SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-340
District Docket No. XIV-2008-66E

IN THE MATTER OF	
PHIL E. LEONE	
AN ATTORNEY AT LAW	

Decision

Argued: January 21, 2010

Decided: March 16, 2010

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Martin J. Arbus appeared on behalf of respondent.

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

This matter came before us on a recommendation for a three-year suspension filed by Special Master Peter W. Kenny, Esq., based on his finding that respondent had knowingly misappropriated client and escrow funds. For the reasons

expressed below, we agree with the special master's conclusion that respondent knowingly misappropriated client funds in two matters and escrow funds in a third matter. We, thus, recommend that respondent be disbarred.

Respondent was admitted to the New Jersey bar in 1977. At the relevant times, he maintained an office for the practice of law in Middletown. He has no disciplinary history.

On January 8, 2009, the Office of Attorney Ethics ("OAE") filed a formal ethics complaint, charging respondent with knowing misappropriation of escrow funds in one client matter and knowing misappropriation of client funds in two client matters, in violation of RPC 1.15(a) and RPC 8.4(c); gross neglect, a violation of RPC 1.1(a), as a result of his failure to pay the closing costs in a client's real estate transaction; commingling personal funds with client and escrow funds (R. 1:21-6(a)(1)) and recordkeeping infractions (R. 1:21-6(c)(1)), a violation of RPC 1.15(a) and RPC 1.15(d); and practicing while ineligible, a violation of RPC 5.5(a)(1).

On July 27, 2009, the special master presided over a one-day hearing, where he heard the testimony of OAE investigator Mary Jo Bolling, respondent, and respondent's client, Mary Khaleq.

Bolling testified that the OAE's investigation began, in January 2007, after another of respondent's clients, Mildred Larson, filed a grievance, claiming that respondent had withheld some funds that were due to her.[1]

During the course of the OAE's investigation, Bolling learned that respondent did not maintain his financial records as required by R. 1:21-6. According to Bolling, respondent placed client and personal funds into both his trust and business accounts. Moreover, he paid for personal items with funds from the trust and business accounts and made cash withdrawals from the trust account. Finally, respondent did not provide the OAE with either a receipts or disbursements journal.

The OAE's investigation also uncovered trust account checks payable to respondent's family members.

Respondent testified that he had never handled books or records in twenty-five years of practice, before going out on his own, five years previously. During his first twenty-five

[1] The OAE did not file charges against respondent as a result of the Larson grievance. Nevertheless, the grievance set in motion the investigation that led to the filing of formal ethics charges against respondent in three other client matters.

years as an attorney, respondent worked for other law firms, where he had nothing to do with bookkeeping. When he started his own firm, respondent still did not have responsibility for bookkeeping. His wife handled their personal bank accounts.

Respondent admitted that he did not maintain his attorney records properly. He explained:

> [I]t's one of those things I always expected that I would become more astute and become organized and do things in certainly a much more businesslike manner and it was just something that I always never got around to, always put off and you've known me for 30 some years. I've been that way the whole time. Before when I had back-up, it wasn't my responsibility so there was no way for me to have any problems in that regard. And it was something I always — and it was something my wife has been on me for the entire 35 years that we've been married about being — becoming organized and I always thought I could and would and have never to this day successfully been able to do it. I always thought that it was something I could learn and I really never put in any effort to do it but I did not maintain records the way I should have.
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> [T69-12 to T70-3.][2]

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[2] "T" refers to the transcript of the July 27, 2009 hearing before the special master.

Respondent testified that, due to financial difficulties, he had not been able to have an accountant review his books. In fact, he delivered his own filings to the court house to avoid courier fees.

The VanArsdale Matter

Respondent represented Susan VanArsdale in the sale of her home. Bolling testified that, on May 26, 2004, a $96,000 check payable to respondent's trust account by Weichert Realtors, in a real estate matter, was deposited into respondent's business account, which, prior to the deposit, had a negative balance of -$847.53. According to Bolling, $94,600 of the $96,000 from Weichert represented funds due to respondent's client, Susan VanArsdale.

As of June 30, 2004, the balance in respondent's business account was $69,162.90. By the end of the following month, the balance was reduced to $44,927.33. As of August 30, 2004, the balance was down to $33,036.88.

Respondent told Bolling that, in 2004, he received two loans from friends, totaling $65,000, which he deposited into his business account on August 31 and September 1, 2004. After

these checks were deposited, the balance in respondent's business account rose to $97,049.28.

Respondent told Bolling that he had used VanArsdale's funds and admitted that his use of the funds was without her authority and knowledge. Respondent could not recall specifically asking his friends for the $65,000 in loans so that he could replenish the VanArsdale funds. Nevertheless, on September 15, 2004, just two weeks after he deposited the funds, he issued a $94,600 business account check to the order of VanArsdale.

