SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-274

IN THE MATTER OF

ANDREW T. BRASNO

AN ATTORNEY AT LAW

Decision

Argued: May 17, 2001

Decided: October 9, 2001

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

Antonio J. Toto 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 recommendation for discipline (disbarment) filed by special master Nathan Beck.

The complaint in this matter alleged four counts of knowing misappropriation of client trust funds and/or escrow funds, in violation of RPC 1.15 and RPC 8.4(c), and one

count of failure to comply with the recordkeeping requirements of R.1:21-6, in violation of RPC 1.15(d).

Respondent was admitted to the New Jersey bar in 1972 and maintains an office for the practice of law in South River, New Jersey.

In 1997, respondent received an admonition for failure to turn over a client's file upon termination of the representation and failure to cooperate with the ethics investigation. In the Matter of Andrew T. Brasno, Docket No. DRB 97-091(June 25, 1997).

I. The Van Sciver Estate Matter

In May 1997, Ann M. Smith, who was eighty-two years old, retained respondent to settle the estate of her brother, John M. Van Sciver, who died on May 21, 1997. The estate consisted of a liquor store business, the property in which the business was located and five bank accounts: two checking accounts for the business and three individual retirement accounts ("IRA"). The value of the gross estate was $329,457.

There was no written fee agreement between respondent and Smith. Smith testified that respondent agreed to complete the administration of the estate for $5,000, including the sale of the business,[1] because of their long acquaintance. According to Smith, she had known respondent since his birth; her husband had been the obstetrician at respondent's birth.

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[1] All references to the sale of the business include the sale of the property.

Respondent denied that he had agreed to handle the estate for $5,000. He testified that he had been retained earlier by Van Sciver to represent him in connection with the sale of the business, at a $150 hourly fee. There was no written fee agreement between respondent and Van Sciver. The business had been listed for sale with a broker less than a month before Van Sciver's death. Respondent testified that, after Van Sciver's death, Smith agreed to pay respondent the same hourly rate to settle the estate, including the sale of the business.[2]

Respondent never opened a client ledger card for Van Sciver, although he prepared one for the Van Sciver estate. Furthermore, he did not maintain any time records and never provided any interim billing to Van Sciver or to Smith. As set forth below, in May 1999, at the OAE's request, respondent provided a billing of the time he spent on behalf of Van Sciver and the Van Sciver estate.

On May 29, 1997, Smith issued a $4,500 check, payable to respondent's trust account, with the notation "inheritance tax" in its memo section. There is a dispute as to the purpose of the check. Respondent testified that the $4,500 was "for items that were going to be coming up in terms of cost and expenses for handling the estate," including his fee. In contrast, Smith testified that respondent requested the check to pay the inheritance tax and

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[2] Smith also told her new attorney, James Manahan, and the OAE auditor, in January 1999, that respondent's fee was $5,000.

that she did not question the need to pay the tax a week after her brother's death, because "I thought [respondent] was a lawyer and he knew what I had to do."

Respondent deposited the $4,500 check in his trust account and, on June 2, 1997, issued a $4,000 trust account check to himself, with the notation "Van Sciver" in its memo section. Respondent then deposited the check in his business account, which had been overdrawn by $145.26 prior to the deposit. Thereafter, he used $1,500 of the funds for a certified check to pay his mortgage and home equity loans, both of which were three months in arrears.

By September 29, 1997, respondent had disbursed all but $235 of the $4,500 received from Smith. All of the disbursed funds went to him, except for a $50 check to the Division of Alcoholic Beverage Control and a $30 check to a courier service.

On September 10, 1997, Smith issued another check to respondent, this time for $2,500, with the notation "fee" in its memo section. Respondent deposited $2,400 of the $2,500 in his business account. There is no dispute that the $2,500 check was for respondent's fee. Smith testified that, when she gave respondent the $2,500 check, she believed that it represented one-half of his legal fee and that she would pay him the remainder of the fee when the estate was settled.

Pursuant to the contract of sale for the liquor business, the purchaser's attorney sent the $24,500 deposit check to respondent, which was deposited in respondent's trust account on October 24,1997. On December 2, 1997, prior to the closing, respondent issued a $2,500

trust account check to himself, with the notation "Van Sciver Part Fee."[3] Thereafter, respondent issued three additional checks against the deposit, purportedly for his legal fees: $2,000 in February 1997, $4,500 in March 1998 and $500 in July 1998. All of the checks were deposited in his business account and used for personal and business expenses. The $4,500 check was used to obtain a certified check in the amount of $4,484.96 for his mortgage loan, which was four months in arrears.

In total, respondent more than $16,000 in fees from the Van Sciver estate. Between May 31 and December 31, 1997, respondent also issued against the deposit fourteen checks for "delivery" costs, totaling $530. The checks were made payable to respondent or to "Jack's Liquor's" and cashed. It is undisputed that respondent cashed the checks payable to "Jack's Liquors."[4]

The closing on the sale of the business took place on December 5, 1997. Because respondent had not filed the inheritance tax return or obtained a tax waiver prior to the closing, the title insurance company, Royal Title Service, Inc. ("Royal") required that $50,000 of the closing proceeds be placed in an escrow held by Royal.

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[3] Respondent frequently wrote "part fee" on his trust account checks and client ledger cards, even when he took his full fee or an amount in excess of the agreed-upon fee.

