

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-183
District Docket No. XIV-2012-0450E

IN THE MATTER OF
RICHARD D. SCHIBELL
AN ATTORNEY AT LAW

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Decision

Argued: October 20, 2016

Decided: March 20, 2017

Andrea R. Fonseca-Romen appeared on behalf of the Office of Attorney Ethics.

Walton W. Kingsbery, III 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 a six-month suspension filed by Special Ethics Master Nadine Maleski, Esq., based on her finding that respondent violated RPC 1.15(a) (commingling), RPC 1.15(d) and R. 1:21-6 (recordkeeping), RPC 8.1(a) (knowingly making false statements of material fact in connection with a disciplinary matter), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). At the recommendation of the Office of Attorney Ethics (OAE), the

Special Master dismissed the RPC 1.15(b) and (d) charges for respondent's failure to disburse inactive balances. For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey Bar in 1973. He is the founding member and sole equity partner in the firm Schibell, Mennie & Kentos LLC, (SM&K), located in Ocean Township. SM&K was previously known as Schibell & Mennie, LLC (S&M).

The facts set forth below are based on a stipulation of facts, entered into by the OAE and respondent prior to the hearing, as well as testimony elicited during the five-day hearing. The stipulation provided that no contradictory testimony or evidence was to be admitted at trial.

SM&K maintained several trust accounts, including two at Wells Fargo Bank: one account was in the name of S&M (the S&M trust account will be designated "SMA") and the other was in the name of SM&K (the SM&K trust account will be designated "SMKA").

On July 31, 2012, Wells Fargo Bank notified the OAE that a \$7,500 check drawn on the SMA, was presented on that date and had been returned for insufficient funds. The check, payable to Joseph DeLuca, Esq., an attorney at the firm, was dated August 6, 2012.

William M. Ruskowski, Chief of Investigations, OAE, described the OAE's standard protocol for addressing bank notifications of overdrafts in attorney trust accounts. Specifically, on receipt of the notification, the OAE writes to the respondent for a written explanation. If the explanation is not satisfactory, additional information is requested and, if the OAE still is not satisfied by the further explanation, the matter is then assigned to an OAE auditor and Deputy Ethics Counsel for an audit and/or investigation. In the case of the overdraft in the SMA, the OAE followed this protocol.

On August 9, 2012, Ruskowski sent a letter to SM&K requesting a written explanation for the overdraft. In an August 14, 2012 reply, respondent stated, in part, that he had issued the check to DeLuca "by way of a bonus on a very old matter." He also stated that a \$100,000 deposit "was made to accommodate all office bonuses that were being paid." He explained that other employees also had received bonuses and that those bonus checks were negotiated on or about August 6, 2012.

In his letter, respondent explained that, on July 30, 2012, he deposited a \$100,000 check to the SMA, which "cleared" the next day, on July 31, 2012. Prior to the deposit, however, that account contained only \$4,595.83, an amount insufficient to cover the \$7,500 check. Respondent, however, had directed DeLuca

to refrain from negotiating the check until August 6, 2012. Contrary to respondent's instructions, DeLuca had presented the check for payment on July 31, 2012. Respondent claimed that DeLuca erred in presenting the check before August 6, 2012, and the bank erred by not cashing the check because the \$100,000 deposit had cleared.

Ruskowski testified that it was not proper to disburse a bonus from an attorney trust account because these funds should have been deposited into, and disbursed from, SM&K's business account. Therefore, he assigned Disciplinary Auditor Nicole French and Assistant Chief of Investigations Barbara Galati to further investigate.

On August 20, 2012, Ruskowski requested additional information, including copies of bank statements for May, June, and July 2012; three-way reconciliations; client ledger cards; and a list of all employees receiving a "bonus" from the SMA. Respondent replied, and produced various documents on August 21, August 24, and August 31, 2012.

In respondent's August 31, 2012 letter to the OAE, he identified the \$4,595.83 in the SMA prior to the \$100,000 deposit as client funds, belonging to Browne (\$200), Smith (\$100), Duffy (\$1,970.24), and Alzer (\$1,406.62). He represented that he would remit \$200 to Browne for "an escrow on a real

estate closing which can now be disbursed and will be done so forthwith"; the \$100 held for Smith was "a mathematical calculation and, in fact, will be remitted to the appropriate party within a few days"; the \$1,970.24 held for Duffy and the \$1,406.62 for Alzer were "as a result of medical or lien escrows which, if disputed, are kept for six years" and if no suits on those liens were commenced, the monies would be remitted to the clients.

In his August 31, 2012 letter, respondent also stated that the \$100,000 deposit represented settlement proceeds for his client, Cosmo Mezzina, and that SM&K was entitled to a \$30,000 fee, of which \$7,500 was paid to DeLuca, and the balance of \$22,500 was disbursed to SM&K.