Both VanArsdale and her long-term partner, Al Kinal, submitted certifications in which they stated that, if respondent had asked them for permission to use their funds "for his personal emergencies," they would have said yes. Moreover, Kinal stated that he and respondent were so close that respondent's "ability to use those funds would have been implied."

Respondent testified that VanArsdale and Kinal were supposed to use the proceeds from the sale of her home, in New Jersey, to purchase a property in South Carolina. According to respondent, the closings on both properties were very close in time. When the South Carolina closing fell through, respondent held on to the monies realized from the sale of VanArsdale's New

Jersey property. Respondent testified that, "when it no longer was necessary to be with me and it wasn't going to be used in any immediate or relatively short time frame to purchase or complete the deal in South Carolina," he returned the money to VanArsdale. Respondent has never received any complaints from them with respect to his handling of their funds. He testified that they were friends at the time and that they continue to be friends.

The Desiderio Matter

Bolling testified that, on January 10, 2005, respondent deposited into his business account an $8000 check issued by New Jersey Manufacturers Insurance Company to Ronald and Dorothy Desiderio and respondent. These funds represented settlement proceeds due to respondent's clients, the Desiderios, in a personal injury action. At the time of the deposit, respondent maintained an attorney trust account.

Respondent testified that he took a $2500 fee from the proceeds and did not charge the clients for expenses, which included a deposition. Thus, the Desiderios were entitled to $5500. On January 18, 2005, prior to the payment of the $5500 to the Desiderios, the balance in respondent's business account

dropped below $5500. Respondent admitted to Bolling that the Desiderios did not authorize him to use their funds and that they were not aware that he had done so.

On January 20, 2005, respondent deposited $49,400 into the business account. Respondent told Bolling that these funds represented separate loans from Susan and Lawrence Pollare ($45,000), Anthony and Christine Cella ($5000), and from an unidentified source ($600). On that same date, respondent issued a $5500 check to the Desiderios.

Ronald Desiderio submitted a certification in which he stated that, had respondent asked either him or his wife if he could use their funds, they would have "absolutely and unequivocally" said yes. Moreover, Desiderio certified, respondent could have delayed making their $5500 payment. Finally, Desiderio stated that the relationship between his family and respondent was so close that his ability to use their funds "could be implied."

Respondent testified that he had received no complaints from the Desiderios regarding his handling of their matter.

The Kahleq Matter

Mary F. Kahleq testified that she and her husband had hired respondent to represent them in the purchase of their home. According to Kahleq, they signed a retainer agreement, requiring the payment of a $750 fee to respondent.

The total deposit paid was $10,000. Kahleq stated that she paid $1000 to the realtor and gave respondent a $9000 check, which was supposed to be held in escrow until the closing.

Bolling testified that she reviewed respondent's trust account bank statement, the HUD-1 statement, and the ledger for the Kahleq matter. Based on her review of these records, Bolling concluded that respondent had misused Kahleq's funds.

Specifically, on November 7, 2006, respondent deposited Kahleq's $9000 check into his trust account. After that deposit, the balance rose from $26.54 to $9,026.54.

Between November 7 and November 28, 2006, respondent made fourteen cash withdrawals from the trust account, in even dollar amounts, totaling $8490. In addition, he issued one check to Pavin Metha in the amount of $350, requesting the repayment of a loan from Metha to respondent. He also incurred a "miscellaneous debit" of $373.09, which was deposited into his

personal checking account. Respondent made only one additional deposit into the trust account - $500 on November 27, 2006.

Bolling testified that none of the November 2006 trust account disbursements were made on behalf of Kahleq. By November 28, 2006, the trust account balance sank to $363.45, notwithstanding the $500 deposit the day before. On November 30, 2006, the balance was down to $143.45.

Kahleq testified that respondent never asked her if he could use any of the deposit funds, and he never told her that he had used any of the funds. Kahleq denied that she had ever stated to respondent that she would have permitted him to use the funds if he had asked her. Respondent agreed that he could not "take issue with much of what she said."

According to Bolling, when she asked respondent if Kahleq had authorized him to use the deposit monies, he answered that she had not. He told Bolling that Kahleq was not aware that he had used the $9,000.

Bolling testified that the Kahleq closing took place on December 12, 2006. Six days earlier, on December 6, 2006, respondent deposited into his trust account a $14,000 check from Ronald N. Cohen, payable to respondent, with the word "loan" written on the memo line. Prior to that deposit, respondent's

trust account held only $143.45. The Cohen loan raised the balance to $14,143.45.

Respondent told Bolling that Cohen was a friend of his and that he had loaned him the $14,000. When Bolling asked respondent if the purpose of the loan was to replenish Kahleq's funds, he stated that "it wasn't his absolute intention that that was what the money was for but he concedes that according to the bank statement, that's what happened."

Bolling prepared a summary of the deposits and disbursements with respect to the Kahleq real estate transaction. Based on that chart, Bolling testified that, after Kahleq's $9000 had been deposited into respondent's trust account on November 7, 2006, respondent received two wire transfers, for the Kahleq closing, totaling $344,495.50, on December 12, 2006. Bolling testified that, on December 13, 2006, one day after the closing, respondent made two cash withdrawals from his trust account, totaling $1500.[3] Although Kahleq testified that respondent's fee was $750, and the HUD-1

[3] The trust account statement actually shows three cash withdrawals on that date: $1200, $300, and $200.

identifies a fee in that amount, Bolling credited him with a $1000 fee, which is the figure identified in some of respondent's records.[4]

On December 14, 2006, respondent issued a check to the seller, Krzysztof Lendziszewski, in the amount of $160,875.21. In addition, respondent paid $10,040 to the Able Agency and wired $154,516.04 out of his trust account. According to Bolling, after these transactions, respondent's trust account should have held $27,064.25 for the transaction. However, the balance was only $26,757.70.[5]

On December 15, 2006, the bank paid a trust account check in the amount of $1,142.50, which had been issued to attorney Irwin Millinger. This amount was identified on the HUD-1 for the Kahleq transaction, but respondent's client ledger reflected only $992.50.

On December 18, 2006, the bank paid an $8550 trust account check issued to Sylvia Geist, the real estate broker. At this

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[4] The records did not contain a check issued to respondent in payment of his attorney fee.

[5] Respondent also made a $500 cash withdrawal from the trust account on December 14, 2006.

point, respondent should have been holding $17,371.75 in trust for the transaction, but the balance was only $15,465.20.

On December 22, 2006, the bank paid a trust account check issued to Sammy and Mary Kahleq in the amount of $7,656.31. At this point, the balance of funds should have been $9,715.30, but the trust account balance was only $6,396.09.

No disbursements with respect to the Kahleq transaction were posted in January 2007. Thus, respondent's trust account balance should have continued to include $9,715.30 in that matter. Yet, as of January 28, 2007, the trust account balance was a mere $431.02.

On January 29, 2007, the trust account balance was $974.02. The next day, respondent deposited $100 into the account, but a $4176 check was presented for payment, which bounced. This check had been issued to J.P. Morgan Chase Bank, NA, at the Kahleq closing of December 12, 2006, in payment of a broker's fee. When J.P. Morgan attempted to re-negotiate the check, on February 2, 2007, it bounced again, inasmuch as the account balance was minus $3,661.98. Even after the $4176 check was credited back to the account, on February 5, 2004, the account balance was only $186.02.

On February 22, 2007, a check in the amount of $886.63 was posted to respondent's trust account, representing payment of taxes due to the Borough of Sayerville in the Kahleq real estate transaction. That check cleared.

Bolling testified that respondent's business account was closed for insufficient funds in September 2006. On January 28, 2008, the bank wrote off the negative balance in the trust account and closed it.

Bolling's review of respondent's records did not uncover any evidence that J.P. Morgan had ever been paid. She also learned from respondent that the title insurance was never paid. All recording and realty transfer fees were paid to Sayerville in March 2008, which was more than a year after the December 2006 closing.

Kahleq testified that respondent and her husband attended the closing. Kahleq and her husband were due a refund of an undisclosed amount at the closing, which they received from respondent. Afterward, however, she learned that the deed had not been recorded and that the $2272 in title insurance had not been paid. Ultimately, the deed was recorded a year-and-a-half after the closing.

Respondent testified that he did not know why the deed was not recorded immediately. At the time of the closing, he no longer had an employee to assist him with real estate closing matters. He was not aware that the deed had not been recorded until he received a notice to that effect, at which time he recorded it.

When respondent closed the Kahleq file, he believed that the title insurance had been paid. He conceded, however, that it had not. He explained that there was no money to pay it, and that he had put his head in the sand, pretending that there was no problem.

As for the $4176 check to J.P. Morgan, respondent could not explain why the company delayed in cashing it. He acknowledged having received notice that the check had bounced. He then had the bank issue a cashier's check for the amount due. He claimed that the documentation demonstrating payment was in the Kahleq file. (No such documentation was in the file, which was with respondent's counsel.)