[4] The allegations concerning improprieties in connection with the delivery charges were contained in a separate count (count four) of the ethics complaint. However, the issue is included here for the sake of clarity. Count four of the complaint also alleged that respondent misappropriated funds from two other clients by charging for document deliveries that were never made. The OAE apparently abandoned the charges concerning the other two clients, after one of the clients testified that he had no objection to the delivery charges and the other client did not testify.

In addition, because respondent had failed to obtain a discharge of a mortgage that had already been paid off, another escrow was created at the closing, also held by Royal. The mortgage discharge was obtained within a few days of the closing and the escrow was paid to Smith.

Respondent also failed to obtain a letter of nonapplicability from the Department of Environmental Protection ("DEP"). The letter was obtained some months after the closing by the estate's new attorney.

Respondent did not file the inheritance tax return within the required eight months from Van Sciver's death, January 1998. Although Smith apparently signed the return on June 1, 1998, it was not filed until January 28, 1999.

On June19, 1998, Michael Fusella, Van Sciver's accountant, wrote to respondent expressing his concern that the estate would be subject to interest and penalties because of the late filing of the tax return and requesting that respondent complete the return and close the administration of the estate as soon as possible. Thereafter, Fusella sent several more letters to respondent, requesting a copy of the return and an accounting of the estate. It was not until October or November 1998 that respondent sent a copy of the return to Fusella.

By letter dated January 7, 1999, Fusella told Smith that she should obtain new counsel because he had learned from the Division of Taxation that the inheritance tax return had not been filed. Smith then retained another attorney. On January 22, 1999, the attorney

so advised respondent, requested information on the status of the inheritance tax return and asked for the estate's records and funds, as well as an accounting.

The inheritance tax return prepared by respondent was filed on January 28, 1999. The return showed respondent's estimated fee as $12,500. By that time, however, respondent had already taken $15,500 in fees. In March 1999, the new attorney filed an amended inheritance tax return, which showed $3,100 less in taxes than listed on the return filed by respondent. However, because of the late payment, the estate was charged $3,161.44 in interest.

On February 3, 1999, respondent turned over the estate file to the new attorney, along with a trust account check in the amount of $11,500. He did not, however, provide the requested information. Instead, respondent stated that his accounts were being audited and that he would provide the attorney with "trust assets and my accounting" when the audit was completed.

In March 1999, respondent sent to the Division of Taxation a $30,828.60 check from Royal, in payment of the inheritance tax, and sent to the new attorney Royal's $13,345.68 check payable to Smith, in partial release of the escrow.[5] He also promised the attorney that he would forward an accounting within five days.

Respondent never gave the attorney his bill or an accounting of the estate's funds. In March 1999, the OAE requested that respondent provide an itemized billing for the Van

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[5] Royal retained $7,000 in escrow, pending the issuance of the tax waiver.

Sciver estate. Respondent did not do so until May 1999. The bill contained only general statements about the services respondent purportedly provided to Van Sciver and the estate, showing the number of hours expended, but not the dates of the services. The bill did not show the total number of hours or respondent's hourly rate, but the hours listed for the individual items totaled 110.50. At $150 an hour, the total bill would be $16,575.

The new attorney demanded that respondent pay the interest and repay the funds taken from the estate. Thereafter, the attorney filed a civil action against respondent on behalf of the estate. When respondent did not answer the complaint, a default was entered against him. As of the April 2000 ethics hearing, a default judgment had not yet been entered against respondent.

Respondent had no explanation for his failure to file the return within the required eight months. Although respondent attempted to justify his inaction by stating that the filing was delayed by the late discovery of respondent's IRA accounts, he was not told about those accounts until March 1998, two months after the filing deadline. In fact, it was not until May 21, 1998 that respondent asked the bank to provide Van Sciver's account balances as of the date of his death. Respondent testified that he had believed, incorrectly, that he had filed the return shortly after Smith had signed it and that it was not until the OAE auditor questioned him about the return that he realized that it had not been filed. Respondent's

testimony in this regard was not credible; prior to the audit, respondent had received numerous letters from Fusella asking about the return.

As to his removal of fees from the $4,500 that Smith gave him on May 29, 1997, respondent stated that he gave "no thought" to Smith's notation on the check – "inheritance tax." According to respondent, when he showed Smith the entire inheritance tax return on June 1, 1998, including the schedule estimating his attorney fee as $12,500, Smith did not question his fee.

Smith, in turn, recalled that respondent had given her only the top page to sign, with no attached schedules or a full copy for her files. Therefore, according to Smith, she was not aware that respondent had estimated his legal fee as $12,500 on the return.

Respondent testified that he did not maintain any contemporaneous records of the work that he did for Van Sciver and for the Van Sciver estate. He stated that, after the OAE requested that he prepare an itemized billing of his time, he "sat down with the file and went over what I did and reconstructed – well, not reconstructed – and figured out how much time I spent." He contended that the bill was an accurate reflection of his work.

As set forth below, in nearly every category the witnesses at the ethics hearing contradicted respondent's claims of time spent on the activities in his billing statement.

- Fifteen hours for answering "questions of employees concerning operation of business pending sale and other questions that arose."

Respondent testified that he had "a lot of contact" with Ray Muraszko, the business's general manager, as to whether Muraszko should continue to order liquor and other items for the store and where Muraszko would obtain the funds for the purchases.

However, Smith, Muraszko, a thirty-two year employee of the business, and John Farkas, a ten-year employee, all testified that Muraszko and Farkas continued operating the business, after Van Sciver's death, in the same fashion as before. Muraszko's wife, the part-time bookkeeper for the business from its inception, who had authority to sign business checks, continued as the bookkeeper. Fusella continued as the accountant for the business. According to Muraszko, respondent would stop in the store three or four times a week for various reasons, e.g., to obtain the liquor license or other documents that were kept at the store or to cash his personal checks. However, Muraszko added, respondent never gave him any specific directions on how to run the business.

- Two hours for preparing a refunding bond and a stipulation.

Neither of those documents were signed by Smith. The refunding bond was an All-State form, on which the name of the estate, the executrix's name and address, respondent's name and address and the value of the estate were typed. The stipulation sought to release respondent from the obligation of completing a formal or informal accounting. Respondent testified that he gave the forms to Smith, but did not ask her to sign them because he had not yet completed the administration of the estate. Smith testified that respondent requested that she sign the stipulation at the same time that she signed the inheritance tax form, but that she refused to sign it because respondent had not provided her with any information about the estate.

- Two hours for "[p]reparation of ECRA non applicability letter and research regarding need for same."

According to respondent, he prepared the DEP form application for the nonapplicability determination and brought it to the closing but, after speaking with the Small Business Administration ("SBA")[6] representative at the closing, he determined that the nonapplicability letter was not necessary. Respondent testified that he later found out that the letter was required by the SBA. As set forth above, the new attorney obtained the letter of nonapplicability.

- Twenty-nine hours preparing and reviewing contracts for the sale of the business and five and one-half hours for "negotiations" for a contract that was later voided because the buyer wanted the estate to make repairs to the property.

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[6] The buyer obtained an SBA loan to purchase the business.

Respondent testified that he spent a significant amount of time in preparing, negotiating and reviewing the various contracts. However, respondent prepared only one of the contracts, an All-State form contract. Smith testified that Marilyn Meloni, the listing realtor, not respondent, had discussed with her the sale of the business, including the request by one of the potential buyers that the estate make repairs to the property. According to Smith, there was no reason for respondent to have been involved in extensive negotiations about repairs because she had immediately rejected the repair demand.

Meloni testified that, although there were approximately fourteen inquiries about the business, there were only four offers to purchase it. According to Meloni, she never contacted respondent about showing the business to prospective buyers because there was no reason to do so. She stated that, except for giving respondent information about the inventory shortly before the closing, her only contact with him was to periodically advise him of the status of the listing. Meloni further testified that of the four purchase offers one never progressed beyond the initial form contract completed by her because the buyer had withdrawn the offer within a day or two. Another offer never went beyond Meloni's inquiries on whether the potential buyer qualified for a mortgage. With respect to the third offer, Meloni testified that the contract was voided by mutual agreement because the buyers, Raj and Dina Patel, wanted a new roof on the property, which Smith refused.

The Patels were represented by an attorney. Although respondent billed the estate for five and one-half hours for "contract negotiations" with that attorney, the attorney testified that he spent less than one and one-half hours discussing the transaction with respondent. The successful buyer, Agam Patel, also was represented by an attorney. Except for the initial form contract prepared by Patel's realtor, that attorney prepared all of the contracts and the documents to transfer the liquor license to Patel. The attorney testified that he had charged his client a flat fee of $2,400, which included his services in a prior unsuccessful attempt to purchase a business.

- Three hours for "attendance to transfer of lottery license to [e]state."

Muraszko testified that respondent met with a lottery official on two occasions for fifteen to twenty minutes.

- Two and one-half hours for attending the business inventory and two hours reviewing the prepared inventory.

Muraszko and Meloni testified that respondent stopped in for only ten to twenty minutes when the inventory was completed.

With respect to the $530 that respondent took for delivery charges, respondent testified that his aunt owned a tavern near his office, Sunny's Tavern, and that he would pay individuals who were in the tavern to deliver documents for him. According to respondent, he would pay the individuals in cash, then issue a check to himself from his trust account for reimbursement of the delivery charges. Respondent did not have any documentation of the deliveries.

Meloni, Fusella, Raj and Dina Patel's attorney and Agam Patel's attorney all testified that respondent never sent any documents to them by messenger. Smith testified that respondent had something delivered to her home on one occasion.

Respondent's cousin, Leon Witkowski, testified that he worked in Sunny's Tavern between 1990 and 1998 and that there were occasions when a tavern patron would tell him that he had "run an errand" for respondent. Witkowski was unable to approximate the number of the errands, their purpose or their cost. Witkowski was never paid to deliver documents for respondent.

Kenneth Ziemba testified that, between 1996 and 1999, he delivered documents on four or five occasions for respondent and received between $25 and $35 for each delivery, but did not connect his deliveries with any specific client matter. Ziemba had no knowledge about whether other patrons of Sunny's Tavern were paid to deliver documents for respondent.

II. The Antonowicz Matter

Alexander Silvanovic died on April 29, 1992, leaving his estate to his sister, Anna Antonowicz, and Anna's son, Michael. Anna and Michael Antonowicz retained respondent to handle the estate because Michael was a childhood friend of respondent. Shortly after retaining respondent, they paid him a $1,300 retainer. There was no written fee agreement.

In September 1992, respondent received $8,000 from the Antonowiczs. As in the Van Sciver matter, there is a dispute as to the purpose of the check. According to Michael, respondent told him the check was for partial payment of the inheritance tax. Respondent, in turn, claimed that the funds were to be used for fees and costs, as needed. After depositing the $8,000 check in his trust account, respondent issued seven checks to himself as fees, in the total amount of $4,650.

On February 16, 1993, Anna signed the inheritance tax return for the Silvanovic estate, which showed an estate value of $226,736.71. Anna died shortly after signing the return. The return shows an "agreed upon" legal fee of $13,000. The tax bureau later disallowed the deduction for the legal fee, apparently because of a lack of documentation.

In June 1993, Michael Antonowicz retained another attorney to handle his uncle's and his mother's estates.

Respondent filed the inheritance tax return for the Silvanovic estate on July 26, 1993 but did not pay the tax. As of March 24, 1994, the Silvanovic estate owed $43,490.16 in tax

and $5,683.51in interest. Sometime after March 1994, the new attorney paid the tax and interest with funds obtained from Antonowicz.

In the meantime, Antonowicz had filed a request for fee arbitration against respondent. The fee dispute was settled on August 24, 1994. Respondent agreed to pay $10,000 to Antonowicz: $5,000 within six months and the remaining $5,000 by August 24, 1995. As of the April 2000 ethics hearing, respondent still owed $1,450 to Antonowicz and had not made any payments since November 1998.

In connection with the settlement of the fee arbitration, respondent issued five trust account checks to Antonowicz, totalling $2,525.

The OAE auditor testified that, as of May 31, 1996, respondent did not have any funds in his trust account for either Antonowicz or for the Silvanovic estate. Although respondent should have been holding $21,312.15 in his trust account for eleven other clients, he only had $20,738.77 in his account at that time. Therefore, according to the OAE auditor, when respondent issued trust account checks to Antonowicz in June and December 1996, he necessarily invaded other clients' trust funds.

Respondent testified that, when they settled the fee arbitration, he turned over $1,226.44 to Pressler and retained some of Antonowicz's funds in his trust account, because he contemplated filing a variance application to permit Antonowicz to put in a driveway on his property. Respondent could not explain the source of the $1,226.44. He rejected the OAE's suggestion that the amount represented two checks payable to Anna, totaling

$726.44, that respondent had deposited in his trust account in July 1992, plus a $500 homestead rebate paid to Anna. Although there is a notation of a $500 rebate on a copy of the July 1992 checks, there was no corresponding $500 deposit to respondent's trust account.

Respondent further testified that, although he had estimated his fee to be $13,000 for the tax return, if the tax bureau had requested documentation "I'm sure the fee wouldn't have been $13,000." Respondent could not estimate what his fee would have been because "I never got far enough to issue a file [sic] bill."

According to respondent, when he wrote the five checks to Antonowicz from his trust account, he believed that he still had in the account the funds that he had retained for the variance application.

Michael Antonowicz testified that respondent never told him his fee for handling the Silvanovic estate. He never asked respondent for a bill because "[n]othing was done. Why should I ask him?" Antonowicz testified that, after his mother's death, he called respondent "every so often" and nothing was being done. Because of respondent's inaction, Antonowicz retained another attorney.

Antonowicz further testified that he had at one time spoken with respondent about putting a driveway on his property and that respondent "more or less, just come over and took a look, you know. We didn't have nothing done, you know." Antonowicz denied that he had retained respondent to obtain a variance for him.

III. The Real Estate Closings Matters

The ethics complaint alleged that, in the seven real estate closings set forth below, respondent wrongfully kept funds that were to be paid to third parties or were to be refunded to his clients. The OAE auditor testified that respondent did not have sufficient funds in his trust account to pay the outstanding closing amounts. The auditor further testified that, as of January 1, 1999, respondent should have been holding $11,749 in his trust account for the Van Sciver estate and for the seven real estate transactions. At that time, respondent's trust account balance was only $1,489.62. Therefore, according to the auditor, respondent's trust account was out of trust by $10,254.38. Respondent later provided the auditor with amended client ledger cards. However, even if those ledger cards are to be accepted, respondent was still out of trust by $6,666.31.

Respondent testified that the deficiency in his trust account was the result of a $10,000 "overpayment" to two clients, Russell and Douglas Linke, in 1997, and a $2,698.40 check that he issued to the Linkes in September 1997 that should not have been cashed. The Linkes were longtime clients of respondent. They also owned the building in which respondent's office was located, having purchased it from respondent in 1996.

Respondent explained that the $2,698.40 represented "a return of the monies that [the Linkes] gave me for the Daskalakis [transaction] that fell through, less items that they owed me for previously." According to respondent, the Linkes were not supposed to cash the $2,698.40 check until "we straightened out the past bills that they owed me and the

problem I had with my carrryover." The "carryover" problem, according to respondent, occurred when he combined the client balances on several ledger cards for the Linkes onto one ledger card.

In 1996, respondent represented the Linkes in several matters and had a separate client ledger card for each matter. For some unexplained reason, in January 1997, respondent allegedly consolidated the balances listed on several ledger cards onto one card and, in doing so, credited the Linkes for $10,000 more than he should have. It was impossible to correlate the balances on the ledger cards produced by respondent with the combined ledger card, even if the $10,000 was deducted. This problem was further complicated by the fact that the combined ledger card for the Linkes showed a deduction for a mortgage payment for respondent's mortgage on his house.