Ruskowski believed that the postdated check and the improper distributions from the SMA warranted further review. He therefore, scheduled respondent for a demand audit, and requested client ledger cards, the status of the trust account balance, and an explanation for inactive client balances. On November 27, 2012, Gerard E. Hanlon, respondent's then counsel, on behalf of respondent, provided a certification from DeLuca, letters disbursing outstanding client funds, and the Mezzina client ledger card.

The demand audit was held on December 4, 2012, with Hanlon present. During the audit, respondent reiterated that the \$30,000 fee was disbursed to DeLuca (\$7,500) and SM&K (\$22,500). Satisfied with respondent's explanation, the OAE did not issue charges in connection with the overdraft.

At the conclusion of the demand audit, the OAE asked respondent to provide additional documentation. By letter dated December 19, 2012, Hanlon sent the OAE copies of the settlement statements for Cosmo Mezzina; judgments in workers' compensation matters; and the August, September, and October 2012 bank statements with cancelled checks for SMA.

On December 7, 2012, the OAE subpoenaed trust account bank records from Wells Fargo Bank, including the August, September, and October 2012 bank statements and checks. French found significant discrepancies between the documents respondent provided and the subpoenaed records. According to the bank records, respondent had not issued a \$22,500 check to SM&K but, instead, distributed the fee as follows:

Ck.	Date	Payee	Amount
1280	8/6/12	Bank of America	\$20,000.00
1281	8/6/12	Mary A. Schibell	\$3,000.00
1282	8/6/12	Mary A. Schibell	\$5,000.00
1283	8/6/12	Dolores Davis	\$1,952.58
1290	11/12/12	Richard D. Schibell	\$47.42
		TOTAL	\$30,000.00

The Mezzina client ledger card that respondent produced also reflected that \$30,000 had been disbursed to DeLuca (\$7,500) and SM&K (\$22,500). The five checks listed above did not appear on the client ledger card. French verified all the other transactions listed on the client ledger card.

Moreover, French's review showed that the August 2012 bank statement that Hanlon provided on respondent's behalf was not accurate. She testified to the following variances: (1) differing ending balances (\$4,595.83 v. \$4,643.25); (2) a \$5,000 deposit appeared on the bank's statement, but not on respondent's copy; (3) check number 1281 was for a different amount (\$7,500 v. \$3,000); (4) a \$2,000 deposit on August 7, 2012 appeared on the bank's statement but not on respondent's records; and (5) check numbers 1274 and 1280 were not on respondent's records but appeared on the bank's copy. In addition, French noted that respondent's copies of both the September and October 2012 statements reflected incorrect beginning and ending balances.

French also reviewed the cancelled checks related to both statements and determined that the copy of check number 1280 that respondent produced was payable to SM&K in the amount of \$22,500 with reference to "Mezzina #48269," contrary to the check from the bank, which was payable to Bank of America, in

the amount of \$20,000 with reference to an account ending in 1491. Additionally, French discovered that the subpoenaed check number 1281 was payable to Mary A. Schibell in the amount of \$3,000, but the copy of check number 1281 provided by respondent was payable to SM&K in the amount of \$7,500.

Based on these discrepancies, the OAE conducted a second demand audit, on February 28, 2013. When confronted, respondent admitted that the funds totaling \$30,000 had not been disbursed to SM&K and DeLuca, but, rather, to Bank of America, Mary A. Schibell, Dolores Davis, and himself, as reflected by the bank records. Further, he acknowledged the bank records had been altered and stated,

I didn't have anything touched that I thought in any way was germane to your investigation The only thing that was done per my direction was that the allocation of the fee was to reflect what would be reported on the tax return. And that the actual particulars of the fee would not be given you for reasons peculiar to my personal life and personal circumstances.

[Ex.OAE-19,p.5.]

When asked to identify the person who had altered the record, respondent replied "[s]omeone outside the firm". He admitted that he had directed that individual to alter the bank statement. He then stated, "I gave you the records that were altered . . . I thought the records I gave you are accurate for anything the Office of Attorney Ethics would be interested in."

In the stipulation, respondent acknowledged that he knew his trust account records had been altered in some fashion, that he did not disclose that fact to the OAE because he believed the OAE investigation concerned the \$7,500 overdraft, and that he believed that the falsifications were not material to the OAE's investigation.

By way of further explanation, respondent told the OAE that, when the overdraft occurred, he realized that his bookkeeper (his sister-in-law, Lois) would examine the transaction causing the overdraft. If she were to review the overdraft, she would, in turn, discover the \$20,000 payment to Bank of America. Lois knew he did not have a Bank of America credit card. Although he had full legal authority to direct such payment, it had no legitimate firm purpose, but instead represented his expenditure of personal funds for a personal purpose, the disclosure of which would prove to be extremely embarrassing to him.