With respect to the knowing misappropriation charges, respondent stated in his answer to the ethics complaint:

> In all dealings involving the long time personal friends, referenced in the first three counts of the complaint (the

> misappropriation counts), respondent never perceived his actions to be the intentional taking of money from his clients. Respondent was always aware of available funds coming to him and was negligent in not making sure that such funds were timely deposited before use of any deposits that could be considered client funds. Several of the involved parties have submitted affidavits in support of the respondent in these particular instances.
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> [A,Separate Defenses,¶3.][6]

Respondent admitted the recordkeeping violations identified in the fourth count of the complaint. Finally, respondent admitted having practiced while ineligible in 2007 and 2008, as alleged in the complaint.

Respondent also asserted a number of mitigating factors in his answer. First, he stated that, during the relevant times, he was suffering from depression, which "caused him to be inattentive to general tasks and unable to focus on his personal responsibilities." Second, respondent claimed that he and his wife were experiencing marital problems, which caused him to suffer from "a much elevated level of stress and anxiety."

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[6] "A" refers to respondent's March 8, 2009 answer to the formal ethics complaint.

Third, respondent asserted that, for most of his career, he had worked in a multi-lawyer firm where others took care of the recordkeeping and banking matters and that he "never did any law office banking of any type prior to becoming self employed." Finally, respondent noted that he has practiced law for thirty years, without incident, that he has devoted a substantial amount of time to pro bono work, and that he has acknowledged his wrongdoing.

At the hearing, respondent denied that he used client funds and then tried to replace the monies. Instead, he maintained that his poor bookkeeping practices were the reason why, for example, he used the Desiderios' funds without realizing it.

Respondent claimed that he did not realize that his trust account was, in fact, a trust account. He stated that the account checks did not identify it as a trust account. After stating that he understood trust accounts to be for real estate closings and personal injury funds, respondent later testified that he did not know why he had placed the VanArsdale funds into his business account. He claimed that he now understands the recordkeeping rules and the obligations they impose upon attorneys. Yet, as of the date of his testimony, July 27, 2009,

respondent did not maintain either a business or a trust account.

Respondent denied that he needed more funds to operate his business than he was earning as an attorney. With respect to the loans, he testified that some were for investment purposes and others were used to operate his law practice.

Respondent concluded:

> I never would have thought my career would come to this. I've attempted, I thought, to represent clients in a very straightforward and honest manner for as long as I've been admitted since 1977. This has been a very difficult and trying experience and, again, I know because of my own foibles and my own personal life difficulties, this is a period of time that I wish I hadn't had to go through but, again, like we've said, difficult [sic] befalls everyone. This is mine.
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> [T76-22 to T77-6.]

When asked why he had not called the Desiderios and VanArsdale to ask them if he could use their money, he claimed that it was because he "didn't think there was any issue regarding that;" he "didn't perceive that [he] was using their funds that [he] needed to contact them about." Also, at the time of the Kahleq transaction – the summer and fall of 2006 – he was experiencing personal difficulties in his life and with

his marriage. These difficulties were "extremely time consuming," and he was "really not as focused as [he] should have been on [his] practice."

Respondent testified that, throughout the course of his representation of these clients, he had put his head in the sand and hoped that the problems would go away. He stated that he now understands that he required psychological help. He acknowledged that he required assistance in complying with the recordkeeping rules and maintaining his accounts and records.

The special master questioned respondent about his ability to practice on his own. Respondent claimed that he could maintain a solo practice, if he had the "assistance out there." He conceded that he had not sought out any assistance previously, when he had trouble with his books and managing his practice. He claimed, however, that he had been unable to seek psychological help because he had no health insurance.

Respondent was ineligible to practice law from September 24, 2007 to October 14, 2009. He testified that he had practiced law "in the last couple of years," having handled some municipal court and other "small matters" in 2007 and 2008.

In his undated report, the special master found that respondent had used Kahleq's $9000 deposit without her

permission. Likewise, the special master found that respondent had used VanArsdale's $96,000 and replenished the monies by obtaining loans from friends. Finally, the special master found that respondent had used a portion of the Desiderios' $8000 settlement. The special master ruled that, notwithstanding the clients' statement that, had respondent asked, they would have permitted him to use their monies, this did not excuse respondent's use of their funds without their permission.

The special master also found that respondent had "failed to maintain his attorney trust account, separate from his business and personal accounts, as well as failed to maintain the proper journals and trust ledgers for all funds received." Moreover, he made cash withdrawals from the trust account. Finally, the special master noted that respondent admitted that he practiced law during a period of ineligibility.

