

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-283
District Docket Nos. XIV-2012-0228E
and XIV-2012-0661E

IN THE MATTER OF
STUART A. KELLNER
AN ATTORNEY AT LAW

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Decision

Decided: February 19, 2014

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

This matter came before us on a certification of default filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-4(f). The complaint charged respondent with failure to safeguard client funds and knowing misappropriation of client funds, a violation of RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985); failure to promptly deliver funds or property to which a client or a third person is entitled, a violation of RPC 1.15(b); failure to cooperate with the OAE's investigation, a

violation of RPC 8.1(b); failure to maintain required records, a violation of RPC 1.15(d); practicing law while suspended, a violation of RPC 5.5(a)(1) and R. 1:20-16(i)¹; conduct involving dishonesty, fraud, deceit, or misrepresentation, a violation of RPC 8.4(c); conduct prejudicial to the administration of justice, a violation of RPC 8.4(d); failure to terminate representation, when the representation violates the Rules of Professional Conduct, a violation of RPC 1.16(a)(1); failure to refund an unearned retainer, a violation of RPC 1.16(d); and a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, a violation of RPC 8.4(b) and N.J.S.A. 2C:20-9. We recommend that respondent be disbarred.

Respondent was admitted to the New Jersey bar in 1975. At the relevant times, he maintained an office for the practice of law in Warren, New Jersey.

Although respondent has no history of final discipline, he was temporarily suspended, on August 28, 2012, for failure to cooperate with the investigation in the instant matter. In re Kellner, 211 N.J. 562 (2012).

¹ That section of the rule states: "No attorney who has been ordered disbarred, suspended, or transferred to disability-inactive status shall practice law after such disbarment or during the period of such suspension or disability, and every order of disbarment shall include a permanent injunction from such practice."

Service of process was proper in this matter. On June 26, 2013, the OAE sent a copy of the formal ethics complaint to respondent's office/home address, by regular and certified mail, return receipt requested. The certified mail was returned marked "unclaimed." The regular mail envelope was not returned to the OAE.

On July 24, 2013, the OAE sent a letter to respondent, at the same address, by both regular and certified mail. The letter directed respondent to file an answer to the complaint within five days and informed him that, if he failed to do so, the OAE would certify the record directly to us for the imposition of sanction. The certified mail receipt, dated August 14, 2013, was returned with respondent's signature. The regular mail envelope was not returned to the OAE.

As of September 13, 2013, the date of the certification of the record, respondent had not filed an answer to the complaint.

The facts of this matter are as follows:

The Cabarcas Matter

Respondent represented Ivan Cabarcas in a transaction requiring respondent to purchase a mortgage note for the benefit of Cabarcas, in connection with a property located in Paterson, New Jersey. The price of the mortgage note was \$90,000. In an email dated October 26, 2010, respondent provided Cabarcas with

his attorney trust account information and confirmed the \$90,000 purchase price for the note.

On October 28, 2010, Cabarcas wired \$90,000 into respondent's attorney trust account. Soon thereafter, respondent informed Cabarcas that there was a \$10,000 tax lien against the property. On or about June 20, 2011, Cabarcas paid respondent an additional \$10,000, by way of a personal check, to satisfy the tax lien. The \$10,000 was deposited into both respondent's attorney trust account (\$7,500) and his business account (\$2,500).

On October 28, 2010, respondent transferred \$86,250 out of his attorney trust account to Kondaur Capital Corporation ("Kondaur") for the benefit of Stuart A. Kellner d/b/a Stuart Alan Associates ("Associates"). Associates is a real estate company owned by respondent. The wire transfer instructions referenced the Paterson property.

On December 9, 2010, respondent recorded, in the Passaic County Clerk's Office, an Assignment of Mortgage for that same property in Paterson. The assignment of the mortgage showed that Kondaur had transferred the mortgage note to Associates. Respondent never conveyed the mortgage note to Cabarcas.