Specifically, respondent explained, he had had an extramarital affair more than twenty years prior and the \$20,000 payment to Bank of America was made on behalf of his former paramour. The payment to Dolores Davis also was made on behalf of his former paramour. Respondent explained that he was willing

to make these payments because his former paramour's family had generated significant business for him.

Respondent had discussed with Kevin Papalia Smith¹ (a former employee and friend, and his former paramour's nephew) the dilemma he faced if Lois discovered the payment. Papalia offered to "fix the problem" and, to that end, he altered the SMA records to disguise the \$20,000 payment. Respondent knew that the trust account records would be altered and claimed that "no good deed goes unpunished."

According to respondent, the \$30,000 fee was appropriately reflected as income on the firm's books and reported as income for income tax purposes. In the stipulation, the parties agreed that the documents had been altered to conceal potentially embarrassing personal payments from respondent's office staff, and in no way related to the OAE's investigation.

Respondent also was questioned about his misstatement in prior correspondence to the OAE about the \$100,000 deposit for bonuses. He explained that, on July 30, 2012, he received a \$90,697.80 check from the law firm of Weiss & Paarz, representing a referral fee in a medical malpractice case. The

¹ The record refers to him as "Papalia."

check was deposited to the SMKA and cleared the next day. Respondent transferred the \$90,000 to the SM&K business account and paid bonuses from that account. For example, John Mennie, Esq. received a \$25,000 bonus from that deposit. Respondent claimed that he had confused the Weiss & Paarz deposit with the Mezzina settlement funds. The parties stipulated that, because respondent was the only equity partner in the SM&K firm, both the \$30,000 Mezzina fee and the \$90,697.80 referral fee belonged to him.

French also discovered that respondent had issued two sets of checks, one from the SMA and the other from the SMKA, to the same clients in the same amounts. In November 2012, respondent issued from the SMA the following checks: Aaron Smith for \$100; Chris Browne for \$200; Crawford Evans for \$279; Joseph Alzer for \$1,406.62; Kevin Duffy for \$1,970.24; James Perri for \$50.00; and himself for \$47.42. Respondent did not deliver these checks to the client payees, but instead, on November 9, 2012, endorsed and cashed them at Community Check Cashing, a business in which he has a proprietary interest, and where Papalia was employed.

It had been respondent's plan to issue six checks from the SMKA to the proper parties and then issue identical checks from the SMA, which respondent would cash. The two sets of checks were issued so respondent's new office clerk would believe that

there was only one attorney trust account; respondent then would close the SMA so that the bank statements would not need to be continuously altered after the concealment of the \$20,000 payment. Respondent maintained, nevertheless, that this action was not done to deceive anyone. The actual clients were paid in November 2012 from the SMKA. Although respondent lacked any authority, such as a power of attorney, to cash the checks, the \$4,595.83 balance in the SMA did not represent client funds. Rather, they belonged to respondent as a capital contribution he had made to the firm some years earlier. Respondent never told Ruskowski that his August 31, 2012 letter misidentified the ownership of the \$4,595.83 in the SMA and that those funds were being held in the SMKA. According to the stipulation, the misrepresentations made in respondent's August 31, 2012 letter regarding these client balances in the SMA were not knowingly made to the OAE.

In the stipulation, respondent admitted that he failed to: (1) maintain accurate trust account records; (2) deposit the \$30,000 fee in the Mezzina matter into his attorney business account; and (3) promptly disburse \$4,595.83 remaining on deposit in the SMA into his business account.

In his defense, respondent presented the testimony of Dr. Robert Dengrove, his psychiatrist. Dr. Dengrove met with

respondent on four occasions and concluded that the following actions of respondent were uncharacteristic: (1) he postdated the check, (2) he allowed documents to be falsified, and (3) he permitted his secretary to send the falsified documents. He found that respondent was acting under a "diminished capacity," which resulted from his self-doubt because of his inability to control the illness of his brother, Stephen, who had been diagnosed with pancreatic cancer. The doctor explained that respondent's "impaired executive functioning . . . which involved problems with concentration, problems with decision making and judgment, [and] problems with slowed information processing" deprived him of the ability to have "specific intent to do wrong." Dr. Dengrove further concluded that respondent's intent was to hide the check from Lois and that respondent was not aware that his actions would be interpreted as trying to deceive the OAE.

