SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-325
District Docket No. XIV-2014-0513E

IN THE MATTER OF

JOHN L. WEICHSEL

AN ATTORNEY AT LAW

Decision

Argued: February 18, 2016

Decided: June 22, 2016

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

Edward S. Zizmor 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 disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent, submitted pursuant to R. 1:20-15(f). Previously, the matter had been submitted as a motion for discipline by consent ("reprimand or censure"), pursuant to R. 1:20-10(b)(1) (DRB 14-197). On September 19, 2014, we denied that motion, determining that

discipline greater than a censure was warranted. Accordingly, we remanded the matter to the OAE for the filing of a complaint or, in the alternative, a disciplinary stipulation.

The matter was returned to us as the instant disciplinary stipulation wherein respondent has stipulated to violations of RPC 1.15(a) (failure to safeguard funds); RPC 1.15(d) (failure to comply with the recordkeeping requirements set forth in R. 1:21-6); RPC 5.3(a), (b), and (c) (failure to supervise a nonlawyer employee); and RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter).

The OAE recommends that we impose either a censure or three-month suspension. Respondent requests imposition of a censure. For the reasons set forth below, we determine to impose a three-month suspension.

Respondent was admitted to the New Jersey bar in 1972. At the relevant times, he maintained a law office in Hackensack.

In 2010, respondent received an admonition for failing to communicate to his incarcerated client that he would not be filing a motion for post-conviction relief on the client's behalf because he had concluded that the motion would be without merit. In the Matter of John L. Weichsel, DRB 10-048 (April 23, 2010).

Two years later, respondent was reprimanded for gross neglect, lack of diligence, and failure to communicate with his

client. In re Weichsel, 212 N.J. 436 (2012). In an unfair competition case, respondent failed to file a lis pendens and an order to show cause, services for which he had received a $6,000 retainer. As in the 2010 matter, respondent made a unilateral decision not to file the lis pendens, and again failed to share that conclusion with the client. Moreover, he failed to reply to the client's requests for updates on the status of the matter.

The following facts are taken from the September 1, 2015 disciplinary stipulation.

In September 1985, respondent hired Roxanne Elliott as his legal secretary. Her responsibilities included opening bank statements for respondent's review, preparing checks for him to sign, and preparing daily bank deposits. Respondent held various attorney trust accounts at both Wells Fargo Bank, N.A. (account numbers xxxx1688 and xxxx4079) and Valley National Bank (account numbers xxxx4396 and xxxx1279). Wells Fargo attorney trust account number xxxx1688 (WF1688) contained $8,889.58 in unidentified funds. Wells Fargo attorney trust account number xxxx4079 (WF4079) contained $145,303.60 for client D. Wren, pertaining to an estate dispute; $1,220.20 for a personal matter of respondent; and $300.10 to cover any administrative fees. Although the stipulation did not identify a date when WF4079 held this balance, a review of its

activity shows that, as of December 2010, the account held $145,868.92.

According to the stipulation, respondent's Valley National attorney trust account number xxxx4396 (VNB4396) held $2,330 in real estate escrow funds for clients Marcello Capparelli and Catherine Cho (the Capparelli escrow funds), which had been given to respondent in connection with a 2007 real estate closing. At some point, VNB4396 was replaced by Valley National trust account number xxxx1279 (VNB1279).

Respondent did not perform monthly three-way reconciliations of his attorney trust accounts. He told the OAE, however, that he regularly reviewed the monthly statements for both Valley National trust accounts, because those accounts were "active and the statements were online." He did not regularly review the monthly bank statements for either of the Wells Fargo trust accounts, because the accounts contained "old and inactive balances."

Unbeknownst to respondent, between December 14, 2010 and June 23, 2011, Elliott issued five trust account checks payable to herself, forged respondent's signature on them, and deposited them in her personal PNC account. Due to respondent's failure to perform monthly three-way reconciliations of his trust accounts, Elliott was able to steal a total of $103,080. Elliott issued four of those checks between December 2010 and February 2011:

Account	Check Number	Date	Amount
WF1688	17566	12/14/2010	$4,500
WF1688	17565	12/28/2010	$4,000
VNB4396	5499	01/31/2011	$2,330[1]
WF1688	17569	02/11/2011	$5,000[2]

Sometime between January 31 and April 26, 2011, respondent became aware of Elliott's forgery of VNB4396 check number 5499. When he confronted Elliott, she admitted the theft, stating that she was having financial problems. Between April 25 and 26, 2011, pursuant to Elliott's request, respondent loaned her $8,837 to pay various debts, including a previous pension loan and "$2,337.00 [sic] to 'refund the Capparelli check.'" This loan was discussed in several e-mails between respondent and Elliott.

Following Elliott's thefts, she continued to work for respondent. They agreed on a payment plan for the $8,837 loan, in the form of a $25 deduction from every paycheck, beginning May 5,

[1] In November 2008, respondent issued to Capparelli VNB4396 check number 5301, in the amount of $2,330, to reimburse escrow funds that respondent had held for payment of taxes, for which respondent had never received a bill. Elliott was aware that this check to Capparelli had never cleared VNB4396 and had been voided in respondent's QuickBooks records.

[2] As previously indicated, the balance in WF1688 had been $8,889.58, which Elliott almost depleted by the first two checks. Later, on February 11, 2011, Elliott issued the $5,000 WF1688 check (#17569) to herself after she forged respondent's signature on WF4079 check number 178, payable to "John Weichsel Attorney Trust Account," and deposited that check into WF1688 on that same date.

2011. Despite the e-mails to Elliott cited above, during respondent's February 18, 2014 OAE interview, he denied that he had agreed to loan Elliott $8,837 and "claimed to have no idea what Elliott meant regarding the $2,330.00 for the Capparelli check." Although respondent admitted that he had loaned $3,000 to Elliott, he claimed that he could not recall the specific reason for the loan. Respondent stipulated that, at the time he made these statements to the OAE, he knew they were false.

Elliott continued to forge respondent's signature on trust account checks even after respondent discovered her defalcations and his agreement to lend her more than $8,000. On June 13, 2011, mere months after respondent's discovery of Elliott's initial theft, Elliott issued WF4079 check number 179, in the amount of $38,000, payable to "John Weichsel Attorney Trust Account," deposited that check in WF1688, issued to herself WF1688 check number 17570, in that same amount, and deposited the check in her PNC account. Ten days later, Elliott issued WF4079 check number 181, in the amount of $48,750, payable to "John Weichsel Attorney Trust Account," deposited it in WF1688, issued to herself WF1688 check number 17571, in that same amount, and deposited the check in her PNC account.

The stipulation states that Elliott stole a total of $103,080 from respondent's attorney trust accounts, causing the invasion

and misappropriation of funds belonging to respondent's clients.[3]

On June 29, 2011, PNC contacted respondent to confirm his authorization of WF1688 check number 17571, in the amount of $48,750. At that point, respondent discovered that Elliott had forged that check as well as WF1688 check numbers 17565, 17566, 17569, and 17570. That same day, respondent filed a police report with the Hackensack Police Department and terminated Elliott's employment.

During the disciplinary investigation, respondent misrepresented to the OAE that it was not until June 29, 2011, after PNC had contacted him about the forged Wells Fargo attorney trust account checks, that he had reviewed his Valley National attorney trust account records and learned that VNB4396 check number 5499, in the amount of $2,330, had also been forged.

All of the misappropriated funds were replaced through a combination of bank credits, recovery of stolen funds from Elliott's PNC bank account, respondent's personal funds, and proceeds from an employee dishonesty insurance policy respondent had obtained, as part of his business insurance.

Respondent stipulated that he violated RPC 1.15(a) by failing to safeguard client funds and allowing Elliott access to those

[3] The six checks identified in the stipulation total only $102,580, a difference of $500.

funds, thereby enabling the negligent misappropriation to occur; RPC 1.15(d) and R. 1:21-6 by failing to perform three-way reconciliations, which would have alerted him to the theft earlier; RPC 5.3(a), (b), and (c) by failing to supervise Elliott and by allowing her to access his attorney trust accounts, even after he was aware that she had forged his signature on at least one trust account check; and RPC 8.1(a), by (1) denying, during the February 18, 2014 interview with the OAE, that he had agreed to give Elliott an $8,837 loan and by claiming that he did not know what Elliott meant about the $2,330 "for the Caparelli check;" and (2) telling the OAE that it was not until after PNC had contacted him about the forged Wells Fargo checks, on June 29, 2011, that he had reviewed his Valley National attorney trust accounts and found that check number 5499, in the amount of $2,330, had been forged.

Respondent's admitted ethics violations are clearly and convincingly supported by the facts set forth in the stipulation.

Respondent stipulated that, between December 2010 and June 2011, when Elliot stole the client funds, he was not reconciling his trust and business accounts. Rule 1:21-6(c)(1)(H) requires an attorney to perform monthly reconciliations of "the cash balance derived from the cash receipts and cash disbursement journal totals, the checkbook balance, the bank statement balance and the

client trust ledger sheet balances." Thus, by failing to reconcile his accounts, respondent violated R. 1:21-6(c)(1)(H) and, therefore, RPC 1.15(d).

As a result of respondent's failure to comply with R. 1:21-6(c)(1)(H), Elliott was able to misappropriate clients' trust funds, without his knowledge. Accordingly, respondent violated RPC 1.15(a) by failing to safeguard those trust account funds.

RPC 5.3(a) requires a lawyer to "adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer . . . is compatible with the professional obligations of the lawyer." RPC 5.3(b) requires a lawyer who has "direct supervisory authority over [a] nonlawyer" to make those same "reasonable efforts." RPC 5.3(c)(2) renders a lawyer responsible for conduct of the nonlawyer employee that would be a violation of the RPCs, if engaged in by the lawyer, when the lawyer "has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Respondent violated all three subparagraphs of RPC 5.3. As Elliott's employer and direct supervisor, he failed to make any effort to ensure that she could not invade client funds in the trust account, a violation of RPC 5.3(a) and (b). Moreover, when, sometime in 2011, he learned of her theft of more than $15,000 in

client funds, he did not take any "reasonable remedial action." To the contrary, Elliott continued to have access to the trust account, thereby permitting her to steal an additional $86,000 in client funds, a violation of RPC 5.3(c).

Finally, respondent violated RPC 8.1(a), which prohibits an attorney from knowingly making a false statement of material fact in connection with a disciplinary matter. As stipulated, respondent lied to the OAE when he claimed that he had loaned Elliott only $3,000, not $8,837, and when he claimed that he did not learn that she was stealing client funds until June 29, 2011, when he was contacted by Elliott's bank about the $48,750 check.

There remains for determination the appropriate quantum of discipline for respondent's unethical conduct.

Attorneys whose failure to supervise nonlawyer staff results in the loss of client funds are typically admonished or reprimanded. See, e.g., In re Mariconda, 195 N.J. 11 (2008) (admonition for attorney who delegated his recordkeeping responsibilities to his brother, a paralegal, who forged the attorney's signature on trust account checks and stole $272,000 in client funds; no prior discipline); 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, which resulted in the paralegal's forgery of a

client's name on a retainer agreement and later on a release and a $1,000 settlement check in one matter and on a settlement check in another matter; the funds were never returned to the client; mitigating factors included the attorney's clean disciplinary record since his 1984 admission and the steps he took to prevent a reoccurrence); In re Murray, 185 N.J. 340 (2005) (attorney reprimanded for failing to supervise non-attorney employees, which led to unexplained misuse of client trust funds and negligent misappropriation; the attorney also committed recordkeeping violations; two prior admonitions); In re Berqman, 165 N.J. 560 (2000) and In re Barrett, 165 N.J. 562 (2000) (companion cases; attorneys reprimanded for failure to supervise their 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; no prior discipline for either attorney); 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).

Here, a reprimand does not adequately address respondent's misconduct. Even after he discovered that Elliott had stolen client funds, he took no corrective action to prevent her from doing so again. He did not fire her. He did not deny her access to the trust accounts or take any action to safeguard his trust account checkbook. He did not begin to reconcile his accounts to satisfy himself that Elliott had suddenly become trustworthy. Rather, it was business as usual, leading to Elliott's emboldened and continuing theft of client funds, which escalated from less than $5,000 per incident to tens of thousands of dollars per incident. Had her bank not questioned one of those checks, Elliott could have stolen additional sums from the trust accounts.

For such gross negligence in safeguarding client funds and failure to supervise his employee, a term of suspension is warranted. See In re Hecker, 167 N.J. 5 (2001) (attorney suspended for three months after he rehired a former nonlawyer assistant

who had a known history of substance abuse, and had previously stolen $15,000 from the attorney's trust account and been convicted of a bank robbery; after the assistant served a five-year prison term, the attorney rehired him to do clerical work; the attorney's decision to rehire the assistant was not based on objective evidence that the assistant had been rehabilitated, but merely on the assistant's assurances that he was a "changed person;" the assistant proceeded to steal close to $7,000 from an estate account maintained in the attorney's office; we found that by rehiring the assistant, the attorney placed his client funds at extreme risk; prior six-month suspension for unrelated misconduct).

Respondent is guilty of additional misconduct – that is, his misrepresentations to the OAE during the course of the disciplinary investigation. A reprimand is typically imposed for a misrepresentation to disciplinary authorities, so long as the lie is not compounded by the fabrication of documents to conceal the misconduct. See, e.g., In re DeSeno, 205 N.J. 91 (2011) (attorney reprimanded for misrepresenting to the district ethics committee the filing date of a complaint on the client's behalf; the attorney also failed to adequately communicate with the client and failed to cooperate with the investigation of the grievance; prior reprimand); In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who lied to the OAE during an ethics investigation of the

attorney's fabrication of an arbitration award to mislead his partner and failure to consult with a client before permitting two matters to be dismissed; no prior discipline); and In re Powell, 148 N.J. 393 (1997) (attorney reprimanded for his misrepresentation to the district ethics committee, during its investigation of the client's grievance, that his associate had filed a motion to reinstate an appeal when the motion had not yet been filed; the attorney's misrepresentation was based on an assumption, rather than an actual conversation with the associate about the status of the matter; the attorney also was guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior reprimand).

In this case, a reprimand would be in order solely for respondent's two misrepresentations to the OAE. Yet, in crafting the appropriate discipline, we must also consider, in aggravation, respondent's ethics history.

Respondent received an admonition in 2010 and a reprimand in 2012. The common thread in both cases was respondent's unilateral decisions, veiled in the cloak of strategy, not to take certain actions, which he failed to communicate to the clients. Respondent's prior misconduct, when considered in the context of the facts of this matter, suggests that, for unknown reasons, he is not employing the requisite level of diligence in his practice

of law, thus neglecting both his clients and the management of his law firm, thereby placing client funds at risk. The totality of his misconduct, thus, when considered in the light of his ethics history, mandates the imposition of a term of suspension.

The cases cited by the OAE and respondent provide guidance, but are not dispositive, when compared to the facts of this matter. For example, in In re Pamela N. Tighe, 143 N.J. 304 (1996), the attorney's partner (and brother) had deliberately established a practice with the firm's bookkeeper that resulted in the disbursement of fees before their receipt. For that, the brother was disbarred. See In re Charles I. Tighe, III, 143 N.J. 298 (1996). When Pamela Tighe became responsible for the firm's recordkeeping, the practice established by her brother continued, without her awareness. In the Matter of Pamela N. Tighe, DRB 94-332 (August 11, 1995) (slip op. at 15). Unlike respondent, however, once she learned of the improper practice, she immediately instructed the bookkeeper to correct it. Ibid. Nevertheless, she was reprimanded for her inattention to the firm's books and records and for relying, instead, on the firm's staff, resulting in negligent misappropriation of client funds. Id. at 32.

In In re Murray, 185 N.J. 340 (2005), a somewhat factually bizarre case, an unknown person or persons had managed to access the attorney's law office, institute suit against Pathmark on

behalf of Kevin Worthan, under Murray's name, negotiate a settlement, forge endorsements on the settlement check, deposit the check into Murray's attorney trust account, and issue trust account checks against those funds to Murray's housekeeper. In the Matter of Diane K. Murray, DRB 05-108 (July 27, 2005) (slip op. at 11-12). Murray denied knowledge of all of these facts, claimed that she had no idea how all of these events could have transpired under her nose, and asserted that a fraud had been perpetrated on Worthan and her. Id. at 11. She was unaware of what happened with the trust account because of her failure to abide by many of the R. 1:21-6 requirements. Id. at 14.

Despite the fact that Murray had been disciplined before for defalcations by an employee, she received only a reprimand because of her poor health. Id. at 17. There are no such mitigating factors to consider in this case.

In re Sunberg, 156 N.J. 396 (1998), involved a case with several mitigating factors, including a prolonged passage of time and the attorney's unblemished disciplinary record. Here, as described above, respondent's professional record has been tarnished twice already due to his neglect.

Finally, in urging the imposition of a censure, the OAE relied primarily on In re Falzone, 209 N.J. 420 (2012), a case in which the facts are remarkably similar to this matter. There, the

attorney's wife/bookkeeper stole $279,000 in client funds by transferring trust account funds to the business account and issuing business account checks to herself. In the Matter of John Michael Falzone, Jr., DRB 11-245 (December 19, 2011) (slip op. at 8). She was able to accomplish her theft because of Falzone's poor recordkeeping practices. Ibid. When Falzone learned of his wife's defalcations, he did nothing to prevent her from continuing to steal. Ibid. He also lied to the OAE and stated that the wife had no access to the trust account and that she could not sign checks. Ibid.

Although we determined to censure Falzone, we noted that, were it not for his unblemished twenty-seven-year record, we may have determined to impose more severe discipline. Id. at 17. Here, respondent's additional misconduct – purposeful misrepresentations made to the OAE during the course of its investigation - coupled with his prior disciplinary history mandates the imposition of more severe discipline. Thus, we determine to impose a three-month suspension for respondent's misconduct. We also require respondent to provide the OAE with monthly reconciliations of his trust account, on a quarterly basis, for a period of two years.

Vice-Chair Baugh, and Members Clark and Singer voted to impose a censure, with the same conditions imposed by the majority.

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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John L. Weichsel
Docket No. DRB 15-325

Argued: February 18, 2016

Decided: June 22, 2016

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Censure	Abstained	Did not participate
Frost		X			
Baugh			X		
Boyer		X			
Clark			X		
Gallipoli		X			
Hoberman		X			
Rivera		X			
Singer			X		
Zmirich		X			
Total:		6	3		

Ellen A. Brodsky
Chief Counsel