Furthermore, on the client ledger card for respondent's sale of his office property to the Linkes, respondent also deducted mortgage payments on his own house. Although respondent claimed that the funds belonged to him, as seller, as they would in a normal closing, the closing statement showed that the balance of the proceeds were to be "held in buyers' trust account toward payment of legal fees re: loan repay from AT Brasno Sr. estate."

In any event, respondent testified that he realized that he was out of trust in December 1997, because of the "overpayments" to the Linkes. However, he did not replace the missing trust funds because he did not have the money and was waiting for the Linkes to

return the funds. According to respondent, the Linkes promised to discuss the issue with their accountant but, as of the April 2000 ethics hearing, they had not verified the "overpayments" and had not repaid respondent.

In four of the real estate closings, Murray, Nelson, Corvino and DeVoe, respondent failed to pay for the surveys, which totaled $1,755. Thomas Ernst, the surveyor, testified that, as of February 1999, respondent had not paid for ten surveys, including the above four. Ernst further testified that, after speaking with the OAE auditor in February 2000, he had his bookkeeper prepare a ledger sheet listing all of the surveys for which respondent had not paid, then contacted respondent, who promised to pay as much of the debt as he could.

Respondent thereafter sent Ernst a check for $1,550, but did not designate the specific bills to be paid from the check. Ernst testified that he left several messages on respondent's answering machine, asking respondent to specify the survey bills to which the check should be applied. Because respondent did not reply to his calls, Ernst applied the $1,550 to the oldest bills, which dated back to 1987. None of the $1,550 was applied to the four surveys at issue in this matter. As of the April 2000 ethics hearing, respondent still owed $2,865 to Ernst.

In addition to the surveys, respondent failed to disburse funds for other closing expenses, despite having received sufficient funds at the closings, as set forth below.

A. The Linke Closing

Respondent represented the Linkes in their purchase of property from CW Enterprises, Inc. The closing took place on June 1, 1995, at which time $397.60 was deducted from the closing proceeds for title insurance, title searches and services.

Respondent admitted that he did not remit the funds to Realty Guardian Title ("Realty Guardian"), the agent for the title insurance company, despite at least two notices from Realty Guardian. According to respondent, he did not pay Realty Guardian because the Linkes did not want title insurance on the property. Respondent testified that the Linkes purchased vacant land, put a modular home on the land and sold the property within a few weeks of the land purchase.

The title insurance accounted for only $94 of the $397.40. However, respondent asserted that the title company would not have charged the Linkes the remaining amount because the company could collect the search fees from the ultimate purchaser. Although the settlement statement showed that respondent retained $397.40 from the closing proceeds, respondent testified that he later gave the funds to the Linkes, who then had the responsibility to "work it out" with Realty Guardian. Respondent provided no documentation to support his testimony.

B. The Wargo Closing

Respondent represented Thomas and Lisa Wargo in their purchase of property. The closing took place on June 16, 1995, at which time $997.80 was deducted from the closing proceeds for title insurance, title searches and services and $140.70 for mortgage insurance premiums. Respondent also retained $100 for a utility escrow. Finally, because respondent incorrectly listed the amount paid by the Wargos, he received $900 more than was necessary for the closing.

Respondent admitted that he did not remit the $997.80 to Realty Guardian, despite an October 10, 1997 letter from Realty Guardian, advising that it would forward the title policies as soon as respondent paid its invoice and provided certain documents, such as the affidavits of title. Respondent also admitted that he did not pay the mortgage insurance premiums, did not remit the $900 overpayment to the Wargos and did not remit the $100 utility escrow to the sellers.

According to respondent, he intended to replace the Wargos' $2,027.70 and the seller's $100 as soon as he "straightened out the Linke matter."

C. The Murray Closing

Respondent represented the purchaser, Peter Murray, in his purchase of property from Cynthia Ur. The closing took place on December 22, 1997, at which time $385 was

deducted from the closing proceeds for a survey. Respondent also deducted $150 from the seller's proceeds for a utilities escrow.

Respondent did not pay the surveyor or the utilities. Sometime after the closing, the seller paid the outstanding utilities but respondent did not return the escrow, despite requests from a paralegal in Ur's attorney's office. Respondent stated that he did not return the $150 utility escrow to the seller because he never received documentation that the utilities had been paid. He admitted that, as of the April 2000 hearing, he did not have sufficient funds in his trust account to remit the $150 utility escrow to the seller, even though he should have been holding $535 ($385 plus $150) in trust from the December 22, 1997 closing.

D. The Nelson Closing

Christopher Nelson purchased real property from his parents, Bruce and Jeannine Nelson. Respondent represented both the buyer and the sellers.[7] The closing took place on November 13, 1997, at which time $400 was deducted from the closing proceeds for the survey, $725.07 for the fourth quarter 1997 taxes and $200 for a utility escrow. Respondent did not pay any of those expenses.

However, testimony from Christopher's wife indicated that respondent may not have collected enough funds at closing to make all of the disbursements. Apparently, the OAE

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[7] Respondent had the sellers sign an acknowledgment that he was not representing them in the transaction, but was only preparing the necessary closing documents. In any event, the complaint did not contain any conflict of interest charges.

abandoned the charges against respondent related to the tax and utility escrows. Respondent admitted that he did not pay the surveyor, even though he received enough funds at the closing to make that payment.

E. The Marcinczyk Closing

Respondent represented Jason Marcinczyk in his purchase of real estate. The closing took place on February 1, 1997, at which time $97 was deducted from the closing proceeds for hazard insurance and $957.40 for property taxes, which were to be remitted to the mortgage company. An additional $574.43 was set aside to pay the first quarter 1997 property taxes.

Respondent admitted that he had received a total of $1,628.83 that he should have sent to the mortgage company or to the township, but did not. According to respondent, he did not realize that he had not made the payments until another client told him of Marcinczyk's complaint that he had been "ripped off." Thereafter, according to respondent, he attempted, unsuccessfully, to contact Marcinczyk. He claimed that he did not remit the funds to Marcinczyk because "I had an inkling that there was a problem with my trust," and afterward, "I couldn't come up with the money to repay."

Discrepancies were found in respondent's documents for this transaction. According to the settlement statement, respondent was to receive a $750 fee. Initially, respondent provided the OAE with a client ledger card for the transaction, showing that he had taken

the following amounts as fees: $750 for "part fee various," $300 for "wills," $750 for "closing fee" and $350 for "fee bal." The balance on the ledger card was $18.31.

Thereafter, respondent gave the OAE another ledger, showing that he had added back the last two fee amounts, $750 and $350, thereby bringing the ledger balance to $1118.31. However, the corresponding checks showed that respondent attributed those checks to "part fee Marcinczyk."

Respondent testified that, except for the $750 fee, the fees shown on his ledger card for Marcinczyk should have been attributed to Corvino, instead of Marcinczyk.

F. The Corvino Closing

Respondent represented Edwin Corvino in the purchase of property. The closing took place on May 5, 1995, at which time $575 was deducted from the closing proceeds for the survey and $150 for a utility escrow.

Respondent did not pay the $575 to the surveyor, did not pay any utility expenses and did not remit the $150 utility escrow to the seller.

According to the settlement statement, respondent should have taken $200 for "closing fee" and $150 for "document preparation." There were also charges of $80 for recording fees and $30 for the notice of settlement. Therefore, the most that respondent should have taken for fees and costs was $460. However, according to respondent's client

ledger card for the transaction, respondent took $250 and $650 as "part fees," shortly after the closing.

On November 5, 1995, the mortgage company refunded the $1,035 loan origination fee that had been deducted at the closing. The check was deposited in respondent's trust account. In March 1998, respondent took additional fees of $300 and $750 from the Corvino funds in his trust account and, in July 1998, he took another $300. In total, respondent withdrew $2,000 in fees from the Corvino trust funds.

As noted above, respondent had initially attributed the $750 taken in March 1998 and the $300 taken in July 1998 to the Marcinczyk matter. Respondent testified that he had inadvertently posted the $750 and $300 checks to the Marcinczyk ledger card, when they should have been posted to Corvino for other legal work. Respondent did not provide any documentation of this additional legal work.

With respect to the utility escrow, respondent testified that the seller never produced documentation that he had paid the utility bill, that "evidently" Corvino paid it, and that he performed legal work for Corvino, rather than return the escrow to him. Corvino did not testify at the hearing.

G. The DeVoe Closing

Respondent represented Thomas and Carol DeVoe, who purchased property from Mark DeVoe. The closing took place on December 28, 1995, at which time $719.55 was deducted from the closing proceeds for title insurance and $395 for a survey.

Respondent admitted that he did not remit the $719.55 to Realty Guardian, the title agency, despite a July 2, 1997 overdue notice. Respondent also admitted that he did not remit $395 to Ernst. Finally, respondent admitted that he charged his client $350 more than the agreed-upon fee of $875. At respondent's request, his clients had paid him $350 prior to the closing, for which they did not receive credit on either the settlement statement or on the ledger card for the transaction.

Respondent testified that, sometime in 1997, he realized that he did not have enough funds in trust to pay the title agency or the surveyor and that he owed his clients $350 for the fee overcharge. As to why he did not pay the title agency or the surveyor immediately after the closing, respondent stated that "[t]here is no reason that I can give you why they weren't paid promptly."

IV. Recordkeeping Violations

The complaint charged – and respondent admitted — that he failed to comply with R.1:21-6, in violation of RPC 1.15(d). Respondent did not maintain the required trust account and business account receipts and disbursements journals and did not prepare quarterly schedules of clients' ledger account balances and reconcile the balances to his trust

account bank statements. In addition, he issued trust account checks payable to cash, instead of a named payee, required by R. 1:21-6(b)(1). Finally, respondent's attorney business account, checks and deposit slips did not contain the required designation.

* * *

Kevin Meszaros, CPA, testified as an accounting expert on behalf of respondent. He testified that he was retained by respondent in November 1998, because of the OAE audit. Meszaros initially completed reconciliations of respondent's attorney trust account, beginning with late 1995. He then attempted to reconcile respondent's client ledger cards to the trust account bank balances, but was unable to "find a starting point to do the reconciliation" because "I was never able to come to a balance to agree with what I had done in my reconciliation." He noted that there were "mispostings" on client ledger cards, i.e., that checks were posted on the ledger card for the wrong client, that ledger cards were not completed contemporaneously with the transaction and that the recordkeeping "was just so poor."

Meszaros never attempted a reconstruction of respondent's attorney records. Aside from looking at respondent's bank statements and canceled checks and speaking with respondent, Meszaros did not verify the figures on respondent's client ledger cards. Although Meszaros disagreed with some of the figures on the OAE auditor's analysis, he did not dispute that respondent was out of trust.

* * *

In mitigation of his misconduct, respondent advanced his community activities: borough councilman, mayor, Grand Knight of the Knights of Columbus, squire and trustee for the Elks club and trustee for the South River Little League.

Two witnesses, an attorney and a former F.B.I. agent, who have known respondent for many years, testified to respondent's honesty and trustworthiness.

* * *

The special master found respondent guilty on all counts of knowing misappropriation charged in the complaint. He also found – and respondent admitted – that respondent did not comply with the attorney recordkeeping requirements.

With respect to the Van Sciver estate matter, the special master found that respondent had agreed to handle the estate for $5,000 and that his bill was "exaggerated and not representative of any reasonable fee for the handling of the estate," but merely an attempt to justify the funds that respondent had improperly withdrawn from the estate. Therefore, the special master found that respondent had knowingly misappropriated the funds that he had taken in excess of $5,000. The special master had "no doubt as to the credibility of Mrs. Smith." He found respondent's explanations "not believable."

The special master also found that respondent had misappropriated the $530 withdrawn from the estate's fund for delivery charges.

In the Antonowicz matter, the special master found that respondent knowingly misappropriated the $8,000 that he had received to pay the inheritance tax and that respondent had knowingly invaded other clients' trust funds, when he issued trust account checks to Antonowicz in payment of the arbitration settlement.

Finally, the special master also found that respondent misappropriated closing proceeds in the seven real estate transactions.

* * *

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. The special master correctly concluded that respondent knowingly misappropriated client trust funds and/or escrow funds from the Van Sciver estate, from other clients' funds to pay Antonowicz and from the Linke, Wargo, Murray, Nelson, Marcinczyk, Corvino and DeVoe real estate closings.

As found by the special master, Smith's testimony that respondent's fee for handling the Van Sciver estate was $5,000 was credible. Furthermore, before the amount of the fee became an issue, Smith told the OAE auditor and her new attorney that respondent's fee was $5,000. In contrast, respondent claimed that he was to be paid $150 an hour for handling

the estate. He kept no record of his time or of the work done, however. Nor did he bill the estate for his time. Finally, several witnesses disputed the time and work shown on the bill that he provided to the OAE.

Smith's testimony that the $4,500 check was intended to pay the inheritance tax was also credible and supported by the notation on her check. Like the special master, we find not credible respondent's testimony that the check was for fees and costs and that he gave "no thought" to the notation on the check.

We also find that respondent's credibility was adversely affected by his testimony on ancillary issues. For example, his explanation of why he did not timely file the inheritance tax return for the Van Sciver estate had no basis in fact. Although respondent attempted to blame the late filing on the fact that he did not initially know that Van Sciver had IRA accounts, according to his own testimony he did not learn about the accounts until after the filing deadline. Furthermore, despite several letters and telephone calls from Fusella, the accountant for the Van Sciver estate, respondent failed to file the return or provide an accounting. It was not until after Smith retained another attorney that respondent finally filed the return. It is also noteworthy that respondent attempted to avoid an accounting by having Smith sign a consent form agreeing that no accounting was necessary. We found all of the above indicative of respondent's knowledge that he had misappropriated estate funds.

Similarly, we find that respondent's testimony that the $530 delivery charges were legitimate estate expenses was unworthy of belief. All of the individuals involved in the

estate and in the sale of the business testified that respondent did not have anything delivered to them, except for one package to Smith.

Based on the foregoing, we conclude that the evidence clear and convincingly establishes that respondent knowingly misappropriated in excess of $11,000 from the Van Sciver estate.

In the Antonowicz matter, respondent objected to the admission of any evidence pertaining to the $8,000 that Antonowicz had given him, arguing that the ethics complaint only charged him with misappropriation of the funds that he gave to Antonowicz in payment of the arbitration award. We found merit in respondent's argument. Although the complaint alleged that the $8,000 was intended to pay the inheritance tax, it did not charge that respondent knowingly misappropriated those funds, only the $2,525 that he used to pay for the fee arbitration settlement. At the ethics hearing, respondent objected to the OAE's evidence concerning the $8,000, arguing that he was not on notice of the charge and, therefore, not prepared to present a defense to it. The special master allowed the evidence and found that respondent had knowingly misappropriated the funds.

In light of the gravity of the offense, the fact that the complaint charged only that respondent had knowingly misappropriated the funds used to pay the fee settlement, the fact that respondent objected to the introduction of the evidence concerning the $8,000, the fact that respondent claimed that he was not prepared to defend against that charge and the fact that the special master did not give respondent additional time to prepare a defense to the

charge (although respondent did not request additional time), we did not deem the complaint to be properly amended to include a charge that respondent knowingly misappropriated the $8,000 given to him for the inheritance tax in the Antonowicz matter.