During the hearing, respondent described the care he provided to his brother and the effect his brother's illness had on him. Toward the end of Stephen's illness, in the beginning of 2013, respondent went to his office only for emergencies; otherwise, he had no involvement with SM&K. He testified that he had completely withdrawn from SM&K and had left his partner John Mennie in charge of the financial and operational aspects of the

firm. Mennie testified that respondent did not come into the office toward the end of Stephen's illness. If checks needed to be signed, they would be couriered to respondent's home and then returned.

At the hearing, respondent denied that he knew of the falsified documents before they had been turned over to the OAE and denied falsifying the bank statements and the client ledger card. Further, he claimed that the originals had not been altered, but rather only the copy for Lois' review, which, he contended, did not constitute misconduct. He blamed Papalia for the submission of the falsified copies to the OAE because Papalia had placed the altered documents in the wrong place and never replaced them with the originals. During Papalia's OAE interview, he did not tell the OAE that he was expected to return the originals after Lois had reviewed the fraudulent documents.²

When questioned at the hearing about the November 27 and December 19, 2012 letters to Hanlon, which included the

² The OAE interviewed Kevin Papalia on September 30, 2013. Respondent stipulated to the admission of French's report regarding this interview, in lieu of Papalia's testimony at the hearing.

falsified documents, respondent claimed he did not know who had sent them, but assumed it to be his secretary, Marjorie Mershon. Respondent explained that, during this time, he was caring for Stephen and was not in the office. Mershon testified that respondent had directed her to obtain documents for the OAE from a cabinet and that the Mezzina client ledger card was on her desk when she arrived in the office the morning following her conversation with respondent.

In respect of respondent's disbursement of the Mezzina settlement, he explained that, when the settlement check was received, he was contacted by support staff at his office because the check had been made payable to Schibell and Mennie, LLC, and not SM&K. He directed that the deposit be made into the SMA. He denied that his earlier statement to the OAE (that the \$22,500 Mezzina fee had been issued to the firm through a deposit to the business account) was a misrepresentation. Rather, because the \$30,000 represented SM&K's fee, he claimed that the distributions that were made were consistent with his prior statements to the OAE (that the \$22,500 had been paid to SM&K) and that his decision to then pay a portion of that amount to a third party from the trust account did not alter the fact that the funds belonged to SM&K.

Respondent also maintained that the OAE was on a "witch hunt" and that it had pursued this matter beyond its satisfaction of his explanation for the overdraft because it was fearful of being sued. After respondent's name had appeared on the OAE's website reflecting charges of knowing misappropriation, respondent's counsel notified the OAE of the inaccurate posting. Respondent believed that the OAE filed charges against him to avoid being sued for this mistake. He added that he signed the stipulation only because he believed he was entering into "a settlement."

Respondent's partner, Mennie, who testified at the hearing about respondent's absence from SM&K during Stephen's illness, also served as a character witness. Respondent presented five character letters as well, relating to his charity and generosity. Respondent also presented evidence of his physical deterioration during the period of time he cared for his brother.

In his brief to us, respondent advanced the same defenses he had presented during the hearing. He claimed that the letter misstating the purpose of the \$100,000 Mezzina deposit was based on confusion because he was referring to the \$90,697.80 (referral fee) deposit. Further, he asserted that his statement regarding the distribution to SM&K for \$22,500 was accurate

because "he drew no distinction between a disbursement to himself and a disbursement to 'the firm' since all SM&K's money belonged to him." As to the alteration of the bank records, respondent emphasized that the originals never were altered. He also noted that the stipulation made clear that, at no time, did respondent knowingly make false statements to Ruskowski regarding the client funds on deposit.

Further, respondent contended that, because the original deputy ethics counsel on the matter had told him that the case would be "diverted and dismissed," the case should be resolved in that manner. As to his admissions made during the demand audit, respondent suggested that he had been lulled into offering certain admissions because of his vulnerable state during the time he was caring for his brother, and his belief that the case would be diverted. Respondent had been given an opportunity, however, to adjourn the demand audit for those reasons, but declined.

The special master found that respondent violated RPC 1.15(a), RPC 1.15(d), RPC 8.1(a) and RPC 8.4(c). Although she found French and Mershon to be credible witnesses, she concluded that Mennie "was disinterested in the truthfulness of his testimony, and only assisting his partner." As to Dr. Dengrove's testimony, the special master rejected his conclusion that

respondent suffered from diminished capacity, finding it implausible. Instead, she concluded that his alteration of records spanned months, and that respondent had ample opportunity to correct any untruths told to the OAE. She explained:

The evidence as a whole led to the conclusion that simple dishonesty was the root cause of actions and inactions that constituted violations, and for self-serving reasons. The evidence showed that Respondent was capable of thinking clearly about details necessary to falsify records in order to successfully hide from his wife the overdraft of the check written on behalf of his former paramour.

[SMR19.]³

The special master also noted that respondent's testimony contradicted the stipulation, as follows: (1) the overdraft was not his fault, but rather it was bank error and DeLuca's fault; (2) copies, not original records, were falsified; (3) he could not recall whether DeLuca had taken the post-dated check from respondent's desk or whether respondent had given it to DeLuca; (4) Papalia took it upon himself to alter the records; (5) respondent accepted responsibility only because he believed he

³ SMR refers to the special master's undated report.

would receive diversion; and (6) respondent's secretary provided the false documents without his knowledge.

In addition, the special master observed that respondent stipulated to the admission of Papalia's testimony through French's memo of the interview, but, during the hearing, he questioned its veracity or the accuracy of the transcription. The special master also characterized as a "defense tactic" respondent's attempt to call into question the accuracy of his answer to the ethics complaint. She found his testimony not credible in that he was evasive during cross-examination, but offered a clear recollection during direct. She noted that, although he claimed to be "an automaton," he made calculated decisions regarding what information the OAE would receive. She recited examples of his attention to detail during a period for which he claimed to have distorted thinking. The special master also considered the concept of "transferred intent" and found that "intent to deceive Respondent's staff, bookkeeper, sister-in-law and wife, would be equivalent to the intent to deceive the OAE."

The special master concluded that respondent knowingly made false statements to disciplinary authorities, in violation of RPC 8.1(a) or (b), when he (1) stated in his first letter that the \$100,000 deposit was for office bonuses; (2) claimed he gave

bonuses to other employees; (3) represented that the \$22,500 fee from the \$100,000 settlement was disbursed to SM&K; (4) generated false checks to clients that he endorsed; (5) caused the false ledger to be sent to the OAE; and (6) knowingly provided falsified bank statements and checks to the OAE. She also found that he failed to respond to lawful demands for information by failing to provide requested documents. Based on these findings, the special master also determined that respondent violated RPC 8.4(c).

In respect of the commingling charge, in violation of RPC 1.15(a), the special master noted that respondent admitted holding personal funds in the SMA for many years. Moreover, she concluded that respondent had violated RPC 1.15(d) and R. 1:21-6 when he engaged in the following recordkeeping violations: he admittedly failed to maintain accurate trust account records; he failed to transfer \$4,595.83 from his trust account to his business account; and he failed to disburse the \$30,000 fee in the Mezzina matter to the business account.

The special master dismissed the charged recordkeeping violations relating to inactive balances in his attorney trust account based on the OAE's recommendation for dismissal.

In reaching the determination to impose a six-month suspension, the special master considered several aggravating

factors, including respondent's previous service on an ethics committee; the length of time that his dishonesty spanned during numerous interactions with the OAE; and his persistence in blaming others, although he claimed to take responsibility for his actions. In mitigation, she considered that there was no loss to clients; respondent had a long career with only one ethics charge; he had a reputation for generosity; he admitted wrongdoing (but contradicted these admissions); and he was involved in civic activities and made numerous charitable donations. The special master relied heavily on In re Katsios, 185 N.J. 424 (2006), in finding that "the cover was worse than the crime."

* * *

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.

Respondent stipulated to the following recordkeeping violations: (1) he failed to maintain accurate trust account records; (2) he failed to deposit the \$30,000 fee in the Mezzina matter into his attorney business account; and (3) he failed to promptly transfer the \$4,595.83 remaining on deposit in the SMA into his business account. Therefore, the special master

properly found that respondent violated RPC 1.15(d) and R. 1:21-6.

Similarly, respondent violated RPC 1.15(a) by commingling \$4,595.83 in personal funds with client funds. Respondent stipulated that the \$4,595.83 represented a capital contribution he had made to the firm many years prior to the overdraft. The contribution, however, should not have been deposited into the firm's trust account. Indeed, RPC 1.15(a) allows an attorney to deposit personal funds only in an amount sufficient to pay bank charges.⁴

The facts in respect of respondent's conduct in connection with the false statements and falsified records are largely not in dispute. These facts implicate both RPC 8.1(a) and RPC 8.4(c) and are, therefore, simultaneously considered.

On July 31, 2012, the OAE was notified that a \$7,500 check payable to then associate DeLuca was presented against insufficient funds in the SMA. After the exchange of several letters between the OAE and respondent, OAE Chief of

⁴ R. 1:21-6 does not address the maximum amount of personal funds permitted in the trust account. The OAE's website states that the "limit suggested by the Random Audit Program is \$250."

Investigations Ruskowski scheduled respondent for a demand audit, primarily because respondent had postdated a check and had paid employee bonuses from a trust account. In respondent's August 14, 2012 letter, he stated that he issued the check to DeLuca "by way of a bonus on a very old matter" and that a \$100,000 deposit "was made to accommodate all office bonuses that were being paid." In fact, the \$100,000 represented a deposit of settlement proceeds in the Mezzina matter.

Apparently, respondent postdated DeLuca's check to give the \$100,000 deposit time to clear, but DeLuca presented the check immediately. In respondent's August 31, 2012 letter to Ruskowski, he represented that the funds in the SMA, prior to the \$100,000 deposit, belonged to various clients. He also stated that the \$30,000 legal fee from the \$100,000 settlement had been paid by disbursing \$7,500 to DeLuca and \$22,500 to SM&K. Respondent reiterated this distribution during the December 4, 2012 demand audit.

Review of the records by French, however, revealed that no \$22,500 check issued to SM&K. In fact, she determined that the \$30,000 fee had been disbursed via five checks, including two totaling \$21,952.58 on behalf of respondent's former paramour.

At the conclusion of the demand audit, the OAE requested respondent to produce additional documents. By letter dated

December 19, 2012, respondent's attorney provided the OAE with copies of a client ledger card, bank statements, and cancelled checks. After subpoenaing the relevant bank records, French determined the documents provided by respondent had been falsified. She detailed each of the differences on the Mezzina client ledger card, bank statements, and cancelled checks.

At a second demand audit, the OAE confronted respondent with the falsified documents. He admitted having someone alter the documents at his direction to hide the payments made on behalf of his former paramour from his sister-in-law/bookkeeper. He later revealed that Papalia had altered the documents. Respondent also admitted having given the altered documents to the OAE, explaining that he believed that the alterations were not relevant to the OAE's investigation. During his testimony, however, respondent claimed he was unaware that the altered documents had been turned over to the OAE.

In the stipulation, the parties agreed that the documents were altered to shield a potentially embarrassing personal transaction from discovery by respondent's office staff and were in no way related to the OAE's investigation

As to the outstanding client balances, respondent explained during the demand audit that the \$4,595.83 in the SMA represented his money. In November 2012, respondent issued a

series of checks from the SMA to various clients. These checks were not delivered to the client payees, but instead, on November 9, 2012, respondent endorsed the checks and cashed them at Community Check Cashing. Respondent did so to deceive the new office clerk that there was only one attorney trust account and to allow respondent to close the SMA and end the charade of falsifying the bank statements.

The complaint charged respondent with both RPC 8.1(a) and RPC 8.4(c) violations for telling the OAE that the \$100,000 Mezzina settlement was a deposit for bonuses; for repeatedly stating that \$22,500 had been paid to SM&K as its portion of legal fees; and for providing falsified bank records, including the client ledger card, bank statements, and cancelled checks. Respondent maintains that he lacked the requisite intent, and, therefore, did not violate RPC 8.1 and RPC 8.4. We note that no evidence was produced to establish that respondent intended to deceive the OAE with the false documents. He did, however, make knowingly false statements to the OAE and expressed an intent to deceive Lois.

In support of the defense that he lacked intent, respondent relied in part, on the testimony of Dr. Dengrove. New Jersey criminal law recognizes a diminished capacity defense, which has

been applied in the context of ethics proceedings. In re Asbell, 135 N.J. 446 (1993). Pursuant to N.J.S.A. 2C:4-2:

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have the state of mind which is an element of the offense. In the absence of such evidence, it may be presumed that the defendant had no mental disease or defect which would negate a state of mind which is an element of the offense.

Dengrove concluded that respondent was acting under a "diminished capacity" because of his inability to control his brother's illness and that he was unable to form a "specific intent to do wrong." He found it was respondent's intent to hide the check from Lois, not to deceive the OAE.

Even if we accept respondent's position that he created the falsified documents to deceive only Lois, deception of a third party may rise to the level of a violation of RPC 8.4(c). See, e.g., In re Walcott, 217 N.J. 367 (2014) (attorney misrepresented to a third party, in writing, that he was holding \$2,000 in escrow from his client as collateral for a settlement agreement; reprimand for violations of RPC 4.1(a)(1) and RPC 8.4(c)); In re Chatterjee, 217 N.J. 55 (2014) (reprimand for an attorney who misrepresented to her employer, for five years, that she had taken steps to pass the Pennsylvania bar examination, a condition of her employment; she also requested,

received, but ultimately returned, reimbursement from the employer for payment of the annual fee required of Pennsylvania attorneys; compelling mitigation); and In re Liptak, 217 N.J. 18 (2014) (attorney misrepresented to a mortgage broker the source of funds she was holding in her trust account for a real estate transaction; the attorney also committed recordkeeping violations; compelling mitigation; reprimand).

