SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-280
District Docket No. XIV-08-579E

IN THE MATTER OF	
DANIEL D. HEDIGER	
AN ATTORNEY AT LAW	

Decision

Argued: November 18, 2010

Decided: December 13, 2010

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

Joseph P. Castiglia appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter came before us by way of a stipulation between the Office of Attorney Ethics (OAE) and respondent. Respondent stipulated to violating RPC 1.15(a) (failure to safeguard property), as well as RPC 1.15(d) and R. 1:21-6 (failure to maintain adequate trust account records. We determine that a censure is the proper discipline for the above violations, together with conditions on respondent's law practice.

Respondent was admitted to the New Jersey bar in 1995. He currently maintains a law office in Hackensack, New Jersey.

In 2004, respondent received a reprimand in a default matter, having been found guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities. In re Hediger, 179 N.J. 365 (2004).

On July 12, 2007, respondent was censured twice. In one matter, he was found guilty of lack of diligence, negligent misappropriation of client funds, failure to promptly deliver funds to a third person, improper use of a firm name, and failure to cooperate with disciplinary authorities. In re Hediger, 192 N.J. 105 (2007). The second censure stemmed from his lack of diligence, failure to communicate with a client, recordkeeping violations, and failure to cooperate with disciplinary authorities. The Court order required him to provide proof to the OAE that all outstanding balances in his attorney trust account had been reconciled; to submit to the OAE, for a two-year period, quarterly reconciliations of his trust accounts, prepared by an OAE-approved certified public accountant; and, for the same two-year period, to practice under the supervision of an OAE-approved proctor. In re Hediger, 192 N.J. 108 (2007).

In 2008, respondent was reprimanded for practicing law while ineligible and failure to communicate with a client. In re

Hediger, 197 N.J. 21 (2008). In 2010, he received a third censure for lack of diligence. In re Hediger, 202 N.J. 336 (2010). Specifically, in a real estate matter, he failed to promptly record the deed for almost fifteen months following the closing, causing accrued interest and penalties to be assessed against the seller.

The stipulated facts establish that Ruta Kapocius retained respondent to represent her in the purchase of real estate in New Jersey. Kapocius appointed grievant Ernestine McFadden-Whitaker (Whitaker) to serve as her agent for the purchases. The transactions were ultimately canceled. Whitaker and Kapocius then became involved in a dispute over the distribution of funds that were to have been used to purchase the properties.

The Upper Saddle River Property

Kapocius obtained a $125,241.44 home equity loan against property that she owned in Illinois to partially fund the purchase of property located in Upper Saddle River, New Jersey (the USR property) from Aret and Rita Kartalyan. Kapocius gave respondent the proceeds of the home equity loan, which, on September 10, 2007, he deposited into his attorney trust account. He recorded the deposit on a client ledger card titled

"'Ernestine McFadden-Whitaker: Kapocius frm (sic) Kartalyn ('Kapocius/Kartalyan (the sellers) client ledger card')."

Also in September 2007, respondent prepared a power-of-attorney (POA) that designated Whitaker as Kapocius' attorney-in-fact. The POA authorized Whitaker to purchase the USR property on Kapocius' behalf and gave Whitaker access to the Kapocius funds in respondent's trust account for "any purpose whatsoever, including any purpose which is in the interest of my attorney-in-fact."

Unbeknownst to respondent, in return for Whitaker's use of Kapocius' loan proceeds, Whitaker had agreed to repay Kapocius' loan within six months and to pay Kapocius a $15,000 fee to use the funds. Respondent was neither involved with the negotiation of this arrangement, nor did he prepare any documents pertaining to their agreement.

From September 13, 2007 through March 24, 2008, respondent disbursed approximately ninety-three attorney trust account checks totaling $127,544.64, "on account of the closing," to pay Kapocius' and/or Whitaker's debts. Whitaker signed authorizations for all of the disbursements. Periodically, respondent would forward the authorizations to Kapocius for her records.

By March 18, 2008, respondent's Kapocius/Kartalyan client ledger card had a negative balance of $1,803.20. By March 24, 2008, the negative balance had increased to $2,303.20. As a result of this deficit, respondent invaded other client funds.

While the stipulation failed to detail how the deficit occurred, in a March 12, 2009 letter to the OAE, respondent's accountant explained the following:

> During the course of our reconciliations we have identified certain issues which have been addressed and are being corrected, or have already been corrected, as of this date. Specifically, several issues involve the client ledgers where funds were originally deposited in a prior account and, inadvertently, disbursements were made out of the current trust account. These have been identified and transfers of funds are being made to clear this matter up.
>
> [Ex.20.]

Thus, according to the accountant, the deficit that resulted as to Kaprocius' funds, was "inadvertent."

