SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-245
District Docket No. XIV-2010-0062E

IN THE MATTER OF	
JOHN MICHAEL FALZONE, JR.	
AN ATTORNEY AT LAW	

Decision

Argued: October 20, 2011

Decided: December 19, 2011

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

Respondent appeared pro se.

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 respondent and the Office of Attorney Ethics (OAE). Respondent stipulated that he violated RPC 1.15(a) (negligent misappropriation of client funds), RPC 1.15(d) and R. 1:21-6 (recordkeeping violations), RPC 5.3(a) through (c)(3) (failure to supervise non-attorney staff), RPC 8.1(a) (making a false

statement to ethics authorities in an ethics investigation), RPC 8.1(b) (failure to cooperate with an ethics investigation), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The OAE recommended a censure or a three-month suspension. We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1984. He has no prior discipline.

The stipulated facts are as follows:

On June 24, 2009, the OAE conducted a random audit of respondent's attorney trust and business accounts. A prior random audit, conducted on August 24, 1990, had turned up a minor deficiency – a failure to deposit all earned fees into the business account.

At the June 2009 audit respondent was unable to properly account for all client funds in his trust account. He informed the OAE auditor that his wife, Patricia Falzone, had improperly transferred funds from his trust account to his business account and then to her personal bank account.

Respondent explained that he employed his wife as his bookkeeper and that she maintained the trust and business account check stubs, opened and filed bank statements, prepared deposit slips when respondent was out of the office, and

conducted his banking at the bank branch located in the same building as his law office. Because his wife had destroyed the original check stubs, bank statements, and deposit slips prior to the OAE auditor's review, respondent obtained copies of the statements directly from his bank. Respondent told the OAE that he was reviewing his client ledger cards and bank statements from 2004 to June 2009 to determine the degree of any trust account shortage. His wife had indicated that it was about $245,000.

The OAE's preliminary audit of the provided records uncovered a shortage of $260,088.63. The auditor also concluded that respondent had not complied with the recordkeeping requirements by

> 1) not having the proper designation of "Attorney Trust Account" or "IOLTA Attorney Trust Account" on bank statements, checks, and deposit slips as required by Rule 1:21-6(a)(2);
>
> 2) not maintaining an ATA receipts journal as required by Rule 1:21-6(c)(1)(A);
>
> 3) not maintaining [a trust account] disbursements journal as required by Rule 1:21-6(c)(1)(A);
>
> 4) allowing inactive balances to remain in the [trust account] for an extended period of time, in violation of Rule 1:21-6(d);
>
> 5) not maintaining individual client ledgers in an open or closed ledger file, rather than in

each client case file, as required by Rule 1:21-6(c)(1)(B);

6) not maintaining a running cash balance in the [trust account] checkbook as required by Rule 1:21-6(c)(1)(G);

7) not preparing and reconciling a schedule of clients' ledger accounts to the [trust account] bank statement on a monthly basis, as required by Rule 1:21-6(c)(1)(H);

8) not ensuring that electronic transfers out of the [trust account] be made on signed written instructions from respondent to his financial institution and confirmed in writing by the financial institution, including date of transfer, payee, and amount of transfer, as required by Rule 1:21-6(c)(1)(A);

9) not having the proper designation of "Attorney Business Account," "Attorney Office Account," or "Attorney Professional Account," on bank statements, checks, and deposit slips, as required by Rule 1:21-6(a)(2);

10) not maintaining [a business account] receipts journal as required by Rule 1:21-6(c)(1)(A);

11) not maintaining [a business account] disbursements journal as required by Rule 1:21-6(b)(1)(A); and

12) not correcting his financial institution's image processing of checks (front and back) in his [business account] to a limit of only two checks per page as required by Rule 1:21-6(b).

[S2.][1]

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[1] "S" refers to the disciplinary stipulation between respondent and the OAE.

By the time the OAE conducted a second audit, on September 24, 2009, respondent had deposited funds in the trust account to cover the $260,088.63 shortfall. In fact, respondent's deposits, in June and August 2009, totaled $270,000. Respondent had sold his house in order to make up a large share ($235,000) of the missing funds.

Using respondent's bank statements and client ledger cards, the OAE auditor reconstructed three-way reconciliations of the trust account for June 22, June 30, July 31, and August 31, 2009, which showed a total shortage of $279,482.70. The OAE determined that transfers from the trust account from December 2005 to May 2009 had caused the shortage. Once notified, respondent deposited an additional $9,482.70 into his trust account, on January 27, 2010.