Here, however, whether respondent's misrepresentations to Lois rises to the level of a violation of RPC 8.4(c) is a close question. On one hand, he did deceive a third party, his bookkeeper/sister-in-law, in connection with his attorney records. On the other hand, it may be argued that the misrepresentation was made in connection with respondent's private life. Because, however, respondent made misrepresentations in this case in other contexts, we need not resolve this issue.

We note that the special master referred to "transferred intent," in part, to support a finding of an RPC 8.4(c) violation. She found that intent to deceive respondent's staff is equivalent to the intent to deceive the OAE. Although transferred intent is a novel concept, adopted from criminal proceedings, it is misplaced on the facts before us. Here, respondent's intent was to deceive Lois and, hence, the creation

of the falsified documents. He was successful in his deception. He had not planned for the OAE to come into possession of the falsified records. In fact, the OAE so stipulated. Therefore, there was no transfer of an intent to deceive. The intent was directed to Lois and that is where the deception remained.

Pursuant to RPC 8.1(a), a lawyer, in connection with a disciplinary matter, shall not "knowingly make a false statement of material fact." Further, RPC 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The requisite mental state required for a violation of RPC 8.4(c) is an intent to engage in such conduct.

In In re Katsios, 185 N.J. 424 (2006), the Court imposed a two-year suspension on an attorney who, among other violations, provided falsified bank statements to the OAE with the intent to conceal his early distribution of escrow funds. In the Matter of Demetrios Katsios, DRB 05-074 (July 21, 2005) (slip op. at 12). The attorney had been retained to represent his uncle and cousin in the sale of a business. Id. at 2. The buyer provided a \$22,000 deposit, which Katsios was to hold in escrow. Ibid. Under pressure from his cousin, the attorney issued a \$22,000 check to the cousin as a "loan." Id. at 2-3. The sale of the business did not occur and the buyer demanded the return of his deposit. Id. at 3. Katsios did not have the funds and ignored

calls from the buyer about the deposit. Ibid. Once the cousin repaid the attorney, Katsios returned the funds to the buyer. Ibid. During the OAE's investigation, the attorney submitted altered bank statements and false reconciliations in an attempt to mislead the OAE that the \$22,000 had remained in his trust account. Ibid. Despite participating in a demand audit, Katsios did not reveal the deception until a subsequent meeting. Id. at 4.

In our decision, we noted that the attorney would have received a reprimand for the early release of escrow funds, but that the fabrication of evidence elevated the discipline imposed. Id. at 9. We also recognized that the attorney's "cover up" required a "great deal of thought, planning, and time" and, thus, warranted a period of suspension. Id. at 11-12.

Here, respondent made misrepresentations, in violation of RPC 8.1(a) and RPC 8.4(c), in his communications with the OAE, stating that the \$100,000 was a deposit for bonuses and the \$22,500 fee was paid to SM&K. Respondent repeatedly made these statements with the knowledge that they were untrue and in furtherance of his attempt to hide his deception of Lois. In respondent's communications with the OAE, he intended to avoid admitting that the \$30,000 disbursement was made, in part, on

behalf of his former paramour because it would have exposed his deception of Lois.

Respondent claims that (1) contrary to his stipulation, he did not learn of the falsified documents until after they had been turned over to the OAE; (2) he did not falsify the statements or client ledger card; (3) the originals were never altered; (4) Papalia and Mershon were responsible for the submission of the false documents to the OAE; and (5) any false statements in the letters to the OAE were not knowing.

Like the special master, we find that respondent lacks credibility. Thus, we give no weight to his claims that he had no knowledge of the submission of the altered documents to the OAE. Moreover, we find it irrelevant that the originals were not altered.

We find implausible respondent's explanation that his statements were merely mistakes. These statements were detailed and occurred over a period of time. Respondent never corrected any of his misstatements. He disbursed four of the five checks from the \$30,000 fee on August 6, 2012. Later, on August 31, 2012, he represented, in a letter to the OAE, that \$22,500 was disbursed to SM&K. Although respondent was caring for his brother at this time, in our view, it is not believable that, when he drafted this letter, he could not remember that he had

paid over \$20,000 on behalf of his former paramour only approximately three weeks earlier. Rather, we find that respondent made these misrepresentations specifically to hide payments that he believed could cause the ruination of his marriage and law practice, if discovered. Respondent intended to keep the payments on behalf of his former paramour secret until the OAE's investigation into the overdraft was complete. Finally, respondent, along with Papalia, developed a scheme to end the charade by issuing the two sets of checks.

Respondent correctly notes, however, that the stipulation made clear that at no time did he knowingly make false statements to Ruskowski regarding the client funds on deposit. Respondent's confusion about where the client funds were held (in the SMA or SMKA account) cannot serve as a basis for a finding of an RPC violation. Notwithstanding, his scheme to issue the checks from both accounts and to cash one set was certainly a component of his deception. Although this specific act of deception was not charged in the complaint, it serves to support our finding of a violation of RPC 8.4(c) in other respects and we consider it in aggravation.

Given the nature of respondent's protracted scheme and subsequent cover up, we find that he knowingly made false statements to the OAE in his letters regarding the \$100,000

deposit and \$22,500 check, violations of both RPC 8.1(a) and RPC 8.4(c).

We now turn to the appropriate discipline for respondent's violations of RPC 1.15(a), RPC 1.15(d), RPC 8.1(a), and RPC 8.4(c). Recordkeeping irregularities ordinarily are met with an admonition. See, e.g., In the Matter of Sebastian Onyi Ibezim, Jr., DRB 13-405 (March 26, 2014) (attorney maintained outstanding trust balances for a number of clients, some of whom were unidentified, discipline by consent); In the Matter of Stephen Schnitzer, DRB 13-386 (March 26, 2014) (an audit conducted by the Office of Attorney Ethics revealed several recordkeeping deficiencies; the attorney also commingled personal and trust funds for many years; prior admonition for unrelated conduct); and In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009) (for extended periods of time, attorney left in his trust account unidentified funds, failed to satisfy liens, allowed checks to remain uncashed, and failed to perform one of the steps of the reconciliation process; no prior discipline).

Knowingly making a false statement of material fact ordinarily requires a reprimand. See, e.g., In re Frey, 192 N.J. 444 (2007) (attorney, while representing a purchaser, misrepresented to a real estate agent that he had received an

additional down payment deposit of \$31,900 when he had not; when the attorney received funds from his client toward the deposit, he later released those funds back to his client, despite his fiduciary obligation to hold them and to remit them to the realtor); In re Agrait, 171 N.J. 1 (2002) (attorney, despite being obligated to escrow a \$16,000 deposit in a real estate transaction, failed to collect it but caused it to be listed on the RESPA as a deposit; the attorney also failed to disclose a prohibited second mortgage to the lender); and In re Mills, 127 N.J. 401 (1992) (motion for reciprocal discipline, attorney left a telephone message for an adverse party falsely stating he was an Internal Revenue Service agent, a violation of RPC 4.1(a)(1); mitigating factors considered were lack of disciplinary history and acknowledgement of wrongdoing).

Generally, the discipline imposed in matters involving misrepresentations to ethics authorities ranges from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating or mitigating factors. See, e.g., In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the attorney's

unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Homan, 195 N.J. 185 (2008) (censure for attorney who fabricated a promissory note reflecting a loan to him from a client, forged the signature of the client's attorney-in-fact, and gave the note to the OAE during the investigation of a grievance against him; the attorney told the OAE that the note was genuine and that it had been executed contemporaneously with its creation; ultimately, the attorney admitted his impropriety to the OAE; extremely compelling mitigating factors considered, including the attorney's impeccable forty-year professional record, the legitimacy of the loan transaction listed on the note, and the fact that the attorney's fabrication of the note was prompted by his panic at being contacted by the OAE and his embarrassment over his failure to prepare the note contemporaneously with the loan); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended, and failed to communicate with both clients); and In re Penn, 172 N.J. 38 (2002) (three-year suspension for attorney in a default who failed to file an

answer in a foreclosure action, thereby causing the entry of default against the client; thereafter, to placate the client, the attorney lied that the case had been successfully concluded, fabricated a court order, and signed the name of a judge; the attorney then lied to his adversary and to ethics officials; the attorney also practiced law while ineligible).

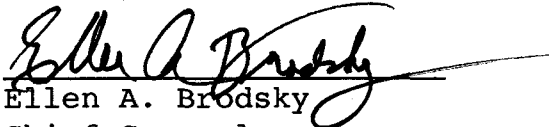
Here, although the special master relied on Katsios in recommending a term of suspension, respondent lacked the intent to deceive the OAE with the falsified bank records, rendering his conduct less egregious. Nevertheless, respondent's misconduct was serious and protracted. In mitigation, respondent has been practicing for more than forty years and has no history of discipline. In aggravation, respondent pretends to accept responsibility for his misconduct, yet continues to blame everyone but himself for how the violations occurred and for misconduct that properly should be laid at his feet. After balancing the aggravating and mitigating factors, we determine to impose a censure.

Members Gallipoli and Zmirich voted for a three-month suspension.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matter of Richard D. Schibell
Docket No. DRB 16-183

Argued: October 20, 2016

Decided: March 20, 2017

Disposition: Censure

Members	Censure	Three-month Suspension	Did not participate
Frost	X		
Baugh	X		
Boyer	X		
Clark	X		
Gallipoli		X	
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich		X	
Total:	7	2	


Ellen A. Brodsky
Chief Counsel