

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-118
District Docket No. XIV-2009-0456E

IN THE MATTER OF
ELIO A. ARRECHEA
AN ATTORNEY AT LAW

:
:
:
:
:
:
:

Decision

Decided: October 7, 2011

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

This matter was before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.15(a) (failure to safeguard client funds and commingling personal and client funds in the trust account), RPC 1.15(b) (failure to promptly turn over funds to client or third party), and RPC 1.15(d) (recordkeeping violations). None of the counts charge respondent with knowing misappropriation. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1975. He has no prior discipline. Respondent has been ineligible to practice law, since September 27, 2010, for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection (CPF). He remains ineligible to date.

According to the complaint, respondent has had cardiac problems that required "a number" of hospitalizations and also suffers from "mild dementia and is at risk for further cognitive decline." In March 2010, respondent closed his New Jersey office and moved to Florida.

Service of process was proper in this matter. On December 9, 2010, the OAE sent a copy of the complaint to respondent by certified and regular mail, at four separate addresses: 5701 Boulevard East, Apartment 3G, West New York, N.J. 07903; 3600 Bergenline Avenue, Union City, N.J. 07087; P.O. Box 367, Leonia, N.J. 07605; and c/o Ana M. Arrechea, Esq. (respondent's daughter), 675 East 18th Street, Patterson [sic], N.J. 07501.

The regular mail sent to West New York was returned to the OAE, on January 5, 2011, marked "Return to Sender - Attempted Not Known." The certified mail was returned to the OAE, on January 19, 2011 marked "Unclaimed."

The certified mail sent to Leonia was returned to the OAE marked "Unclaimed." The regular mail envelope to that address was not returned.

The certified mail sent to Union City was returned indicating delivery on January 8, 2011 and was signed by respondent's daughter, Ana Arrechea. The regular mail envelope sent to that address was not returned.

The certified mail sent to Paterson was delivered on December 14, 2011. The delivery receipt was signed by respondent's daughter. The regular mail was not returned.

On January 24, 2011, a notice that a formal ethics complaint had been filed against respondent was published in the New Jersey Law Journal. On March 9, 2011, a like notice was published in The Jersey Journal.

On March 11, 2011, the OAE sent respondent a five-day letter, advising him that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted and that, pursuant to R. 1:20-4(f) and R. 1:20-6(c)(1), the record would be certified directly to us for the imposition of sanction. That letter was sent to the same addresses listed above, by regular

mail. Only one envelope, addressed to West New York, was returned to the OAE. It was marked "Return to Sender."

Respondent did not file an answer.

I. The Aguirre Matter

Count one of the complaint charged respondent with failure to safeguard client funds (RPC 1.15(a)); commingling personal funds and client funds in the trust account (RPC 1.15(a)); and recordkeeping violations (RPC 1.15(d) and R. 1:21-6).

Respondent maintained two bank accounts for his law practice: an attorney trust account at the Provident Bank and a business account at Wachovia Bank.

On August 31, 2009, an overdraft occurred in the trust account, in the amount of \$338.79. The overdraft was caused by check #14219, payable to James E. Aguirre, in the amount of \$4,000. At that time, the balance in respondent's trust account was only \$3,661.21.

On January 15, 2010, the OAE conducted an audit of respondent's trust account for the period of June 1, 2008 through December 31, 2009, later expanded to include through March 31, 2010.

The OAE audit revealed that respondent had routinely commingled personal and client funds in the trust account and had issued trust account checks to pay both business and personal expenses, including office rent, insurance, and credit cards. He also issued trust account checks payable to cash.

During the audit, respondent admitted that he had paid rent, utilities and personal bills from his trust account, but denied that those disbursements had invaded client funds. Rather, he maintained that, in May 2009, he had borrowed \$13,000 from the son of Ramon Miranda, who had given him the funds in three separate checks, which had then been deposited into the trust account. The OAE audit "could not confirm the deposit of the \$13,000 loan proceeds."

II. The Martinez Matter

Count two charged respondent with gross neglect, failure to safeguard client funds and commingling, and failure to turn over funds to a client or third party.

On July 27, 2009, respondent deposited in his trust account a \$5,000 check from Claudio and Ivania Martinez, representing a deposit for their purchase of a restaurant, "Tres Rosa," from respondent's client, James E. Aguirre. Respondent was required

to maintain that \$5,000 deposit in his trust account until closing of title or until otherwise instructed by the parties to the contract. On July 29, 2009, respondent issued a trust account check to the CPF, in the amount of \$240. The next day, July 30, 2009, he issued a trust account check to the New Jersey Family Support Center, in the amount of \$500. On August 3 and 4, 2009, he issued two trust account checks, each in the amount of \$500, to himself, for his "anticipated legal fee" in the matter.

Respondent issued the above checks for his own personal use. They did not relate to the Martinez-from-Aguirre matter. After the checks were presented for payment, the balance in respondent's attorney trust account fell to \$3,661.21.

On August 28, 2009, respondent issued a trust account check to Aguirre for \$4,000. The check was returned for insufficient funds, on September 1, 2009, after which respondent deposited \$400 of his own funds to cure the shortfall.

III. The Carpio/Ortega Matter

Count three charged respondent with gross neglect, failure to safeguard client funds, and failure to promptly deliver funds to a client or third party.

On November 20, 2009, respondent deposited in his trust account, a \$1,000 check and a \$5,000 check from Carmen Carpio and Braulio Ortega, representing the deposit in a real estate transaction. On January 6, 2010, he issued a trust account check to himself for \$1,000 marked "Ortega attorney fees." The next day, on January 7, 2010, after that check was negotiated, the balance in the trust account fell to \$5,000.

At some point, the real estate transaction "fell through." From February 6 to March 8, 2010, respondent issued six trust account checks to Carmen Carpio, totaling \$1,000, representing a partial return of the deposit funds. Two days later, on March 10, 2010, respondent made a \$100 cash withdrawal, leaving only \$3,700 in his trust account.

On March 15, 2010, respondent deposited in the trust account \$1,500 in cash, bringing the account balance to \$5,200. On March 22, 2010, he issued a \$5,000 trust account check for the return of the deposit. On the same date, he issued a check to himself for \$200, which he marked as "excess deposit."

According to the complaint, when OAE personnel telephoned respondent to request the client files in the two foregoing transactions, he appeared to be unaware of a "problem."

As indicated previously, since early 2009, respondent has suffered from cardiac problems. In 2009 and 2010, he was admitted to the hospital on a number of occasions. He also suffers from mild dementia and is at risk for continued cognitive decline, according to the neuropsychological evaluation report furnished to the OAE. That report was not included in our record.

In March 2010, respondent closed his law office and moved to Florida.

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Count one (Aguirre) charged respondent with failure to safeguard client funds, more specifically, negligent misappropriation of client funds. It also charged him with commingling personal and client funds.

On August 31, 2009, when respondent gave a \$4,000 check to Aguirre, his trust account held only \$3,661. The resulting shortfall caused the OAE to conduct a demand audit of

respondent's trust account. The audit encompassed from the period June 1, 2008 to December 31, 2009.

The audit revealed that respondent "routinely commingled" personal and client funds in the trust account, an impropriety that respondent admitted at the audit. He claimed, however, that he had deposited a \$13,000 loan from the son of Ramon Miranda into his trust account. Although the complaint does not directly tie this revelation to the misappropriations contained herein, the OAE did not charge respondent with knowing misappropriation of client funds. We, therefore, rely on the OAE's thorough investigation of respondent's books and records and that, although the OAE did not find any evidence of a \$13,000 deposit in the trust account, it must have been completely convinced of respondent's true belief that he had placed those personal funds in the trust account to fund the disbursements in question. Otherwise, the OAE would have charged respondent with knowing misappropriation of client funds.

According to count two (Martinez), on July 27, 2009, respondent deposited in his trust account a \$5,000 check, the buyers' deposit toward the purchase of a restaurant from respondent's client, Aguirre. Although respondent was required to leave the deposit intact in the trust account until closing,

he paid \$240 to the CPF, \$500 to the New Jersey Family Support Center, and \$1,000 to himself. The latter represented his legal fee in the Martinez matter. Although the trust account was supposed to hold at least \$5,000 on account of this client matter, on August 31, 2009, the balance fell to just \$3,661.21.