Subsequent to the wire transfer to Kondaur, and between October 28, 2010 and March 31, 2012, respondent's attorney trust account never had an available balance high enough to cover the

\$90,000 deposit in the Cabarcas matter. In fact, by October 4, 2011 and through March 31, 2012, the balance in that account remained at \$50.

Between June 23, 2011 and January 18, 2012, the available balance in respondent's business account was less than \$2,500. On September 13, 2011, the available balance in the business account was only \$0.31. Between January 26, 2012 and March 31, 2012, the available balance in the account was less than \$2,500.

As of the date of the complaint, respondent had not returned any of Cabarcas' \$100,000. Cabarcas had not given respondent permission to use any portion of the funds for any purpose, other than to purchase the mortgage note on Cabarcas' behalf. Respondent did use the \$90,000 to purchase the note, but not for Cabarcas. He did so for himself. In addition, respondent did not use the \$10,000 to satisfy the tax lien.

By letter dated May 10, 2012, the OAE notified respondent that a grievance had been filed against him and that his written reply to the allegations was due within ten days. Respondent did not file a written reply to the grievance.

On June 12, 2012, respondent told the OAE investigator assigned to this matter that he was considering retaining counsel and planned to meet with attorney H.K., on June 14, 2012. Neither H.K. nor any other attorney ever contacted the OAE on behalf of respondent.

By letter dated June 26, 2012, the OAE notified respondent, by regular and certified mail, that he was required to appear for a demand interview on July 24, 2012. That letter directed respondent to produce client ledgers, bank statements, cancelled checks, checkbook stubs, deposit slips, cash receipts and cash disbursements journals for his trust and business accounts, and all documents associated with the Cabarcas matter. On July 9, 2012, respondent signed the return receipt for the certified mail. He did not appear for the July 24, 2012 demand interview.

On July 24, 2012, the OAE attempted to reach respondent, but the calls were directed to his voicemail. On August 1, 2012, the OAE filed a petition for respondent's immediate temporary suspension, based on his failure to cooperate with that office's investigation. On August 28, 2012, the Court temporarily suspended respondent. To date, he has not produced any of the requested records to the OAE and remains suspended.

On February 28, 2013, in reference to an additional grievance filed against respondent, as detailed below, the investigator again contacted him. During that call, respondent claimed that Cabarcas was his business partner. He told the investigator that he had not previously appeared at the OAE because he could not obtain counsel.

On April 11, 2013, the OAE sent a letter to respondent, scheduling a demand interview for April 26, 2013 to discuss his

newly-proffered defense. The letter also directed respondent to bring all documents, records, or other files pertaining to the alleged partnership with Cabarcas. The OAE sent the April 11, 2013 letter to respondent by regular and certified mail. The record does not indicate whether the April 11, 2013 letter was delivered to respondent. Respondent neither appeared for the demand interview nor supplied any of the requested documents to the OAE.

The Herchenroder Matter

On July 26, 2012, Jane Herchenroder, Esq., retained respondent, on behalf of her aunt, Jean C. Riehle, to provide legal services related to the sale of a residential property. Herchenroder was the attorney-in-fact for Riehle. At some point, Riehle's son paid respondent \$1,000 of an estimated \$3,500 legal fee.

On October 27, 2012, respondent provided Herchenroder with a real estate contract. On November 14, 2012, he provided Herchenroder with a HUD-1 closing statement listing him as the settlement agent.

During the week of November 19, 2012, Herchenroder discovered that respondent had been temporarily suspended. She then terminated respondent's representation of Riehle, on November 29, 2012. Respondent never advised Herchenroder or

Riehle of his suspension. Although he was aware of his suspension, respondent continued to represent Riehle, until Herchenroder ended the representation.

According to the HUD-1, respondent's legal fee was \$1,250. Herchenroder demanded from respondent the return of the \$1,000 retainer paid on behalf of Riehle. Respondent failed to refund any of that sum.

By letter dated January 7, 2013, the OAE notified respondent of the Herchenroder grievance and directed him to submit a written reply within ten days. Respondent did not reply to the grievance.