Still, the stipulation stated that respondent believed that the Kapocius/Kartalyan ledger card had a negative balance of only $303.20, rather than the actual negative balance of $2,303.20. Therefore, on April 17, 2008, respondent transferred $303.20 to the Kaprocius/Kartalyan account from another Kapocius account. However, the transfer reduced the negative balance on the Kapocius/Kartalyan client ledger card to -$2,000. Because

the shortage was not completely corrected until March 12, 2009, respondent continued to invade unrelated clients' trust funds. On March 12, 2009, he transferred $2,000 from his attorney business account to cover the shortage in the Kapocius/Kartalyan account.

The contract for the USR property was ultimately canceled.

The Ramsey Property

Kapocius sought to purchase a second property in Ramsey, New Jersey. On April 16, 2008, respondent deposited $17,070 into his attorney trust account for that purpose: $1,070 from Kapocius and a $16,000 bank check.

In May 2008, respondent prepared, and Kapocius signed, another POA designating Whitaker as Kapocius' attorney-in-fact. This POA authorized Whitaker to purchase the Ramsey property on Kapocius' behalf, to use the Ramsey property deposit to purchase the Ramsey property, and to use the deposit for "any purpose whatsoever which is solely for the benefit of my attorney-in-fact."

From April 17 through May 19, 2008, respondent issued approximately sixteen trust account checks, disbursing a total of $10,657.54 to either Whitaker or other creditors. He also issued one non-check transfer for $303.20 (money transferred to

cover the shortage relating to the USR property transfer), leaving a balance of $6,109.26 in the Kapocius/Whitaker client account. Whitaker signed authorizations for the disbursements.

On May 20, 2008, Whitaker gave respondent a $20,000 bank check as an additional deposit for the Ramsey property. The deposit increased the Kapocius/Whitaker client ledger balance to $26,109.26.

By letters dated May 31 and June 5, 2008, Kapocius notified Whitaker that, pursuant to their agreement, Whitaker was required to pay off the full amount of the $125,241.44 home equity loan and to pay to Kapocius the $15,000 fee. The second of the letters also informed Whitaker that Kapocius would not proceed with any transactions until the loan was satisfied.

On June 27, 2008, respondent notified Kapocius that Whitaker needed the $26,109.26 trust account funds for housing for her family. The next day, Kapocius informed respondent that she did not want to proceed with the purchase of New Jersey property and withdrew the POA she had granted to Whitaker. The Ramsey property contract was canceled.

Dispute Over the Funds

A dispute arose between Whitaker and Kapocius over the $26,109.26 balance remaining in respondent's trust account.

Respondent presented Whitaker and Kapocious with an $8,275 invoice for legal services relating to three incomplete real estate transactions (the third transaction was not set forth in the stipulation). On January 29, 2009, respondent filed with the court an interpleader action seeking a determination for the proper disbursement of the escrowed funds. He could not, however, locate Whitaker to serve her with process in the matter. The court issued an order disbursing the funds to Kapocius.

Respondent's Trust Account

The OAE's review of respondent's attorney trust account, bank records, and three-way reconciliations for the period from May 20, 2008 to the date of the Kapocius/Whitaker $20,000 deposit and to September 30, 2009, the date of respondent's most recent submission of his three-way reconciliation to the OAE, confirmed that, at all times, respondent held intact in his attorney trust account the Kapocius/Whitaker balance of $26,109.26.

In January 2007, respondent had employed an accountant to reconcile his trust account. As noted above, on March 12, 2009, the accountant informed the OAE about errors discovered with respondent's recordkeeping practices and stated that corrections

were being made. The negative balance relating to Kapocius/Kartalyan was one of the errors that the accountant had discovered and that respondent had corrected.

The OAE determined that respondent's invasion of funds held on behalf of Kapocius/Kartalyan and other clients was done negligently, not knowingly. Respondent invaded other client trust funds in the amount of $2,303.20 from March 18 through April 15, 2008. When he mistakenly deposited $303.20, rather than 2,303.20 to cure the shortage, he continued to negligently invade other clients' trust funds, in the amount of $2,000, from April 16, 2008 through March 12, 2009. Respondent did not benefit from the disbursements that created the shortage.

The stipulation listed as aggravating circumstances respondent's ethics history and the fact that his misconduct is part of a pattern. The stipulation listed as mitigating factors respondent's cooperation with ethics authorities, his quick admission of wrongdoing, and the subsequent remedial measures that he took.

Respondent admitted violating RPC 1.15(a) (failure to safeguard property) and R. 1:21-6 and RPC 1.15(d) (failure to maintain adequate trust records).

Respondent's counsel submitted for our consideration a September 20, 2010 letter from respondent's accountant.

