

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-264
District Docket No. XIV-07-572E

IN THE MATTER OF
TERRY J. FINKELSTEIN
AN ATTORNEY AT LAW

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Decision

Argued: October 15, 2009

Decided: December 8, 2009

Lee A. Gronikowski 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 came before us on a recommendation for discipline (censure) filed by the District VIII Ethics Committee ("DEC"). The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to communicate with the client), RPC 1.15(a) (negligent misappropriation), and RPC 1.15(d) and R. 1:21-6 (recordkeeping

violations). We agree that a censure is the appropriate discipline for respondent.

Respondent was admitted to the New Jersey and to the New York bars in 1985. Although he was admitted to the Ohio bar in 1976, his license there is inactive for failure to comply with continuing legal education requirements. He maintains a law office in East Brunswick, New Jersey.

In 2004, we admonished respondent for gross neglect, lack of diligence, and failure to communicate with the client. In the Matter of Terry J. Finkelstein, DRB 03-420 (February 6, 2004). After respondent filed a complaint in a personal injury matter, he did not reply to discovery requests or to the clients' requests for information about its status. When the case was settled, respondent failed to send the appropriate releases to the insurance carrier and eventually paid the settlement from his own funds.

Respondent was again disciplined in 2004, this time receiving a reprimand for conflict of interest, gross neglect, lack of diligence, and failure to communicate with the clients. In re Finkelstein, 180 N.J. 526 (2004). In that case, respondent represented the purchasers of real property in a claim against the sellers for defects that only became apparent after the closing. After respondent filed a complaint, he failed to pursue

the case, allowing it to be dismissed for lack of prosecution. Thereafter, he took no action to have the complaint reinstated and did not disclose to the clients that the complaint had been dismissed. Later, he engaged in a conflict of interest, when he represented the prospective buyers of the same property in a sale by his former clients.

In the matter now before us, respondent admitted the allegations of the complaint and requested a hearing on mitigation only. The facts were gleaned from the complaint, the answer, and the testimony of witnesses.

Respondent is a sole practitioner whose practice is primarily comprised of real estate work, supplemented with some estate, personal injury, and municipal court work.

In November 2000, grievant Steven Maciurek, the administrator of the estate of his brother Walter, retained respondent to settle the estate. Dissatisfied with the work of the attorney who had initially represented the estate, Maciurek hired respondent and instructed him to complete the administration of the estate "relatively quickly." Maciurek, an eighty-year-old retired truck driver, and his sister were Walter's heirs.

Among other assets, the estate included two parcels of real estate in Perth Amboy, New Jersey. On March 27, 2001, Maciurek

sold one of the parcels. As the settlement agent, attorney Casper Boehm, Jr. retained the proceeds from the sale (\$50,264.89), pending receipt of the New Jersey inheritance tax waiver from respondent.

Approximately seven years after the closing, Boehm still had not received the waiver. He notified the Office of Attorney Ethics ("OAE") that he was holding the proceeds from the sale and would continue to do so until respondent provided him with the tax waiver.

On April 16, 2001, Maciurek sold the estate's other property. The estate received \$78,518.73 from that sale. On April 18, 2001, respondent deposited the sale proceeds into his trust account, increasing to \$94,288.64 the total funds held on behalf of the Maciurek estate.

On November 14, 2007, OAE disciplinary auditor Arthur Garibaldi conducted an audit of respondent's accounts. Garibaldi noted that respondent cooperated fully with the OAE investigation.

In the course of Garibaldi's review, which encompassed the seven-year period from 2000 to 2007, he discovered, in respondent's boxed files for the estate, approximately \$5,000 worth of United States Savings Bonds owned by the decedent. According to respondent, it was not clear who owned the bonds

because the contingent beneficiary was also deceased. Respondent had not taken any action to ascertain the ownership of the bonds since the time he was retained, in November 2000.

Respondent admitted to the OAE that he had not obtained, nor taken any steps to obtain, the necessary tax waiver for the estate since the March 27, 2001 sale of the Perth Amboy property. He also admitted that he had not kept Maciurek informed about the status of the matter.

As of November 24, 2008, the date that the OAE completed its investigation, respondent had not completed the New Jersey inheritance tax return that was required to obtain a tax waiver for the estate. Because respondent delayed in filing the return, on June 23, 2005, the New Jersey Division of Taxation filed a certificate of debt against the estate. The assessment included an arbitrary tax estimate of \$225,000, plus interest. The issue remained unsettled as of the date of the complaint, February 10, 2009.

Respondent finally filed the New Jersey inheritance tax return for the estate on January 30, 2009. He admitted that he had "messed up" the Maciurek matter. He stated that, although he had done a good job for hundreds of clients, at times he did not do what was required of him. He added that he had handled two real estate matters for the estate, paid some of the estate's

bills, and handled a "lawsuit from the prior attorney," but conceded that he had not timely completed the administration of the estate for Maciurek, a "very, very nice man." At the DEC hearing, respondent claimed that he had spoken to an auditor from the New Jersey Division on Taxation, who told him that he would receive the inheritance tax waivers in two weeks. According to respondent, he is "prepared to reimburse" or otherwise make Maciurek and his sister whole.

Garibaldi noted that, now that respondent has filed the inheritance tax return, the estate's beneficiaries should receive approximately a \$62,000 refund of the estimated \$70,000 taxes paid by the original administrator, \$50,000 held by the settlement agent from one of the real estate transactions, as well as savings bonds with a face value of approximately \$5,000, and \$20 or \$30 dollars worth of silver certificates.

Respondent charged the estate only for the two real estate closings. He added that, for the last four or five years, he has been using his own funds to pay for the bond to continue as the estate's administrator (\$1,600-\$1,800). He stated that "it's the least I can do, not the most."

Respondent admitted that he engaged in gross neglect, lacked diligence, and failed to communicate with Maciurek, as charged in the complaint.

On November 14, 2007, the OAE directed respondent to reconstruct the estate's trust account ledger. Respondent retained accountant Robert D. Gelman, CPA to perform the reconstruction. The reconstruction revealed that, between April 18, 2001 and April 18, 2008, respondent appropriately expended various sums on behalf of the estate for taxes, bequests and medical expenses (presumably the decedent's). However, according to the complaint, respondent had "negligently overdrawn the Estate's ledger by (\$5,285.90) as of April 18, 2008, which negatively impacted the funds respondent had on deposit for other clients." Respondent, therefore, admitted violating RPC 1.15 (a) (negligent misappropriation), as well as RPC 1.15(d) and R. 1:21-6 (recordkeeping violations). Respondent noted that he immediately replenished the trust account with his personal funds.

Garibaldi found that respondent's records were grossly incomplete and, therefore, not kept in accordance with R. 1:21-6. At the time of the demand audit, Garibaldi notified respondent of the following, numerous recordkeeping deficiencies:

- (a) No trust receipts or disbursements journals were maintained;
- (b) Client trust account ledger cards were not fully descriptive;

- (c) Inactive balances were left in the trust account;
- (d) No monthly trust account bank reconciliations, with client ledgers, journals, and checkbook, were prepared;
- (e) No running checkbook balance was maintained;
- (f) Old outstanding checks were not resolved;
- (g) No business account receipts or disbursement journals were maintained; and
- (h) