SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-390
District Docket Nos. XIV-02-277E
and XI-06-900E

IN THE MATTER OF	:
ALAN J. MARICONDA	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 25, 2008

Decided: April 17, 2008

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

Robert J. Galluccio 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 on a recommendation for discipline (reprimand) filed by the District XI Ethics Committee ("DEC"). A random audit revealed that respondent's bookkeeper/brother, a nonlawyer, had stolen client funds from respondent's trust account. For respondent's negligent misappropriation and recordkeeping violations we determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 1978. He has no prior discipline.

The two-count complaint charged respondent with having violated RPC 1.15(a) (negligent misappropriation of client trust funds), RPC 5.3 (a), (b) and (c) (failure to supervise non-attorney staff), mistakenly cited in the complaint and in the hearing panel report as RPC 5.4, and RPC 1.15(d) and R. 1:21-6(a) (recordkeeping violations).

Respondent admitted the essential facts in both his answer to the complaint and testimony before the DEC.

On May 20, 2002, the Office of Attorney Ethics ("OAE") conducted a random audit of respondent's attorney books and records. The audit covered the period from May 2000 through May 2002.

The auditor's initial review revealed that respondent's attorney trust account with First Union Bank was out-of-trust by $161,019.76, as of April 30, 2002. Due to the large amount of missing funds, the OAE ordered respondent to appear for a demand audit on July 11, 2002, at the OAE headquarters.

Respondent appeared on July 11, 2002. In the interim, he employed an accountant to reconcile the trust account. The OAE and respondent's accountant determined that a slightly larger

sum, $166,916.76, was actually missing from respondent's trust account.

When respondent met with the OAE auditors in July 2002, he explained that, on the morning of May 20, 2002 (the first audit date), his brother and office manager, David, admitted having taken funds from the trust account for himself. Respondent had retained David (a certified paralegal) in 1988. David was responsible for the day-to-day aspects of running the law office, as well as the finances of the firm. Respondent did not give David authority to sign trust account checks.

Respondent also explained to the OAE that his records were in shambles, on the original audit date, because David had not properly maintained them and had since fallen ill.

The OAE interviewed David on June 18, 2002. He admitted that he had taken client funds from the trust account, without respondent's knowledge, beginning in July 2000, to meet his and the firm's obligations. He corroborated respondent's statement that he had kept the misappropriations from respondent until the last minute, that is, on the morning of the May 20, 2002 audit.

The OAE's forensic reconstruction of respondent's trust account, going back to 1998, revealed that David had misappropriated a total of $272,278.17 in client funds for three general purposes: a) the payment of David's own mortgage

($39,018.17); b) David's American Express bills ($2,918.41); and c) law firm obligations ($230,342.03).

In 2000, David had advised respondent to borrow $105,000 to cover some large outstanding office expenses. Without any investigation into the need for that large sum, respondent borrowed the money and gave it to his brother. In fact, until the audit, respondent was unaware that David had deposited the borrowed funds into respondent's trust account to cover shortfalls created by his own misappropriations, rather than into the business account, where he told respondent the problem lay.

Within a month of David's disclosure, David gave respondent funds to replace the missing $166,000, which respondent deposited into his trust account.

With regard to the $230,342.03 in law firm obligations, some constituted payments to respondent for legitimate fees, but others represented David's attempt to cover his theft by using checks for duplicate fees or fees to which respondent was not entitled.

There is no allegation that respondent knowingly received duplicate or improper fees. The complaint is clear, and respondent testified at the hearing, that he had completely abdicated to David his authority over the firm's finances. He

paid no attention to his trust or business account from 1998 through 2002, granting to his brother exclusive control over the financial aspects of his law practice.

Respondent did not open or inspect bank statements, canceled checks or reconciliations from his accountant. He never noticed that David had written checks and forged his signature on them to remove funds from the trust account. Some of the checks were made payable to respondent, allegedly for fees (but deposited into the business account for David's use). David wrote other checks to himself and cashed them. A few more checks were even written directly to David's creditors, such as American Express, and signed by David with a forgery of respondent's signature.

Count two of the complaint alleged numerous recordkeeping violations. An earlier 1997 random audit of respondent's trust account yielded a number of violations that respondent corrected soon afterward. The 2002 audit revealed that, less than a year later, in June 1998, checks were being written out of the trust account in "round figures without client references," in violation of the recordkeeping rules. According to the complaint, many of the same recordkeeping violations found in 1997 had resurfaced by June 1998. The complaint, however, only specified the deficiency noted above.

Respondent offered mitigation for his actions. He stated, in both his answer and before the DEC, that his brother David was his closest confidant and friend, in addition to being an employee. Respondent trusted him implicitly. He delegated the business aspect of the law firm to David, freeing him up to concentrate on the legal aspects of his practice. Respondent recognized that "his trust was misplaced and his reliance on his brother should not have been unconditional."

In May 2002, respondent discharged the initial accountant whom he had retained during his brother's tenure, because that accountant did not uncover David's misdeeds or maintain accurate records. Respondent stated that his current accountant, Morris Merker & Co., whom he retained in mid-2004, has maintained fully compliant books and records since that time.

Respondent has had no other brushes with disciplinary authorities in his almost thirty years at the bar.

The DEC found respondent guilty of failing to supervise his non-attorney office manager (RPC 5.3(a), (b) and (c)), negligent misappropriation of client funds (RPC 1.15(a)), and various *nonspecific recordkeeping* violations that had crept back, after the initial 1997 random audit (RPC 1.15(d) and R. 1:21-6(a)(1) and (2).

Following a de novo review of the record, we are satisfied that the evidence clearly and convincingly establishes that respondent's conduct was unethical.

Respondent did not contest the charges against him, admitting that he was ultimately responsible for his brother's misappropriations and that he had abdicated his authority over the trust and business accounts to his brother. Respondent understood that his lack of involvement in the financial aspect of his practice allowed David to run roughshod over his clients' trust funds. In fact, between 1998 and 2002, David stole about $272,000 in client funds, $166,000 was still missing from the trust account, when the OAE became involved in 2002.

The record is clear, however, that respondent was unaware, until May 20, 2002, that David was stealing the funds. Only then, on the audit day, did David finally "fess up" to respondent.

Respondent was charged with negligent, not knowing, misappropriation. Had there been any evidence that respondent was aware of his brother's actions, or that he had directed David to utilize client funds in the trust account for office expenses or some other purpose, the charges against him would have been much more severe. Respondent conceded, and we

determine, that he was guilty of negligent misappropriation, a violation of RPC 1.15(a).

Respondent was also guilty of failing to properly supervise his brother, the office manager and a non-attorney, whom he entrusted with the law office finances. Respondent's lax involvement allowed David to steal. If respondent had been even minimally attentive to his attorney responsibilities, he would have discovered David's fairly obvious thefts. By turning his back on his duties in this regard, respondent violated RPC 5.3(a) and (b), which required him to take reasonable measures to ensure that the conduct of his non-attorney staff complied with the RPCs. Because, however, respondent was unaware of David's unlawful activities, we dismiss the charged violation of RPC 5.3(c), which addresses an attorney's failure to investigate prior instances of misconduct by the non-attorney.

Finally, according to the complaint, the 2002 audit revealed a number of recordkeeping deficiencies that reoccurred as early as 1998, shortly after respondent took corrective measures under the 1997 random audit. The complaint specified only one such deficiency: the writing of trust account checks in "round figures without client references." Respondent conceded, and we find, that his conduct in this respect violated RPC 1.15(d) and R. 1:21-6.

In all, respondent was guilty of failing to supervise his brother (RPC 5.3(a) and (b)), negligent misappropriation (RPC 1.15(a)), and recordkeeping violations (RPC 1.15(d) and R. 1:21-6)).

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated $103,750.61 of trust funds as a result of his failure to reconcile his trust account; the attorney was also found guilty of recordkeeping violations); 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); In re Blazsek, 154 N.J. 137 (1998) (attorney negligently misappropriated $31,000 in client funds, and failed to comply with recordkeeping requirements); 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).

So, too, attorneys who fail to supervise their nonlawyer staff are typically admonished or reprimanded. See, e.g., In the Matter of Brian C. Freeman, DRB 04-257 (September 24, 2004) (attorney admonished for failing to supervise his paralegal, who also was his client's former wife; the paralegal forged a client's name on a retainer agreement, a release, and two settlement checks; the funds were never returned to the client; mitigating factors included the attorney's clean disciplinary record and the steps he took to prevent a reoccurrence); In the

Matter of Lionel A. Kaplan, DRB 02-259 (November 4, 2002) (attorney admonished for failure to supervise his bookkeeper, which resulted in recordkeeping deficiencies and the commingling of personal and trust funds; mitigating factors included the attorney's cooperation with the OAE, including entering into a disciplinary stipulation, his unblemished thirty-year career, the lack of harm to clients, and the immediate corrective action that he took); In re Bergman, 165 N.J. 560 (2000) and In re Barrett, 165 N.J. 562 (2000) (companion cases; attorneys reprimanded for failure to supervise secretary/bookkeeper/office manager who embezzled almost $360,000 from the firm's business and trust accounts and from a guardianship account; the attorneys cooperated with the OAE, hired a CPA to reconstruct the account, and brought their firm into full compliance with the recordkeeping rules; a bonding company reimbursed the losses caused by the embezzlement); and In re Hofing, 139 N.J. 444 (1995) (reprimand for failure to supervise bookkeeper who embezzled almost half a million dollars in client funds; although unaware of the bookkeeper's theft, the attorney was found at fault because he had assigned all bookkeeping functions to one person, had signed blank trust account checks, and had not reviewed any trust account bank statements for years; mitigating factors included his lack of knowledge of the theft,

his unblemished disciplinary record, his reputation for honesty among his peers, his cooperation with the OAE and the prosecutor's office, his quick action in identifying the funds stolen, his prompt restitution to the clients, and the financial injury he sustained).

This case is similar to Hofing. In fact, Hofing is, arguably, the slightly more serious case of the two. The misappropriations there totaled a half-million dollars, contrasted to $272,000 here. Hofing had also given his bookkeeper total control over his attorney trust account, including control over checks signed in blank. This respondent did not give his brother signed, blank checks. Rather, David resorted to stealing the checks and forging respondent's name on them.

Other similarities exist. Both respondent and Hofing failed to look at trust account bank statements or other financial information about their trust accounts for years at a time. In addition, both attorneys had otherwise unblemished disciplinary records, cooperated fully with ethics authorities about the misappropriations, and swiftly replenished their trust accounts, once it became apparent that funds were missing. The precedent in Hofing persuades us that the appropriate discipline for respondent's misconduct is also a reprimand.

Members Lolla, Baugh, and Neuwirth 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
William O'Shaughnessy, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Alan J. Mariconda
Docket No. DRB 07-390

Argued: February 21, 2008

Decided: April 17, 2008

Disposition: Reprimand

Members	Disbar	Suspension	Censure	Reprimand	Admonition	Did not participate
O'Shaughnessy				X		
Pashman				X		
Baugh						X
Boylan				X		
Frost				X		
Lolla						X
Neuwirth						X
Stanton				X		
Wissinger				X		
Total:				6		3

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel