

h

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-282
District Docket No. XIV-04-246E

IN THE MATTER OF
GORDON N. GEMMA
AN ATTORNEY AT LAW

:
:
:
:
:
:
:

CORRECTED
Decision

Argued: January 17, 2008

Decided: April 23, 2008

Lee Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter came before us on a disciplinary stipulation, filed by the Office of Attorney Ethics ("OAE"). Respondent negligently misappropriated client funds in seven real estate matters, as the result of poor recordkeeping practices. The OAE recommended the imposition of a reprimand. We agree with that recommendation.

Respondent was admitted to the New Jersey bar in 1985. He has no prior discipline.

On July 24, 2007, respondent and the OAE entered into a disciplinary stipulation, in which respondent admitted certain recordkeeping violations that came to light out of seven real estate transactions conducted between 2001 and 2004. These violations caused the negligent misappropriation of client funds held in respondent's attorney trust account. Respondent admitted violating RPC 1.15(a) (negligent misappropriation of client trust account funds), as well as R. 1:21-6(c) and (d) and RPC 1.15(d) (recordkeeping violations).

Although it is not clear from the record, it appears that the OAE became aware of the present infractions after receiving notices from respondent's bank that several of respondent's trust account checks had been drawn on insufficient funds.

Respondent maintained two Sovereign Bank trust accounts during the relevant time period: a trust checking account and a trust savings account.

This was not the first time that respondent violated the recordkeeping rules. In 1998, a random audit performed by the OAE uncovered recordkeeping violations in five areas: 1) improper trust account designation; 2) debit balances on client ledger cards; 3) failure to maintain ledger cards for attorney funds or bank charges; 4) failure to prepare

quarterly reconciliations; and 5) trust funds on deposit that exceeded trust obligations. Respondent later certified, to the OAE's satisfaction, that he had corrected the deficiencies. As a result, the OAE determined not to initiate a disciplinary action.

I. The S&C Matter and the Instant Demand Audit

On June 10, 2003, respondent represented the Summerton Plaza Group, LLC in its sale of a shopping center to S&C Realty Co. The contract of sale called for S&C to furnish a deposit of \$200,000 against the sale price, for which respondent held three checks, totaling \$200,000 (\$25,000, \$75,000 and \$100,000). Respondent deposited the \$75,000 and \$25,000 checks in his trust checking account on September 16, 2003, and the \$100,000 check in his trust savings account, on September 24, 2003.

Also on September 24, 2003, respondent received notice from Sovereign Bank that the \$25,000 and \$75,000 checks were being returned for insufficient funds. Thereafter, respondent misplaced the bank notices and failed to correct his records to reflect the shortage created by the returned checks.

By mutual agreement, in January 2004, the parties decided to terminate the contract of sale. Respondent was instructed

to return the buyers' deposit, with interest. On January 30, 2004, he issued trust account check No. 2928, for \$200,125.37, to S&C's attorney. Respondent stipulated that, when he issued the check, he had forgotten that the \$25,000 and \$75,000 checks had been returned unpaid by Sovereign Bank.

As of February 10, 2004, when the \$200,125.37 check was posted to respondent's account, the trust checking account held \$129,318.70. The trust savings account held \$60,586.39. After the OAE became involved, respondent prepared a corrected ledger card, reflecting the negative \$100,000 balance in the trust checking account from January 30 to June 7, 2004.

Respondent prepared three-way reconciliations of both trust accounts for the month ending February 29, 2004. He found a consistent negative balance (\$127,861.26) across all three reconciliations. He admitted that, had he kept proper records, he would have noticed the negative balance sooner.

Using data compiled by respondent, the OAE reconstructed his client balances as of February 10, 2004, the date of the trust checking account overdraft. According to the stipulation, as of that date, respondent held client balances totaling \$40,775.28 (presumably in the savings account) and a negative \$125,005.85 in the checking account.

According to the stipulation, respondent accidentally maintained a \$50,061.42 balance in the trust savings account from September 5, 2003 to April 9, 2004, in a matter designated as Register Plaza to Kali Tihi. There, Sovereign Bank was supposed to transfer \$50,061.42 from the trust savings to the trust checking account, for a November 25, 2003 closing. The bank, however, failed to take that action until April 9, 2004.