During a July 22, 2010 interview conducted at the OAE offices, respondent disclosed, for the first time, that the "destroyed" records were actually in his possession, at his office.

When asked about the discrepancy with his prior statements, respondent explained that, just prior to the June 2009 audit, his wife had admitted to him that she had stolen the funds. "In

a state of shock," respondent had no recollection of making the false statements to the OAE auditor. In fact, respondent conceded that his wife had not been his bookkeeper, but his secretary. He also conceded that his wife had not handled trust or business account bank statements. He had opened and reviewed them every month.

Respondent also told the OAE that his wife was not authorized to sign checks out of either the trust or business account. In late 2007 or early 2008, he had discovered transfer slips that evidenced excessive transfers by his wife from the business account to her personal account. He had discussed the situation with her and had told her to cease transferring funds in that manner.

Respondent did not, thereafter, realize that his wife had also been transferring funds from the trust account to the business account and then from the business account to her own account. Respondent claimed that he was not aware of the thefts. By his account, "she received a salary for her secretarial position and fees for her assistance in real estate closings, such that he had inferred that she was able to cover their household and lifestyle expenses through the same."

On August 17, 2010, respondent produced his original bank statements, deposit slips, and check stubs to the OAE for its final review. The OAE was unable to find clear and convincing evidence that respondent knowingly misappropriated the $279,482.70 of client funds missing from his trust account. Moreover, his wife refused to cooperate with the OAE investigation of the thefts. She did, however, plead guilty, in Middlesex County, to charges related to the theft of the trust account funds.

The parties stipulated that respondent violated several RPCs. First, he negligently misappropriated $279,482.70 of client funds by failing to discover that his wife was stealing funds from the trust account, a violation of RPC 1.15(a). Second, he did not discover the thefts as a result of his failure to reconcile his attorney accounts, a violation of RPC 1.15(d) and R. 1:21-6. Third, he failed to properly supervise his wife, a non-attorney in his employ, thereby enabling her to make the improper and undetected transfers from the trust account to the business account and then to her own use. After discovering his wife's practice of transferring excessive funds from the business account to her own, he failed to take

reasonable remedial actions to prevent further thefts, a violation of RPC 5.3(a) through (c)(3).

In addition, respondent also violated RPC 8.1(a) by knowingly making a false statement of material fact during an ethics investigation. He did so when he informed the OAE auditor, during the initial OAE random compliance audit, that his wife was his bookkeeper and that she had destroyed his original attorney accounts banking records. His lie to the auditor about the existence and whereabouts of the original trust and business account records also violated RPC 8.4(c).

Respondent also failed to cooperate with ethics authorities (RPC 8.1(b)), when he did not provide requested attorney trust and business account records for over a year, after the initial OAE audit.

Following a review of the stipulation, we find that the facts recited therein fully support that respondent's conduct was unethical. His trust and business account practices were so reckless that his wife was able to repeatedly plunder the trust account of almost $280,000 in client funds, from 2005 to 2009. He also failed to properly maintain required records, failed to supervise a non-attorney employee, knowingly made a false statement of material fact to the OAE during an ethics

investigation, and, failed to cooperate with ethics authorities, all in violation of RPC 1.15(a) and (d), RPC 5.3(a) through (c)(3), RPC 8.1(a) and (b), and RPC 8.4(c).

Generally, a reprimand is imposed for negligent misappropriation of client funds, usually found alongside recordkeeping deficiencies. See, e.g., In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 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 over-disbursed 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; the attorney had received a reprimand for a conflict of interest); In re Fox, 202 N.J. 136 (2010) (motion for discipline

by consent; attorney ran afoul of the recordkeeping rules, causing the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds); In re Dias, 201 N.J. 2 (2010) (an over-disbursement 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 cooperate with ethics authorities' requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, we considered that the attorney, a single mother working on a per diem basis with little access to funds, committed to and had been replenishing the trust account shortfall in installments); and In re Seradzky, 200 N.J. 230 (2009) (due to poor recordkeeping practices, attorney negligently misappropriated $50,000 of other clients' funds by twice paying settlement charges in the same real estate matter; prior private reprimand).

Attorneys who fail to supervise their non-attorney staff 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); 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 and the steps he took to prevent a reoccurrence); In the Matter of Lionel A. Kaplan, DRB 02-259 (November 4, 2002) (attorney admonished for failure to supervise his bookkeeper, which resulted in recordkeeping deficiencies and the commingling of personal and trust funds; mitigating factors included the attorney's cooperation with the OAE, including entering into a disciplinary stipulation, his unblemished thirty-year career, the lack of harm to clients, and the immediate corrective action that he took); 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); In re Riedl, 172 N.J.

