

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 18-142
District Docket No. XIV-2011-0333E

In the Matter of
Robert C. Masessa
An Attorney At Law

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Decision

Argued: June 21, 2018

Decided: October 22, 2018

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Robert C. Scrivo 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 by way of a disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent, submitted pursuant to R. 1:20-15(f). Respondent admitted violating RPC 1.15(b) (failure to promptly notify clients or third parties of receipt of funds in which they have an interest

and to promptly disburse those funds) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

This case represents another example of increasingly common misconduct that we have encountered in transactional real estate matters. In our recent decision in In the Matter of Yuexin Li, DRB 17-356 (January 24, 2018), we recommended that the Court consider the issuance of a Notice to the Bar announcing more stringent treatment of conduct that involves the purposeful, systematic, and unauthorized retention of excess recording fees, including an analysis of the conduct under the principles of In re Wilson, 81 N.J. 451 (1979), and its progeny (knowing misappropriation of client and/or escrow funds). The Li matter is currently pending before the Court.

The OAE recommended that we impose a censure on respondent, who, in turn, requests a reprimand. For the reasons set forth below, as a matter of stare decisis, we determine that a censure is the appropriate sanction for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1982 and to the New York bar in 1991. He has no disciplinary history, and practices law with the firm Masessa & Cluff, in Butler, Morris County, New Jersey.

Respondent and the OAE entered into a disciplinary stipulation, dated April 24, 2018, which sets forth the following facts in support of respondent's admitted ethics violations.

In July 2011, an attorney reported to the OAE respondent's systematic practice of overcharging recording costs and retaining excess funds, in connection with his service as the settlement agent in real estate closings. The OAE began an investigation, and respondent provided a written submission, wherein he admitted, but defended, that practice. Specifically, respondent asserted that, as a settlement agent, his practice was proper, pursuant to the Real Estate Settlement Procedures Act (RESPA), a federal law governing real estate transactions. Respondent, thus, maintained that he had committed no ethics violations.

The OAE investigation was then "held in abeyance pending the outcome of a class action" lawsuit involving the attorney who had reported respondent's conduct. On May 19, 2016, while the investigation was still on hold, the Court issued its decision in In re Fortunato, 225 N.J. 3 (2016), censuring an attorney for engaging in the same practice, and ordering that attorney to review his real estate closing records for the last seven years, and to return all excess recording costs to the aggrieved parties.

In October 2016, the class action litigation concluded and the OAE reactivated its investigation in this matter. In March 2017, the OAE provided respondent a copy of our decision in Fortunato and the Court's corresponding Order, and directed him to conduct a review of his records for the last seven years, including client ledger cards, HUD-1 forms, and billing invoices, to identify all excess recording costs that he had retained. The OAE informed respondent that, if he were still asserting that his conduct was proper, the relevant party to the transaction "had to have been informed of the same and billed appropriately."

From March through December 2017, respondent conducted a review of his real estate closing records for the prior seven years, and provided the OAE with a summary of all excess recording costs that he had retained. The OAE granted him multiple extensions to complete the review. Respondent then refunded to various parties \$76,254 in excess recording fees that he had improperly retained.

Abandoning his RESPA defense, respondent then admitted that, from 2010 through 2017, he had systematically and improperly retained excess recording costs from real estate transactions in which he had served as settlement agent. Moreover, he admitted that, during the same time frame, he had signed hundreds of HUD-1s, confirming that they were true and accurate

accounts of the transactions and affirming that he had "caused or will cause the funds to be disbursed in accordance with this statement." In all of those transactions, however, the HUD-1 was neither an accurate account of the transaction nor a true reflection of the disbursement of the settlement funds.

Respondent, thus, admitted that he had systematically violated RPC 1.15(b), by retaining the inflated recording costs, instead of promptly notifying his clients or third parties of his receipt of funds to which they were entitled and promptly disbursing those funds to them. Moreover, respondent admitted that, by his execution of the HUD-1s in these transactions, he had engaged in a pattern of misrepresentation, in violation of RPC 8.4(c).

The OAE asserts, in respect of discipline, that respondent's conduct is so akin to that of the attorney in Fortunato that a censure is the appropriate quantum of discipline. In mitigation, the OAE noted respondent's unblemished disciplinary history. Respondent maintains that, until he was provided the Fortunato decision, he was unaware of the impropriety of his practice. He represents that he has modified his practice to avoid engaging in such misconduct in respect of future real estate transactions. He, thus, requests the imposition of only a reprimand.

Following a review of the record, we find that the facts contained in the stipulation clearly and convincingly support respondent's admitted ethics violations.

Respondent stipulated that, from 2010 through 2017, he systematically collected estimated recording fees from parties to real estate transactions, and then improperly retained the excess recording fees, in violation of RPC 1.15(b). He did not have authorization to retain the excess recording fees. Thus, he should have promptly returned those funds to the relevant party, rather than routinely retaining them as income. During that period, he knowingly overcharged and retained recording costs totaling \$76,254.

Moreover, as the closing agent for those transactions, respondent executed the final HUD-1s, confirming that they were true and accurate accounts of the transactions, and affirming that he had "caused or will cause the funds to be disbursed in accordance with this statement." In all of those transactions, however, the HUD-1 was not an accurate account of the transaction, and the settlement funds were not disbursed in accordance with the final HUD-1 forms. Respondent's execution of the HUD-1s in these transactions, when those documents were inaccurate as to both accounting and disbursements, constituted misrepresentations, in violation of RPC 8.4(c).

Cases involving an attorney's failure to promptly deliver funds to clients or third persons, in violation of RPC 1.15(b), generally result in the imposition of an admonition or reprimand, depending on the circumstances. See, e.g., In the Matters of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) (admonition imposed on attorney who, in three personal injury matters, did not promptly notify his clients of his receipt of settlement funds and did not promptly disburse their share of the funds; the attorney also failed to promptly communicate with the clients; we considered that the attorney had no prior discipline); In the Matter of Jeffrey S. Lender, DRB 11-368 (January 30, 2012) (admonition; in a "South Jersey" style real estate closing in which both parties opted not to be represented by a personal attorney in the transaction, the attorney inadvertently overdisbursed a real estate commission, neglecting to deduct from his payment an \$18,500 deposit for the transaction; he then failed to rectify the error for over five months after the overdisbursement was brought to his attention; violations of RPC 1.3 and RPC 1.15(b); the attorney had no prior discipline); and In re Dorian, 176 N.J. 124 (2003) (reprimand imposed on attorney who failed to use escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities; attorney previously was admonished for gross neglect, failure to communicate,

failure to withdraw, and failure to cooperate with disciplinary authorities, and reprimanded for gross neglect, lack of diligence, and failure to communicate).

The discipline imposed for misrepresentations on closing documents based on the improper retention of excess recording fees ranges typically is a reprimand or a censure. See, e.g., In re Rush, 225 N.J. 15 (2016) (reprimand for attorney who, in two real estate matters, improperly retained more than \$700 in excess recording fees, and falsely attested that the HUD-1s he had signed were complete and accurate accounts of the funds received and disbursed as part of the transactions; the attorney also was guilty of lack of diligence, commingling, and recordkeeping violations; in mitigation, he stipulated to his misconduct and had no prior discipline); In re Fortunato, 225 N.J. 3 (2016) (censure for attorney who engaged in the systematic, unauthorized retention of excess recording fees, couched as "services fees," in addition to his legal fee; the attorney also prepared and executed inaccurate HUD-1s, repeated violations of RPC 8.4(c); in mitigation, the attorney asserted that "I have seen many other attorneys do this, and I believe it may be the rule among [transactional real estate] attorneys rather than the exception"); In re Weil, 214 N.J. 45 (2013) (censure imposed on attorney who admitted inflating the costs for title and survey charges and recording fees for mortgages, deeds, and cancellation of mortgages in 174 real estate matters and then placing those

inflated figures in the HUD-1s relative to those transactions, in violation of RPC 8.4(c); more than \$150,000 in inflated costs and fees were collected; the attorney was also guilty of commingling, in violation of RPC 1.15(a); in aggravation, the attorney had been the subject of a prior reprimand); and In re Gensib, 206 N.J. 140 (2011) (censure for attorney who failed to inform his clients that he was inflating the cost of their title insurance to cover possible later charges from the title insurance company, failed to convey his fee, in writing, to his clients, failed to safeguard client funds, and had a prior reprimand for improperly witnessing a document).

Here, respondent's admitted misconduct echoes the overcharging schemes confronted and disciplined in the above cases. Over the course of approximately seven years, he purposely overcharged parties to real estate transactions for recording costs. In turn, he reaped more than \$76,000 in additional income that did not rightfully belong to him. Like the attorneys in Rush, Fortunato, and Weil, respondent systematically inflated recording costs and knowingly executed inaccurate HUD-1 statements, misrepresenting the accounting and disbursements for the transactions. As a result, the parties to the transactions were cheated while he was monetarily enriched.

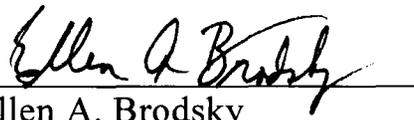
Respondent's misconduct is similar in scope to that of the attorney in Weil, albeit without any of the aggravating factors present in that case, and

with less money reaped from the enterprise. The breadth of his improper conduct, however, far exceeded that of the attorneys in Rush and Fortunato. In mitigation, respondent has no disciplinary history, ultimately admitted his guilt, and has refunded the identified excess costs and fees, totaling \$76,254, to the aggrieved parties. On balance, as a matter of stare decisis, we determine to impose a censure. Certainly, respondent should take notice that, if he resumes his unethical practice in respect of real estate transactions, more severe discipline will follow.

Member Hoberman 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

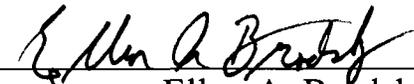
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Disposition: Censure

<i>Members</i>	Censure	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer	X		
Gallipoli	X		
Hoberman			X
Joseph	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8	0	1


Ellen A. Brodsky
Chief Counsel