With respect to the $2,525 in trust account checks that respondent issued to Antonowicz, we found clear and convincing evidence that he invaded other clients' funds when he issued the last two checks, for $350 on June 20, 1996 and $250 on December 15, 1996. The OAE auditor testified – and respondent's ledger sheet for Antonowicz showed – that respondent did not have any remaining trust funds for Antonowicz, when he issued those checks, and that he did not deposit any of his own funds in the account to cover those checks.

On the other hand, we were unable to find clear and convincing evidence that respondent invaded other clients' trust funds when he issued the three earlier checks. The OAE auditor did not address those checks. Moreover, respondent's ledger sheet for Antonowicz indicated that there were funds available.

Unquestionably, however, respondent knowingly misappropriated client trust funds and escrow funds in the seven real estate closings. There is no dispute that, in the Murray, Nelson, Corvino and DeVoe matters, respondent received sufficient funds to pay for the surveys. In fact, respondent admitted that he had received $1,755 from the four closings to pay for the surveys, but did not do so.

In the Linke, Wargo and DeVoe matters, respondent retained a total of $2,114.95 for title insurance, title searches and related services, but did not pay Realty Guardian. Although respondent claimed that he had returned $397.60 to the Linkes sometime after the closing, there was no documentation of that fact. Furthermore, respondent's explanation for not paying Realty Guardian was not credible. Even if the Linkes did not want title insurance, they were still obligated to pay for the searches and other services. Respondent's credibility on this issue was also adversely affected by his failure to explain the situation to Realty Guardian, despite at least two overdue payment notices from that company.

Respondent admitted that he retained $1,628.83 from the Marcinczyk closing proceeds for hazard insurance and property tax but did not remit those funds to the appropriate parties. Respondent's testimony that he did not realize, until told by another client in 1999, that he had not made the required payments was not believable. There was no evidence that the closing was other than routine; the payments should have been made at the closing. Respondent offered no explanation for why his failure to do so. Furthermore, he made disbursements one month after the closing and recorded them on his ledger card for the transaction. The client ledger card showed a balance in the account at that time, which should have put respondent on notice that there were unpaid closing expenses. Of course, respondent thereafter depleted the Marcinczyk funds by taking additional fees to which he was not entitled. We rejected as incredible respondent's explanation that the fees were

mistakenly attributed to Marcinczyk, instead of Corvino since he noted, on the checks and on the ledger card, that the fees were related to Marcinczyk.

Respondent also misappropriated funds that should have been paid for mortgage insurance premiums in Wargo and for utilities in Wargo and Corvino. In Wargo, respondent also collected $900 more than needed for the closing from his client, but never remitted the funds to him.

Respondent claimed that he was out of trust because of "overpayments" to the Linkes. The Linkes were longtime clients of respondent and, in 1996, had purchased from respondent the building in which respondent's office is located. We find not credible respondent's testimony about the "overpayments" to the Linkes. First, for some unexplained reason, he combined all of his client ledger cards for the Linkes onto one card in January 1997. Second, according to the ledger cards, respondent paid his own mortgage from the Linkes' funds. Third, on the client ledger card for respondent's sale of his office property to the Linkes, he also deducted payments on his home mortgage. Although respondent claimed that the funds belonged to him, as seller, as they would in a normal closing, the closing statement stated that the balance of the proceeds were to be "held in buyers' trust account toward payment of legal fees re: loan repay from AT Brasno Sr. estate." Fourth, although respondent testified that he had discussed with the Linkes, in 1997, his "overpayments" to them, Douglas Linke testified that he was not certain that respondent had overpaid them. It was not until after the ethics hearing that Douglas Linke provided a

written statement to respondent that "the money you alleged is due you is correct." Fifth, some of respondent's misappropriations predated the alleged overpayments.

Furthermore, even if we accepted respondent's testimony regarding the "overpayments," respondent is still guilty of knowing misappropriation. He stated that he discovered that he was out of trust in 1997. However, he did not restore the funds to his trust account, did not pay the third parties the funds owed to them and did not repay his clients the funds that he had wrongfully taken from them. In In re Brown, 102 N.J. 512 (1986), the attorney deposited a $20,000 check from his client and immediately disbursed the funds instead of waiting for the check to clear the account. The check was dishonored, resulting in a $20,000 deficiency in the attorney's trust account. Thereafter, the client filed for bankruptcy. Instead of taking steps to restore the funds to his trust account, the attorney resorted to "lapping," using one client's funds to make up for a shortage in the funds that he should have been holding for another client. The Court found that the attorney could not "avoid the impact of Wilson by relying on his having been victimized by a client who gave him a bad check ... For more than four years thereafter he misused trust monies – knowingly so." The Court ordered that the attorney be disbarred. Like Brown, respondent failed, for several years, to restore clients' trust funds, even after he knew that he owed those funds. Instead, respondent, like Brown, used one client's funds to make up for a shortage in the funds that he should have been holding for another client. Like Brown, respondent deserves to be disbarred.

For respondent's knowing misappropriation of client trust funds and escrow funds, we unanimously determined to recommend that he be disbarred. In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985). One member did not participate.

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

Dated: Oct 9 2001

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Andrew T. Brasno, Jr.
Docket No. DRB 00-274

Argued: May 17, 2001

Decided: October 9, 2001

Disposition: Disbar

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

Robyn M. Hill 11/7/01
Robyn M. Hill
Chief Counsel