Once again, although the OAE stated that checks were "issued for [respondent's] own personal use and none of [them] related to the Martinez from Aguirre matter," that office must have believed respondent's contention that he thought that he had sufficient personal funds in the trust account (the \$13,000) upon which to draft checks for his own purposes. Nevertheless, respondent is guilty of commingling and negligent misappropriation of client funds. He also failed to promptly deliver the funds to his client (RPC 1.15(b)) and ran afoul of the recordkeeping rules by writing checks to himself for cash and making cash withdrawals out of the trust account, practices that are specifically prohibited by R. 1:21-6 and, therefore, RPC 1.15(d).

According to count three (Carpio/Ortega), in November 2009, respondent deposited a total of \$6,000 into his trust account, representing the deposit for the Carpio/Ortega real estate transaction. On January 6, 2010, respondent issued a trust

account check to himself for \$1,000, representing his legal fee for the matter. The next day, his trust account held only \$5,000.

Over the next several weeks, respondent returned a portion of the \$6,000 deposit, giving Carpio six trust account checks totaling \$1,000. On March 10, 2010, respondent made a withdrawal of \$100 in cash, leaving just \$3,700 in the trust account. At the time, the account should have had \$5,000 on account of the Carpio/Ortega matter alone. Respondent, thus, negligently misappropriated client funds. Once again, we trust that the OAE was satisfied that respondent reasonably believed that the trust account held personal funds of his own that were available for his own use.

Counts two and three (Martinez and Carpio/Ortega) also charged respondent with having grossly neglected those matters. Because the complaint does not recite sufficient facts to support a violation of RPC 1.1(a), we dismiss those charges.

The complaint also cited facts that smack of mitigation, but are not presented as such. Specifically, it states that, since 2009, respondent has had cardiac problems that required "a number" of hospitalizations and also suffers from "mild dementia and is at risk for continued cognitive decline," according to a

neuropsychological report furnished to the OAE. In March 2010, respondent closed his New Jersey law office and moved to Florida.

Generally, a reprimand is imposed for negligent misappropriation of client funds, even if accompanied by other, non-serious infractions such as recordkeeping deficiencies, commingling, and failure to promptly deliver funds to clients, as here. See, e.g., In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of \$43.55 occurred in attorney trust account, as the 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 overdisbursed 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 Conner, 193 N.J. 25 (2007) (in two matters, the attorney inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of clients' funds; the attorney also failed to

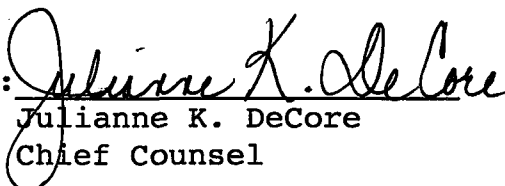
promptly disburse funds to which both clients were entitled); In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated \$13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled 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 Winkler, 175 N.J. 438 (2003) (attorney commingled personal and trust funds, negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account \$4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account); and In re Liotta-Neff, 147 N.J. 283 (1997) (attorney negligently misappropriated approximately \$5,000 in client funds after commingling personal and client funds; the attorney left \$20,000 of her own funds in the account, against which she drew funds for her personal obligations; the attorney was also guilty of poor recordkeeping practices).

In a default matter, the appropriate discipline for the found ethics violations is ordinarily enhanced to reflect the attorney's failure to cooperate with disciplinary authorities as an aggravating factor. In the Matter of Robert J. Nemshick, DRB 03-364, 03-365, and 03-366 (March 11, 2004) (slip op. at 6). With a reprimand as the baseline sanction for respondent's misconduct, the default nature of the proceeding would ordinarily raise the appropriate sanction to a censure.

Here, however, due to respondent's cognitive issues and an otherwise unblemished disciplinary record since 1975, we determine that a reprimand sufficiently addresses his misbehavior. By separate letter, we have asked the OAE to consider taking action to place respondent on disability inactive status.

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
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

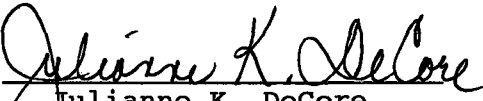
SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Elio A. Arrechea
Docket No. DRB 11-118

Decided: October 7, 2011

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost			X			
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			9			


Julianne K. DeCore
Chief Counsel