

DISCIPLINARY REVIEW BOARD
OF THE
SUPREME COURT OF NEW JERSEY

BRUCE W. CLARK, ESQ., CHAIR
HON. MAURICE J. GALLIOLI, VICE-CHAIR
PETER J. BOYER, ESQ.
THOMAS J. HOBERMAN
REGINA WAYNES JOSEPH, ESQ.
PETER PETROU, ESQ.
EILEEN RIVERA
ANNE C. SINGER, ESQ.
ROBERT C. ZMIRICH



RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 962
TRENTON, NEW JERSEY 08625-0962
(609) 815-2920

ELLEN A. BRODSKY
CHIEF COUNSEL
BARRY R. PETERSEN, JR.
DEPUTY COUNSEL
ROCCO J. CARBONE, III
TIMOTHY M. ELLIS
ELIZABETH L. LAURENZANO
COLIN T. TAMS
KATHRYN ANNE WINTERLE
ASSISTANT COUNSEL

September 23, 2019

Heather Joy Baker, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625-0962

Re: **In the Matter of David G. Esposito**
Docket No. DRB 19-206
District Docket No. XIV-2018-0270E

Dear Ms. Baker:

The Disciplinary Review Board has reviewed the motion for discipline by consent (censure or such lesser discipline as the Board deems warranted) filed by the Office of Attorney Ethics (OAE) in the above matter, pursuant to R. 1:20-10(b). Following a review of the record, the Board granted the motion and determined to impose a censure, with a condition, for respondent's violation of RPC 1.15(b) (failing to promptly notify clients of receipt of funds to which they are entitled and failure to promptly disburse those funds) and RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6).

Specifically, on February 6, 2018, the OAE conducted a random compliance audit of the books and records of respondent's law firm, for the period January 2016 through December 2017. In connection with that audit, respondent admitted sole responsibility for the firm's accounting and recordkeeping obligations. The audit revealed that, as of December 31, 2017, the firm's trust account held \$169,043.03 of unidentified funds and numerous inactive balances. The audit revealed further that respondent, as the settlement agent in five real estate matters, had failed to timely disburse excess fees to clients that he had collected for recording real estate documents.

Respondent admitted that, after a closing, it was the firm's responsibility to verify that documents had been recorded, that fees charged by the county were appropriate, and that any discrepancies in respect of client funds were reconciled. He admitted further that, through an oversight, he failed to diligently reconcile each transaction as it took place, but asserted that he did not intend to retain client funds that were not the result of a legitimate charge. As of April 5, 2018, at the OAE's direction, respondent had refunded a total of \$12,936 to 153 clients (less than an average of \$85 per client) and provided proof to the OAE of those refunds for overcharged

recording fees that occurred over a seven-year period.

Respondent has implemented new procedures to ensure that clients who are owed fees are repaid in a timely fashion. As of January 1, 2019, he had opened a dedicated business account to segregate recording fees from his business revenue so as to prevent commingling recording fees with personal funds in his business account.

In addition, the OAE discovered that the firm's accounting practices were insufficient. As a result, respondent conducted a complete reconciliation of the firm's trust account, which revealed a \$447.36 shortage. According to respondent, the shortage resulted from bank wire fees that had not been credited to the trust account. To correct the shortage, he transferred funds from his business account to the trust account. As of March 31, 2018, following the trust account reconciliation, the firm had disbursed all inactive trust account balances.

The OAE's audit also revealed that respondent's business account checks were not properly identified as such. He corrected the mistake by ordering new business account checks containing the proper designation.

Respondent, thus, stipulated that he violated RPC 1.15(b) by failing to promptly notify clients of receipt of funds to which they were entitled and to promptly disburse those funds, and RPC 1.15(d) by failing to comply with the recordkeeping provisions of R. 1:21-6.

Although respondent further stipulated to commingling client and personal funds in the business account, commingling generally occurs when an attorney commingles funds in the trust account, not the business account. Therefore, the Board determined to dismiss the commingling charge in this case.

Recently, the Court imposed censures in two matters involving the unauthorized retention of excess recording fees and costs in real estate matters. See In re Li, ___ N.J. ___ (2019) (motion for discipline by consent) and RPC 8.4(c), and In re Masessa, ___ N.J. ___ (2019) (stipulation).

In the Li case, from 2009 through 2016, in connection with his transactional real estate practice, the attorney collected inflated, "flat" recording fees from his clients and improperly retained the excess recording fees, in addition to his agreed fee listed on the settlement statement form. Li did not have his clients' authorization to retain the excess fees. During the relevant period, the attorney knowingly overcharged 738 clients for recording costs totaling \$119,660.

In all of the transactions, Li knew that the final settlement statement was not an accurate account of the transaction and that the settlement funds were not disbursed in accordance with the final settlement statements. He also charged other improper fees to his clients, described in the settlement statements as "title binder review fees" of \$100 and "legal documentation and notary fees" of \$50. The attorney admitted that those costs, totaling \$66,450, were excessive and were included in the flat legal fee he had charged the clients for the transactions. Finally, Li acknowledged that he committed multiple recordkeeping violations.

In Masessa, from 2010 through 2017, the attorney engaged in the systematic practice of overcharging recording costs and retaining excess funds as the settlement agent in real estate closings, without client authorization. Over the seven-year period, the attorney's conduct affected hundreds of real estate clients. During the same time frame, he signed hundreds of settlement statements, confirming their accuracy. In all of the transactions, the settlement statements were neither an accurate account of the transactions nor true reflections of the disbursement of settlement funds. Masessa, 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 by failing to promptly disburse those funds to them. He further admitted that, by executing the settlement statements in the transactions, he had engaged in a pattern of misrepresentation. Masessa overcharged and retained costs totaling \$76,254. Id. at 5.

In both the Li and Masessa Orders, the Court cautioned that, in the future, attorneys who engage in the purposeful, systematic, and unauthorized charging and retention of excess recording fees, or the implementation of other deceptive, income-generating practices, may be subject to greater discipline.

Like the above attorneys, respondent also should receive a censure. Because respondent's conduct predated the Court's Orders announcing the possibility of more stringent discipline in the future for this type of purposeful, systematic, and unauthorized practice, discipline in excess of a censure is not warranted.

The Board further determined that respondent should be required to provide the OAE with his monthly attorney account reconciliations on a quarterly basis for a two-year period.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated May 30, 2019.
2. Stipulation of discipline by consent, dated May 30, 2019.
3. Affidavit of consent, dated May 23, 2019.
4. Ethics history, dated September 23, 2019.

Very truly yours,



Ellen A. Brodsky
Chief Counsel

EAB/jm
Enclosures

c. See Attached List

I/M/O/ David G. Esposito, DRB 19-206

September 23, 2019

Page 4 of 4

c: (w/o enclosures)
Bruce W. Clark, Chair
Disciplinary Review Board (e-mail)
Charles Centinaro, Director
Office of Attorney Ethics (e-mail and interoffice mail)
Eugene A. Racz, Deputy Ethics Counsel
Office of Attorney Ethics (e-mail)
Monica C. Fillmore, Respondent's Counsel (e-mail and regular mail)