646 (2002) (attorney reprimanded for failing to supervise his paralegal, allowing the paralegal to sign trust account checks, and displaying gross neglect in a real estate matter by failing to secure a discharge of mortgage for eighteen months after it was satisfied); In re Bergman, 165 N.J. 560 (2000) and In re Barrett, 165 N.J. 562 (2000) (companion cases; attorneys reprimanded for failure to supervise 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); 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 the attorney's 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).

Admonitions are imposed for failure to cooperate with disciplinary authorities, if, as here, the attorney does not have an ethics history. See, e.g., In re Ventura, 183 N.J. 226 (2005) (attorney did not comply with ethics investigator's repeated requests for a reply to the grievance; default case); In the Matter of Kevin R. Shannon, DRB 04-152 (June 22, 2004) (attorney did not promptly reply to the district ethics committee's investigator's requests for information about the grievance); In the Matter of Keith O. D. Moses, DRB 02-248 (October 23, 2002) (attorney failed to reply to district ethics committee's requests for information about two grievances); and In the Matter of Jon J. Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance).

Generally, in matters involving misrepresentations to ethics authorities, the discipline 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 Fusco, 197 N.J. 428 (2009) (reprimand for knowingly making a false statement of material fact in

connection with a disciplinary matter and for conduct involving misrepresentation; the attorney prepared a letter-response for a junior partner of his law firm, in support of his version of events to an ethics grievance against him; the attorney then signed the letter with her name, followed by "for" the junior attorney; he lied to ethics authorities that he had obtained the other attorney's permission to sign for her; reprimand ten years earlier (1995) for unrelated misconduct was considered too remote in type and time to be an aggravating factor); 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 by 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); In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who did not diligently pursue a matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter); In re Katsios, 185 N.J. 424 (2006) (two-year suspension for attorney who prematurely released a $20,000 real estate deposit to the buyer/client, his cousin, without the consent of all the parties to the transaction; ordinarily, that misconduct would have warranted no

more than a reprimand, but the attorney panicked when contacted by the OAE and then sought to cover up his misdeed by falsifying bank records and trust account reconciliations to mislead the ethics investigator that the funds had remained in escrow; we argreed with the special master that the cover-up had been worse than the "crime"); In re Silberberg, 144 N.J. 215 (1996) (two-year suspension imposed on attorney who, in a real estate closing, allowed the buyer to sign the name of the co-borrower; the attorney then witnessed and notarized the "signature" of the co-borrower; the attorney stipulated that he knew at the time that the co-borrower was deceased; after the filing of the ethics grievance against him, the attorney falsely stated that the co-borrower had attended the closing; on another occasion, the attorney sent a false seven-page certification to the district ethics committee in order to cover up his improprieties); and In re Penn, 172 N.J. 38 (2002) (three-year suspension for attorney 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, a reprimand might have been appropriate, had respondent's most serious misconduct been either his negligent misappropriation or his failure to supervise his non-attorney wife/secretary. But he lied to the OAE during the ethics investigation. Moreover, unlike attorneys Bergman, Barrett, and Hofing, he did not cooperate with the OAE's investigation and did not take swift action to uncover the thefts, once he discovered, as early as 2007, that his wife was making excessive transfers from the business account to her own personal account. This is seemingly at odds with respondent's concession that he had reviewed his attorney bank statements on a monthly basis. Even a cursory monthly review of his bank statements should have alerted him to the ongoing thefts that were regularly taking place.

In mitigation, we considered that respondent had no prior discipline in his twenty-seven years at the bar.

For the totality of respondent's misconduct, we determine that a censure is warranted. Were it not for respondent's lengthy career without prior incident, we might have voted for more severe discipline.

Vice-Chair Frost and member Wissinger voted for a three-month suspension. Members Stanton and Yamner 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John M. Falzone, Jr.
Docket No. DRB 11-245

Argued: October 20, 2011

Decided: December 19, 2011

Disposition: Censure

Members	Disbar	Three-month Suspension	Censure	Disqualified	Did not participate
Pashman			X		
Frost		X			
Baugh			X		
Clark			X		
Doremus			X		
Stanton					X
Wissinger		X			
Yamner					X
Zmirich			X		
Total:		2	5		2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel