

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-405

IN THE MATTER OF
ROBERT G. ROSENBERG
AN ATTORNEY AT LAW

Decision

Argued: March 15, 2001

Decided: July 29, 2001

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Salvatore T. Alfano appeared on behalf of respondent.

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

This matter was before us based on a stipulation between the Office of Attorney Ethics (“OAE”) and respondent.

Respondent was admitted to the New Jersey bar in 1976. He maintains an office for the practice of law in Paterson, New Jersey.

In 1992, respondent was privately reprimanded for violations of RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence).

* * *

This matter resulted from two May 1998 trust overdraft notices from First Union Bank, where respondent had his trust account. The OAE's audit of respondent's records revealed "serious recordkeeping violations" and "significant shortages in [respondent's] trust account."

According to the stipulation, between January 1, 1997 and June 30, 1998, respondent negligently misappropriated client trust funds in amounts ranging from \$400 to \$12,000. The misappropriations occurred because respondent routinely deposited large retainers in his trust account, then withdrew his fees from the account as needed, without determining whether he had sufficient fees from a particular client to cover the withdrawals.

Respondent did not know the amount of fees in his trust account because he "maintained very few trust account records and had not reconciled the trust account for several years." He did not realize that he was out of trust until he received the trust overdraft notices from First Union. Thereafter, respondent retained an accountant to reconstruct his clients' ledgers.

Respondent's accountant was unable to identify all of the clients who had funds on deposit and their respective balances. The OAE then subpoenaed deposit items from First Union to reconstruct respondent's records. That reconstruction revealed the trust account shortages.

The OAE concluded that, while respondent's handling of his trust account was "very disturbing," there was not "a sufficient pattern of conduct to indicate knowing misappropriation of trust funds" and that "it appears within the realm of reasonableness that the misappropriation of trust funds occurred as a direct result of careless recordkeeping practices."

The OAE's audit revealed the following recordkeeping violations:

1. client ledger cards were not fully descriptive and some had debit balances;
2. a schedule of client ledger accounts was not prepared and reconciled quarterly to the trust account bank statement;
3. a running balance was not kept in the trust account checkbook;
4. deposit slips did not contain sufficient detail to identify each deposit item;
5. respondent did not maintain a business receipts or a business disbursements book;
6. the attorney business account was frequently overdrawn; and
7. respondent commingled personal and trust funds.

* * *

After the OAE's audit, in October 2000, First Union issued two trust overdraft notices relating to respondent's trust account. The overdrafts were caused by a \$1,000 check that was returned by First Union on two occasions.

Specifically, in April 2000, respondent forwarded a \$1,000 trust account check to another attorney to settle a case on behalf of one of respondent's clients, Jose Vasquez. Thereafter, respondent's employee mistakenly recorded the check as having cleared First Union. Respondent believed that the excess funds in the account were fees that were owed to him and withdrew those funds. When the other attorney finally deposited the \$1,000 check in October 2000, there were not sufficient funds in respondent's trust account to cover the check. After respondent learned of the overdraft, he issued a business account check to the other attorney.

Therefore, the OAE claimed that, despite its ongoing investigation, respondent "continued to handle his trust account in a haphazard manner." Also cited as an aggravating factor was respondent's prior private reprimand.

The OAE recommended that respondent be reprimanded for his misconduct and that he be required to practice under the guidance of a proctor for two years and also submit quarterly reconciliations of his attorney trust account prepared by a certified public accountant approved by the OAE.

In mitigation of his misconduct, respondent presented evidence that he experienced medical problems in 1996 and 1997. Dr. Robert Rosenthal submitted a letter, dated December 10, 1999, in which he states that he has been respondent's cardiologist for eight or nine years and that, in 1996, respondent underwent a "Ross procedure which is a double valve procedure." According to Dr. Rosenthal, respondent had a "prolonged recuperation,"

which lasted through “much of 1997.” During that period, respondent experienced “weakness, fatigue, anxiety and depression,” which resulted in “significant impairment in his ability to concentrate and to work.”

The stipulation also noted that respondent complied with the OAE’s request that he reconstruct his accounting records and that respondent “was prompt in subsequently submitting to the OAE a trust account certification and corresponding documentation as of December 18, 1998 verifying that the account was in trust.”

* * *

Respondent stipulated – and there is ample evidence – that he negligently misappropriated client funds and that he failed to maintain his attorney records, as required by R.1:21-6.