On January 25, 2013, the OAE notified respondent that he was required to appear for a demand interview, on February 8, 2013. On the scheduled date, respondent's appearance was excused, due to inclement weather. The demand interview was re-scheduled for February 11, 2013. Although respondent appeared on that date, he requested an adjournment of the demand audit, in order to retain counsel. The OAE re-scheduled the demand interview for February 27, 2013 and informed respondent that it would occur, whether or not he obtained counsel. Respondent did not appear for the demand interview. As previously noted in the Cabarcas matter, on February 28, 2013, the OAE investigator reached respondent by telephone and re-scheduled the demand interview for April 26, 2013. Respondent failed to appear on

that date.

To date respondent has not produced any of the demanded documents or records to the OAE and has not appeared for a demand interview.

The facts recited in the complaint support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline (R. 1:20-4(f)(1)).

Respondent knowingly misappropriated funds belonging to Cabarcas. He received \$100,000 from Cabarcas to purchase a mortgage note and clear a tax lien. In fact, respondent purchased the mortgage note for \$86,250, but for the benefit of his holding company, instead of Cabarcas' benefit. Nothing in the record indicates that the lien was ever cleared. Hence, there is \$13,750 unaccounted for from Cabarcas' \$100,000 payment. Respondent's trust account has not had a balance remotely high enough to account for these missing funds, since he purchased the mortgage note on behalf of his own real estate holding company. Further, that note was never transferred to Cabarcas.

Respondent eventually claimed to the OAE that Cabarcas was not his client, but his business partner. According to the OAE investigator's report, respondent maintained that Cabarcas was

to put up the cash for his part of the partnership, while respondent would supply contacts and knowledge of the mortgage industry. Respondent also asserted that, without his contacts and knowledge, Cabarcas would have never had access to the deal. He added that they were to split the proceeds after the property was sold.

Cabarcas admitted to the OAE investigator that respondent had brought the deal to his attention, but denied that they were ever partners. In return for the deal, respondent was to get legal fees and a finder's fee. Cabarcas always understood respondent to be his attorney, although he admitted that he never signed a retainer agreement with respondent.

When the OAE investigator contacted general counsel for the seller of the mortgage note, the general counsel stated that he did sell the note to respondent, but that he was under the impression that respondent would be the sole purchaser and titleholder. There were no documents in his file indicating that Cabarcas was involved either as a partner or as an individual.

Ultimately, when pressed by the OAE as to why Cabarcas was not named on the assignment of the mortgage, respondent could not give a clear answer. Further, he could not clearly explain the status of the \$10,000 that Cabarcas had given to him to clear the tax lien.

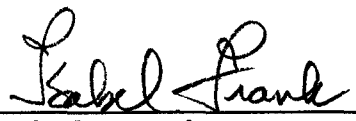
We find that the record clearly and convincingly establishes that Cabarcas was respondent's client. Incidentally, even if there was something other than an attorney-client relationship in this matter, the fact remains that the funds were used for purposes unrelated to Cabarcas' benefit and without Cabarcas' consent to their use for unrelated purposes. Cabarcas has received no benefit from the purchase of the mortgage note and has not received his monies back.

For respondent's knowing misappropriation of client funds in the Cabarcas matter, contrary to In re Wilson, supra, 81 N.J. 451, he must be disbarred. We so recommend to the Court. Accordingly, there is no need to address the issue of the proper discipline for the remaining charges against respondent.

Member Doremus did not participate.

We further determine to require respondent to reimburse the Discipline 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: 
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

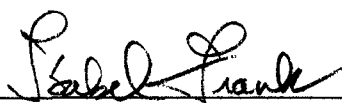
In the Matter of Stuart A. Kellner
Docket No. DRB 13-283

Argued: January 16, 2014

Decided: February 19, 2014

Disposition: Disbar

<i>Members</i>	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost	X					
Baugh	X					
Clark	X					
Doremus						X
Gallipoli	X					
Hoberman	X					
Singer	X					
Yamner	X					
Zmirich	X					
Total:	8					1


Isabel Frank
Acting Chief Counsel