According to the accountant, since respondent retained him, in 2007, the following changes have occurred:

1. Books and records are being provided to [the accountant's] office on a more timely basis.
2. Client ledgers are being properly maintained, utilizing the QuickBooks accounting software.
3. Client ledgers, with some exceptions, are being closed out in a more timely manner.
4. Stale checks are being discovered and reviewed more consistently than before, with payments being reissued where appropriate.

The accountant added that the trust account information provided by respondent has been easier to follow, enabling him to prepare his reconciliations in a more timely manner. In addition, "[w]hile we still find ongoing issues of old checks not being cleared out, these issues are being identified and reviewed in a more timely and consistent fashion."

Counsel urged us to impose only a reprimand, coupled with mandatory compliance of the supervisory requirements previously ordered by the Court (submission of quarterly reconciliations to the OAE, prepared by a certified public accountant, and supervision by a proctor, both conditions for two years). According to counsel, since the Kapocius/Whitaker matter, respondent has taken additional remedial measures: he has

completed a course in trust accounting and his paralegal enrolled and completed a similar course.

Following a full review of the stipulation, we are satisfied that the facts contained therein fully support a finding that respondent was guilty of unethical conduct.

The stipulated facts establish that respondent negligently invaded client trust funds (RPC 1.15(a)) and that he failed to maintain adequate trust account records (RPC 1.15(d) and R. 1:21-6).

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 occurred in the attorney's trust account as the result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac

Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; prior reprimand for a conflict of interest); In re Fox, 202 N.J. 136 (2010) (the attorney's recordkeeping infractions caused the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds); and In re Dias, 201 N.J. 2 (2010) (an overdisbursement from the attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney's recordkeeping deficiencies were responsible for the misappropriation; the attorney also failed to promptly comply with the OAE's requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, we considered that the attorney, a single mother worked on a per diem basis with little access to funds, and was committed to and had been replenishing the trust account shortfall in installments).

A reprimand may still result even if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions. See, e.g., In re Toronto, 185 N.J. 399 (2005) (negligent misappropriation of $59,000 in client funds and recordkeeping violations; the

attorney had a prior three-month suspension for a conviction of simple assault arising out of a domestic violence incident and a reprimand for a misrepresentation to ethics authorities about his sexual relationship with a former student; mitigating factors taken into account); In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated $13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered); In re Rosenberg, 170 N.J. 402 (2002) (attorney negligently misappropriated client trust funds in amounts ranging from $400 to $12,000 during an eighteen-month period; the misappropriations occurred because the attorney routinely deposited large retainers in his trust account, and then withdrew his fees from the account as he needed funds, without determining whether he had sufficient fees from a particular client to cover the withdrawals; prior private reprimand for unrelated violations); and In re Marcus, 140 N.J. 518 (1995) (attorney guilty of negligently misappropriating client funds as a result of numerous recordkeeping violations

and commingling personal and clients' funds; the attorney had received a prior reprimand).

If compelling mitigating factors are present, the reprimand may be reduced to an admonition. If this case were to be considered in isolation, respondent's conduct would warrant discipline no greater than a reprimand, perhaps only an admonition. See, e.g., In re Gemma, 195 N.J. 5 (2008). Here, however, respondent's significant aggravating factor, his ethics history, takes his case out of the realm of an admonition. Indeed, for the same reason, even a reprimand would be insufficient here. At this juncture, nothing shorter than a censure would be appropriate. In determining to impose that measure of discipline, we have taken into account that there are precautionary measures already in place and that respondent's recordkeeping practices have significantly improved. Because, however, respondent continues to experience problems despite the previously imposed measures, we firmly believe that he should be required to designate someone from his staff to assume daily responsibility for the monitoring and proper recording of all his trust account activity.[1]

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[1] By letter dated November 26, 2010, respondent's counsel advised us that, as of that date, respondent had hired a professional bookkeeper on a full-time basis to assist him "in-house in

(Footnote cont'd on next page)

In addition, he should be required to submit to the OAE monthly reconciliations of his attorney records on a monthly basis, rather than quarterly, as previously ordered, also to be prepared by an OAE-approved certified public accountant. We caution respondent that any further trust account problems may result in the imposition of more severe discipline and measures.

We also determine that respondent should continue to practice under the supervision of an OAE-approved proctor until the Court releases him from this obligation.

Vice-Chair Frost 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
Louis Pashman, Chair

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

(Footnote cont'd)

organizing and maintaining his files and trust account." We recommend, nevertheless, that the above condition be made a part of the Court order.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel D. Hediger
Docket No. DRB 10-280

Argued: November 18, 2010

Decided: December 13, 2010

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost						X
Baugh			X			
Clark			X			
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			8			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel