned for insufficient funds. There was no indication that respondent had any personal motivation for utilizing client funds.

The special master found that respondent had a total lack of comprehension concerning the proper operation of an attorney trust account and the need to preserve the individual funds of each client. Respondent believed that he could merely total up the monies sitting in his attorney trust account and in his rent trust account to cover any shortages. The special master, however, did not find knowing and willful conduct and recommended that respondent be publicly disciplined for his gross negligence.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the special master's conclusion that respondent's conduct was unethical is fully supported by the record. The special master properly found that the allegations contained in Count I had been proven by clear and convincing evidence. With regard to the remaining counts, and based on the evidence in this

matter, the Board cannot conclude by clear and convincing evidence that respondent knowingly misappropriated client funds.

The facts herein establish that, even after crediting respondent with 1.) the \$5,000 mistake in the Geria matter (where he commingled trust monies and his personal business funds and then forgot to transfer the money into his trust account); 2.) the \$1,300 fee due to him from the Braunstein matter; and 3.) the \$5,000 balance in the Barbara Corporation, he was out of trust in the amount of \$3,286.50.

Respondent's own client card shows a disbursement in the amount of \$6,138 on June 23, 1987, prior to his deposit of \$4,500 to establish the account, on June 25, 1987. Respondent claimed that the money should have been deposited into the Barbara account, which already had a \$5,000 balance. Nevertheless, respondent would still have been out of trust in the amount of \$1,138 until such time as the \$4,500 deposit was made. Respondent's ledger card (Exhibit C-8) showed negative balances from June 25, 1987 to February 29, 1988, ranging from \$1,266 to \$6,266.

The Bernardo (respondent's daughter) ledger cards (Exhibit C-9) showed negative balances on September 13, 1983 in the amount of \$476.61 and, again, showed negative balances from November 3, 1983 to December 3, 1983. Negative balances existed again from December 6, 1983 to February 29, 1988. The shortages ranged from \$194.73 to \$2,102.30. Finally the Nicholas A. Lazzaro (respondent's brother) ledger cards (Exhibit C-10) showed negative balances from January 2, 1986 to June 10, 1988, excluding the one-month period from

November 28, 1986 through December 30, 1986. The negative balances ranged from \$24.18 to \$1,862.97.

Respondent admitted that he was aware of the negative balances on the client cards; indeed, he was responsible for a number of the entries contained therein. He claimed that he believed he had a sufficient "buffer" from his other accounts to cover any deficiencies. In fact, he had \$5,000 in the Barbara Corporation account, \$1,300 in fees from the Braunstein matter and he believed he had additional fees due to him from several other matters. Therefore, the evidence herein does not establish by clear and convincing evidence that respondent knowingly misappropriated client funds for his personal use or for use by his family.

The Court has not extended the automatic disbarment rule to cases, such as this, of limited, inadvertent and unintentional misuse of clients' funds. In re Hennessy, 93 N.J. 358, 361 (1983). The evidence in this matter established that respondent's accounts were not in order, that the accounts that were involved were personal accounts and that any misappropriation involved was not willful, but the result of inadequate recordkeeping.

This case is similar to the Hennessy matter where an audit of the attorney's records revealed that there were some relatively minor shortages in his trust account. The shortages were not attributable to any client and appeared to have been due to the attorney's shoddy bookkeeping, combined with an apparent lack of comprehension of the proper operation of an attorney's accounts. The Court found that the attorney never intended to misappropriate

funds. In light of those factors and of his unblemished record, coupled with the fact that he conducted a limited practice from his home, the Court imposed a public reprimand.


Here, respondent has no prior disciplinary history. Furthermore, no clients were harmed. In light of these mitigating circumstances and of the fact that respondent's actions appeared to have been confined primarily to personal or family accounts and were not willful, the Board unanimously recommends that respondent receive a public reprimand. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated:

March 9, 1992

By:


Raymond R. Trombadore
Chair
Disciplinary Review Board