By May 13, 2004, respondent had received an overdraft notice from his bank and realized that the bank error had caused problems in his trust accounts. Therefore, he reviewed the accounts, recognized that other clients' funds were in jeopardy due to his overpayment to S&C, and contacted S&C's attorney. On May 18, 2004, respondent sent the attorney a letter explaining the overpayment and requesting a refund. He also deposited \$20,000 of his own funds to cover any immediate shortages in the account.

Between May 21 and June 7, 2004, S&C's attorney made five \$20,000 wire transfers to respondent's trust checking account to replenish the missing funds. Thereafter, on June 10, 2004, respondent drafted a trust account check to himself for the \$20,000 "loan" to that account.

II. The Koplitz from Sammarco Matter

On February 24, 2003, respondent represented Koplitz in a real estate transaction, Koplitz from Sammarco. At about the same time, respondent was also involved in another real estate closing, Nutmeg to Bernstein. According to the stipulation, respondent properly posted a \$20,000 deposit to the Nutmeg transaction, but mistakenly posted it again to the Koplitz matter. Respondent acknowledged that he had accidentally posted the same \$20,000 deposit twice and that the error was not discovered until he retained an accountant, in late 2004, to review his records.

III. The Sea Bright and Choco Cruz Co. Matter

This matter was an "in-kind" exchange of real estate, in which a Red Bank property was traded for two parcels, one in Sea Bright and another in the U.S. Virgin Islands (the Choco Cruz property).

The Sea Bright closing took place on April 29, 2003. After disbursements, respondent still held what he thought were excess funds of \$3,709. His client instructed him to put the excess funds toward the Choco Cruz property. The exchange had been scheduled for closing on June 20, 2003.

As it turned out, the \$3,709 did not represent excess funds. Rather, respondent had failed to disburse them to the title company and surveyor in the Sea Bright purchase. Upon discovering his error, in July 2003, respondent issued checks to the title company and the surveyor, totaling \$3,929, to complete the disbursements. Respondent, however, over-disbursed funds, leaving a negative balance of \$220 on account of the Sea Bright matter.

Respondent then overdisbursed funds in the Choco Cruz matter, when issuing checks to a paralegal, Hannah Terry (\$2,628), and to himself for his fee (\$750). As a result of these two disbursements, respondent was out-of-trust by \$3,378 on account of Choco Cruz.

Respondent's accountant discovered the errors in July 2003, after which respondent recovered the overpayments and returned them to the trust account.

IV. The Johansson from Corcoran Matter

Respondent stipulated that another aspect of the Choco Cruz transaction involved the Johansson from Corcoran transaction. There, respondent paid paralegal Terry \$800 for expenses. Because Terry could not be located for purposes of the ethics investigation, the OAE accepted respondent and the

real estate broker's representation that Terry had incurred legitimate expenses and that respondent had repaid her from settlement funds.

The \$800 check to Terry created a \$495.76 deficiency in the trust account. After the OAE's February 2007 discovery of the discrepancy, respondent requested, and the broker returned, the missing funds.

V. The Gilstein Refinancing

Respondent represented client Gilstein in a mortgage and loan refinancing. Respondent stipulated that he mistakenly posted to the Gilstein account a \$1,112 check as \$112, and a \$5,538.66 check as \$5,338.66, leading him to believe that he held excess funds on account of the transaction. Actually, a deficiency of \$1,119.53 existed at the time. After discovering the discrepancy, respondent attempted, unsuccessfully, to locate Gilstein. In June 2004, he finally replenished the trust account with his own funds.

VI. The Koplitz to Park Terrace Matter

On February 4, 2002, during the normal course of transferring title, respondent paid to Monmouth County a \$3,275 realty transfer fee. In September 2002, respondent

received a notice that the deed had not been filed. Therefore, on September 13, 2002, he forwarded a replacement deed for filing and another check for \$3,275.

On April 21, 2003, respondent reclassified \$3,240 in trust checking account fees from another Koplitz transaction (the Norwood Avenue refinance), in order to balance the ledger for the Park Terrace matter.

In April 2007, the OAE alerted respondent to the double payment, prompting him to write to Monmouth County and the New Jersey Division of Taxation for refunds of their respective portions of the transfer fee overpayment. As of May 4, 2007, respondent had received only the county's portion of the overpayment (\$700.70).

VII. The Saporito from Transfer EEZ Matter

On August 15, 2001, respondent's then-associate, Amy Fratkin, conducted a closing for client John Saporito's purchase of property from Transfer EEZ. On August 29, 2001, Fratkin erroneously refunded \$88,013.60 to Saporito, by trust account check No. 1985, and returned to him the undeposited downpayment check for \$11,846.40. Apparently unaware that he was not entitled to the funds, Saporito cashed the trust

account check. As a result of Fratkin's errors, respondent was immediately out of trust by almost \$100,000.

On September 11, 2001, respondent deposited \$12,000 of his own monies in the trust checking account to prevent checks from "bouncing." On the following day, Saporito returned all of the missing funds (\$88,013.60 and \$11,846.40).

Finally, respondent and the OAE stipulated that, as of June 8, 2004, when the OAE reviewed respondent's books and records, they

were virtually as deficient as they were six years before when the OAE conducted the random audit. In fact, the instant deficiencies included several of the same deficiencies noted in [the 1998 report], including: client ledger cards were not fully descriptive; some client ledger cards had negative balances; respondent held \$1,095.58 in his trust account for bank charges, which exceeded the customary \$250 allowance; there were no trust or business receipts journals; and there were no monthly reconciliations prepared.

[S8.]¹

For the irregularities found in the matters now before us, the OAE recommended a reprimand or a censure. At oral argument before us, however, the OAE presenter urged the imposition of a reprimand, noting that respondent was fully

¹ "S" denotes the disciplinary stipulation.

cooperative with that office and had even gone "out of his way many times" to provide the OAE with information for its investigation.

After an independent review of the record, we are satisfied that the stipulation contains clear and convincing evidence of unethical conduct on respondent's part.

In seven real estate matters, respondent's trust checking account was out of trust in amounts ranging from a few dollars to nearly \$100,000. The misappropriations were negligent, caused by respondent's failure to maintain proper books and records. Respondent conceded that, had he kept proper records and performed monthly reconciliations of his accounts, as required by the rules, he could have avoided the trust account problems that beset him in these matters.

In aggravation, we considered that, in 1998, the OAE found numerous recordkeeping violations in respondent's books and records, as the result of their random audit program.

In mitigation, we took into account that respondent quickly replenished the trust accounts and took appropriate steps to gain control of his books and records. He also retained a "professional firm" to review all of his transactions.

At oral argument before us, respondent explained that a high-volume practice and, in one instance, an error by an associate in the firm accounted for the new incidents. He accepted full responsibility for the new recordkeeping problems.

Respondent no longer maintains his own law office, preferring a full-time position in a non-legal capacity as an officer with the Kushner Companies.

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., 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 other clients' funds; the attorney also failed to promptly disburse funds to which both clients were entitled); 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); 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); and In re Blazsek, 154 N.J. 137 (1998) (attorney negligently misappropriated \$31,000 in client funds, and failed to comply with recordkeeping requirements).

In assessing the appropriate quantum of discipline for respondent, we considered that this is not a case of an attorney who certifies that the recordkeeping irregularities have been remedied, when they actually have not. Or a case of an attorney who, shortly after new accounting measures have been implemented, runs afoul of the recordkeeping rules again. Three years went by before the present incidents took place. In the interim, respondent's attorney records were in compliance with the rules. In fact, the OAE presenter remarked, at oral argument before us, that, even in connection with the new problematic matters, respondent did all of the necessary bookkeeping, but skipped the reconciliation step.

We accept respondent's explanation that his high-volume practice got away from him and that his and an associate's errors accounted for the new incidents. He fully cooperated with the OAE, has accepted full responsibility for his actions, harmed no clients, and no longer practices law, preferring a position in a corporation.

In light of the foregoing, we do not believe that discipline higher than a reprimand is warranted in this case.

Chair O'Shaughnessy and Members Lolla, Neuwirth, and Baugh 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
Louis Pashman, Vice-Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

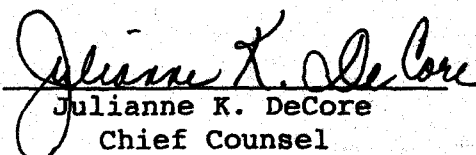
In the Matter of Gordon N. Gemma
Docket No. DRB 07-282

Argued: January 17, 2008

Decided: April 23, 2008

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy						X
Pashman			X			
Baugh						X
Boylan			X			
Frost			X			
Lolla						X
Neuwirth						X
Stanton			X			
Wissinger			X			
Total:			5			4


Julianne K. DeCore
Chief Counsel