

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-202
District Docket No. XIV-2013-0193E

IN THE MATTER OF
OSUALDO GONZALEZ
AN ATTORNEY AT LAW

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Decision

Argued: September 15, 2015

Decided: March 4, 2016

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

This matter was before us on a recommendation for a reprimand filed by the District VI Ethics Committee (DEC). The two-count complaint charged respondent with violating RPC 1.15(b) (negligent misappropriation) and RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6). The DEC recommended a reprimand. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1987. On May 21, 2014, he received an admonition for failing to

communicate with his client, failing to consult with his client regarding the scope and objectives of the representation, and failing to memorialize, in writing, the rate or basis for his fee. In the Matter of Osualdo Gonzalez, DRB 14-042 (May 21, 2014).

Prior to the DEC hearing, respondent and the Office of Attorney Ethics (OAE) entered into a stipulation of facts that was consistent with the disciplinary complaint.

On November 7, 2011, OAE Senior Compliance Auditor Karen Hagerman conducted a random compliance audit of respondent's books and records. At this audit, respondent was unable to properly account for all of the client funds in his attorney trust account (ATA). The audit disclosed that he had a shortage of \$30,818.26 in his ATA. Thus, the OAE required him to reconstruct his ATA records from October 2009 through December 2011 for review at a second audit, scheduled for January 30, 2012. Respondent requested, and was granted, more time to comply with the OAE's reconstruction requirements. The second audit was rescheduled for February 24, 2012.

By the February 24, 2012 audit, respondent still had not adequately reconciled his ATA or reconstructed the records.

Moreover, the reconciliation the OAE performed at this second audit demonstrated an ongoing ATA shortage, detailed as follows:

- a) Negative client balances (eight clients) totaling (\$20,484.50);
- b) Service Charges totaling (\$12,140.39);
- c) Balance Adjustments totaling \$1,099.66; and
- d) Attorney Funds totaling \$2,289.93.

In total, respondent's ATA was short \$29,235.30.

On May 18, 2012, respondent deposited \$12,112.63 to correct the service charges placed against the ATA. Seven negative client balances, however, remained unaddressed as of June 30, 2012, as follows:

- a) Bernal: (\$634.00) (since November 24, 2003);
- b) Cantillo, Torres/Lopez: (\$1,644.96)(since January 12, 2006);
- c) Capris: (\$2,093.07) (since February 23, 1999);
- d) Garcia/Labarbera: (\$9,500) (since June 11, 2001);
- e) Garcia/Levine: (\$1,325) (since February 2, 2001); and
- f) Spinoza: (\$3,617.73) (since May 11, 1999).

The ATA shortages listed above remained undetected due to respondent's failure to perform required monthly three-way reconciliations.¹

On July 25, 2013, respondent deposited \$19,814.66 into his ATA. On September 30, 2013, he provided ATA reconciliations for July 2013 demonstrating that the negative balances were corrected. The OAE's review of respondent's records revealed that his client ledger cards showed no negative balances. However, respondent over-disbursed funds in the aforementioned client matters, invading other client funds held in his ATA at that time.

In addition to failing to conduct monthly three-way reconciliations of his ATA, respondent admitted that he was guilty of several recordkeeping violations. Specifically, his client ledger cards had debit balances; he had inactive trust ledger balances; he had old, outstanding trust account checks unresolved; he had personal funds in his ATA in excess of the

¹ The stipulation does not explain the discrepancy between the original eight client balances with shortages, the seven client balances that the OAE alleged remained short on June 30, 2012, and the six client accounts that the OAE detailed as having shortages as of that date.

amount necessary for bank charges; and he did not maintain appropriate records for electronic funds transfers.

At the hearing before the DEC, respondent testified only to offer explanation and mitigation. He indicated that, although he initially had planned to call his bookkeeper to testify, he subsequently decided against it, recognizing that any recordkeeping mistakes that may have been made by his bookkeeper ultimately were his responsibility. Respondent explained that he began to employ an outside bookkeeper for his practice during a time of great personal struggle. His father had passed away in 2009 and his mother, who ultimately passed away in 2012, was suffering from Alzheimer's disease. Additionally, respondent was divorced in 2010. Hence, he delegated a lot of responsibility to the bookkeeper.

Respondent also explained that, although he had instructed his bank to charge expenses to his business account, the bank mistakenly charged his ATA. He admitted that he should have caught the error earlier, but did not, causing the charges to accumulate to a sizable amount of money over a long period of time. Additionally, his bookkeeper, when performing reconciliations, was "forcing" the journal entries to reconcile.

Eventually, respondent testified, the OAE showed respondent's bookkeeper the proper way to reconcile the account, the bank apologized for its errors, it being new to having attorney trust accounts, and since then, it has remedied the situation. Respondent also noted that he quickly corrected the other shortfalls in his account by using his own money. He described most of the remaining discrepancies as clerical errors.

Respondent discussed one client balance that created a substantial deficiency. He explained that the client made deposits for a closing through several payments and indicated that he had deposited a certain sum, when he apparently had not. Relying on the client's representation, respondent disbursed the funds that he believed were in the account, causing a negative balance. Again, respondent noted that he immediately rectified the shortage with his own funds, but was unsuccessful in recovering those monies from the client.

Respondent no longer conducts real estate closings through his ATA, and instead allows an outside title company to take care of that process. Moreover, respondent testified that he is performing monthly reconciliations. Finally, although respondent admitted that his recordkeeping violations caused the invasion

of client funds, he emphasized that he never knowingly used those funds.

Respondent addressed the "significant" amount of time he took to bring his ATA back into compliance. The random audit had occurred in November 2011 and the matter was ultimately resolved in September 2013, when respondent submitted his final reconciliations. Respondent explained that, when he met with Hagerman, she suggested that, prior to replenishing the accounts that were short, he should reconcile the accounts for which clients owed him money. Once that was done, and he had collected as much of the money owed to him as he could, he then took the next step of paying back the accounts with negative balances.

Respondent urged the DEC to recommend an admonition.

The DEC found by clear and convincing evidence that respondent violated RPC 1.15(b) and RPC 1.15(d) in that he negligently misappropriated client funds as a result of his failure to comply with the recordkeeping requirements.

Noting that there were shortages in numerous client accounts, the DEC expressed concern that, but for the random audit, respondent would never have become aware of the large discrepancies. The DEC also observed that it took respondent twenty-two months to bring his ATA into compliance. This delay

occurred, despite the OAE's continually urging him to remedy the situation and giving him several extensions of time to comply.

In mitigation, respondent submitted several letters of reference. The DEC determined that these letters were insufficient to change the required discipline because none came from clients whose funds had been impacted. Therefore, given the number, size, and nature of the violations, and the inordinate amount of time it took respondent to remedy the violations, the DEC unanimously determined that the appropriate quantum of discipline in this matter was a reprimand.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. The record contains sufficient evidence to support a finding that respondent violated RPC 1.15(b) and RPC 1.15(d). In addition to respondent's failure to conduct monthly three-way reconciliations of his ATA, he had client ledger cards found with debit balances; he had inactive trust ledger balances; he had old, outstanding trust account checks unresolved; he had personal funds in his ATA in excess of the amount necessary for bank charges; and he did not maintain appropriate records for electronic funds transfers. Respondent's failure to comply with

the recordkeeping rules ultimately led to the negligent misappropriation of client funds.

Generally, a reprimand is imposed for recordkeeping deficiencies that result in the negligent misappropriation of client funds. See, e.g., In re Arrechea, 208 N.J. 430 (2011) (negligent misappropriation of client funds in a default matter; the attorney also failed to promptly deliver funds that a client was entitled to receive and ran afoul of the recordkeeping rules by writing trust account checks to himself and making cash withdrawals from his trust account, practices prohibited by R. 1:21-6; although the baseline discipline for negligent misappropriation is a reprimand and, in a default matter, the otherwise appropriate level of discipline is enhanced, a reprimand was viewed as adequate in this case because of the attorney's unblemished professional record of thirty-six years and his cardiac and serious cognitive problems (mild dementia)); In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed

to memorialize the basis or rate of his fee); In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of \$43.55 occurred in attorney trust account as a result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney over-disbursed trust funds in three instances, causing a \$17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a prior reprimand for a conflict of interest); In re Fox, 202 N.J. 136 (2010) (motion for discipline by consent; attorney ran afoul of the recordkeeping rules, causing the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds); and In re Dias, 201 N.J. 2 (2010) (an over-disbursement from the

attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney's recordkeeping deficiencies were responsible for the misappropriation; the attorney also failed to promptly comply with the OAE's requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, the Board considered that the attorney, a single mother working on a per diem basis with little access to funds, was committed to and had been replenishing the trust account shortfall in installments).

A reprimand may still result even if the attorney's disciplinary record includes prior ethics transgressions. In re Toronto, 185 N.J. 399 (2005) (attorney negligently misappropriated \$59,000 in client funds and recordkeeping violations; the attorney had a prior three-month suspension for conviction of simple assault, arising out of a domestic violence incident, and a reprimand for a misrepresentation to ethics authorities about his sexual relationship with a former student; mitigating factors taken into account); In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated \$13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds

in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered); In re Rosenberg, 170 N.J. 402 (2002) (attorney negligently misappropriated client trust funds in amounts ranging from \$400 to \$12,000 during an eighteen-month period; the misappropriations occurred because the attorney routinely deposited large retainers in his trust account and then withdrew his fees from the account as he needed funds, without determining whether he had sufficient fees from a particular client to cover the withdrawals; prior private reprimand for unrelated violations); and In re Marcus, 140 N.J. 518 (1995) (attorney guilty of negligently misappropriating client funds as a result of numerous recordkeeping violations and commingling personal and clients' funds; the attorney had received a prior reprimand).

If compelling mitigating factors are present, the reprimand may be reduced to an admonition. See, e.g., In the Matter of Harold J. Poltrock, DRB 13-325 (January 23, 2014) (admonition imposed on attorney after a random audit revealed an \$11,406.27 shortage in his attorney trust account, a violation of RPC

1.15(a); the shortage went undetected because of his failure to conduct monthly three-way reconciliations of the trust account and his failure to maintain proper ledger cards for clients and for bank charges; several other recordkeeping deficiencies were uncovered; violations of R. 1:21-6 and RPC 1.15(d); the Board considered that no disciplinary infractions had been sustained against the attorney since his 1980 admission to the New Jersey bar; that he had acknowledged his wrongdoing by entering into a stipulation with the OAE; that, once he had become aware of the trust shortage, he promptly reimbursed all missing funds; and that nothing in the record indicated that any harm had befallen his clients).

Here, respondent has a prior admonition, albeit for unrelated conduct. In addition, respondent took twenty-two months to resolve a relatively small number of client accounts. In fact, respondent was given an extension of time to replenish the shortages and to come into compliance before his follow-up audit. Despite that extension, the second audit revealed his continuing failure to do so. We note that respondent has attributed this lengthy delay to the advice he allegedly received from the OAE auditor — specifically, that he should identify the clients whom he had overpaid and those to whom he

owed money prior to finalizing his reconciliation and replenishing his trust account. However, even assuming that to be true, it is clear that the OAE appropriately considered the task to be one of urgency. Indeed, the OAE auditor had set very short deadlines for respondent's completion of the reconstruction and reconciliation of his financial records. Respondent should have assigned that same urgency to the task of identifying and then replenishing his clients' funds. In this context, we view twenty-two months as an unreasonably lengthy delay to complete that very urgent task.

In mitigation, however, respondent cooperated with the OAE by entering into a stipulation in which he admitted his unethical conduct and resolved many of the client accounts by using his own funds. Moreover, respondent experienced a great deal of personal struggle between 2009 and 2012, comprising the audit period. Thus, he explained, he hired a bookkeeper during this time of struggle to handle his records. Even assuming, however, that this employment began as early as 2009, it by no means explains negative client balances totaling more than \$5,000 that had existed in respondent's account since 1999 (the Capris and Spinoza accounts), ten years prior to hiring a bookkeeper. This timeframe contradicts respondent's suggestion

that the recordkeeping errors and deficiencies were the fault of his bookkeeper, for which respondent was merely accepting responsibility. Rather, clearly, at least some of those deficiencies lay squarely at respondent's feet.

We see no reason or justification for downgrading the quantum of discipline in this matter. Thus, given the totality of the circumstances, we determine to impose a reprimand for respondent's misconduct.

Vice-Chair Baugh and Member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

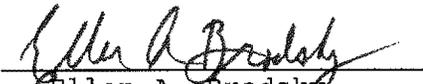
In the Matter of Osualdo Gonzalez
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Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost			X			
Baugh						X
Clark						X
Gallipoli			X			
Hoberman			X			
Rivera			X			
Singer			X			
Zmirich			X			
Total:			6			2


Ellen A. Brodsky
Chief Counsel