Respondent withdrew more in fees than he was entitled to take from the trust account, thereby affecting other client funds. Respondent maintained – and the OAE agreed – that the misappropriations were the result of poor recordkeeping, rather than intentional conduct. There is no doubt that respondent’s records were poor – his own accountant was unable to reconstruct his client ledger cards. Furthermore, respondent was in poor health during 1996 and 1997. Finally, there is no indication that respondent’s clients did not receive all the

monies owed to them. Therefore, we agree with the OAE's conclusion that respondent was guilty of negligent, not knowing, misappropriation.

We find it disturbing, however, that, despite the OAE's ongoing investigation, respondent continued to withdraw funds from his trust account without confirming that the funds were fees that were owed to him. Although one of respondent's employees apparently showed the \$1,000 check as having cleared the trust account, there is no excuse for respondent's removal of funds on the mere belief that they represented legal fees.

In support of its recommendation that respondent be reprimanded, the OAE cited In re Fucetola, 147 N.J. 255 (1997), which was also based on a disciplinary stipulation; In re Lazzaro, 127 N.J. 390 (1992); In re Lewinson, 126 N.J. 515 (1992); In re Barker, 115 N.J. 30 (1989); and In re Hennessy, 93 N.J. 358 (1983). All of the attorneys in the foregoing cases received a reprimand.

In Fucetola, the attorney invaded client funds on several occasions because of his poor recordkeeping. Some of the misappropriations were the result of an excess disbursement to Fucetola's father. Fucetola also invaded clients' funds when he accepted an uncertified check for a real estate closing and made disbursements against the check, which was returned for insufficient funds. Fucetola had received a public reprimand in 1985 for failing to maintain required attorney records and a private reprimand in 1979 for endorsing a settlement check in his client's name, without the client's authorization.

In Lazzaro, the complaint had charged knowing misappropriation. However, we concluded – and the Court agreed – that “the evidence [did] not establish by clear and convincing evidence that [Lazzaro] knowingly misappropriated client funds for his personal use or for use by his family.” In the Matter of D. Vincent Lazzaro, DRB Decision at 16 (March 9, 1992). Rather, it was found that the negative client balances and the trust account shortage of more than \$14,000 was the result of Lazzaro’s poor recordkeeping. Many of the negative client balances related to Lazzaro’s family members because he had overdisbursed funds on their behalf.

In Lewinson, the attorney’s poor recordkeeping practices resulted in numerous trust account shortages over a twenty-one-month period. The complaint had charged knowing misappropriation. However, we found that, although Lewinson was “inexcusably derelict in her recordkeeping obligations,” the shortages were due to “ignorance and inexperience,” not knowing misappropriation. In the Matter of Barbara K. Lewinson, DRB Decision at 10, 13 (December 9, 1991). The Court agreed and reprimanded Lewinson for her “reckless conduct.” Lewinson, supra, 126 N.J. at 516.

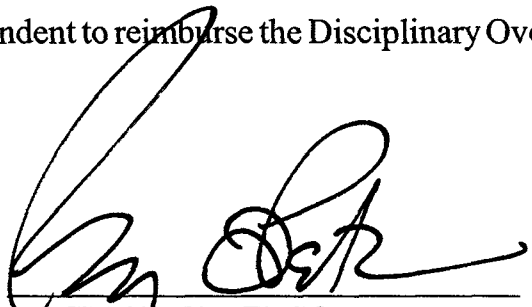
Similarly, the attorney in Barker was reprimanded for “grossly negligent” accounting procedures that resulted in one instance of misappropriation. In re Barker, supra, 115 N.J. at 35. Finally, the attorney in Hennessy was reprimanded for “flagrant recordkeeping errors combined with an apparent lack of comprehension of the proper operation of an attorney’s

accounts,” which resulted in “minor shortages” in his trust account. In re Hennessy, supra, 93 N.J. at 360.

Based on the foregoing cases, we unanimously determined that a reprimand is sufficient discipline for respondent’s recordkeeping violations. One member recused himself. However, respondent is hereby warned that any similar misconduct in the future will result in more severe discipline. We also unanimously determined to require respondent to practice under the supervision of a proctor for two years and to submit quarterly reconciliations of his attorney trust account, prepared by a certified public accountant approved by the OAE.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 7/29/01

By: 
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

**DISCIPLINARY REVIEW BOARD
VOTING RECORD**

**In the Matter of Robert G. Rosenberg
Docket No. DRB 00-405**

Argued: March 15, 2001

Decided: July 29, 2001

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hyerling			X				
Peterson			X				
Boylan			X				
Brody			X				
Lolla			X				
Maudsley			X				
O'Shaughnessy						X	
Schwartz			X				
Wissinger			X				
Total:			8			1	

Robyn M. Hill 10/2/01
Robyn M. Hill
Chief Counsel