Rather than recommend respondent's disbarment, the special master opined that "a substantial suspension" would be more appropriate, as it would leave open the possibility that respondent could "once again be a productive member of the Bar under the appropriate circumstances." The special master recommended that respondent receive a three-year suspension, with "any return to the practice of law . . . to be under the

guidance of a mentor and that [respondent] should never be able to practice by himself but would have to work in a firm with sufficient support staff and monitoring by a practicing attorney." In addition, the special master recommended that respondent "be schooled in the proper handling of trust accounts and business accounts before any re-admission should be considered." Finally, the special master recommended that respondent "be required to seek psychological counseling to be able to deal with the pressures of the practice of law before re-admission is considered."

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The evidence amply supports a finding that respondent knowingly misappropriated client funds in the VanArsdale and Desiderio matters, as well as escrow funds in the Kahleq matter. In the VanArsdale matter, respondent received $96,000 from Weichert Realtors, which represented funds due his client from the sale of her home. Although respondent deposited the funds into his business account, he did not pay them over to VanArsdale. Instead, he used a large portion of the funds and did not pay the monies to his client until after he had

deposited into his trust account $65,000 in loans from friends. Respondent admitted to the OAE that he had used VanArsdale's funds without her authority and knowledge.

In the Desiderio matter, respondent received an $8000 settlement on behalf of his clients, which he deposited into his business account, inasmuch as he no longer maintained a trust account. Respondent used a portion of the $5500 in proceeds that belonged to his clients and admitted to the OAE that his clients had not authorized him to do so and were unaware that he had done so. He did not pay the monies owed to his clients until after he deposited more than $45,000 in loans into the account.

In the Kahleq matter, respondent took the $9000 deposit check, deposited it into his trust account, and made $8490 in cash withdrawals against the funds. He admitted to the OAE that Kahleq had not authorized him to use the funds and also that she was not aware that he had used them. Kahleq confirmed

respondent's admissions during her testimony at the disciplinary hearing.[7]

VanArsdale's and Desiderio's certifications stating that they would have allowed respondent to use their funds, if he had requested their permission, does not save him from a determination that he knowingly misappropriated their monies. The fact is that, at the time that respondent took the funds, these clients had not given him permission to do so.

Although respondent attempted to defend the charges, claiming he was the victim of poor recordkeeping, he presented no evidence to support that claim. Further, in each of these transactions, respondent had no other significant activity in his accounts, which might have rendered confusion in keeping different clients' funds straight. When he deposited VanArsdale's $96,000 check, he had a negative balance in his business account. He made no deposits in June and July of 2004,

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[7] Even if Kahleq had consented to respondent's use of the $9000 deposit, a finding of knowing misappropriation would still have been warranted, inasmuch as respondent did not obtain the seller's permission to the use of the funds. In re Hollendonner, 102 N.J. 21 (1985)(disbarment for attorneys who knowingly misuse escrow funds).

and, by the end of July, the balance was under $45,000. Respondent made two deposits in August, totaling $3600. Given that the business account had a negative balance at the time the $96,000 check was deposited and that respondent made only two deposits in a three-month period, he could not have been confused about the source of the funds that he was using for purposes unrelated to the VanArsdale transaction. Respondent was only able to pay the monies to VanArsdale in September, after he had obtained loans from friends.

Similarly, respondent made only one $340 deposit into his business account, after the Desiderios' $8000 was deposited. The next deposit was the $49,400 in loans that he deposited on the same date that he issued his clients' $5500 check to them. At the time of the deposit, the business account balance was only $4200 — the result of fifteen withdrawals in even-dollar amounts, all for well under $1000.

Finally, when respondent deposited Kahleq's $9000 check into his trust account, the balance was only $26.54. Again, he dissipated the funds in the account and was unable to turn over the monies owed to Kahleq until after he had deposited the proceeds of a loan made to him. In short, respondent's defense must fail.

In light of respondent's knowing misappropriation of client and escrow funds, there is no need to consider the other charges. Nevertheless, he admitted to the recordkeeping violations and to practicing while ineligible. Moreover, respondent grossly neglected the Kahleq closing, when he failed to record the deed in a timely fashion and failed to pay the title insurance.

Based on the clear and convincing evidence, we recommend that respondent be disbarred for knowingly misappropriating client (VanArsdale and Desiderio) and escrow funds (Kahleq). In re Wilson, 81 N.J. 451 (1979) (disbarment for attorneys who knowingly misuse client funds), and In re Hollendonner, supra, 102 N.J. 21 (disbarment for knowing misuse of escrow funds).

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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Phil E. Leone
Docket No. DRB 09-340

Argued: January 21, 2010

Decided: March 16, 2010

Disposition: Disbar

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
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Chief Counsel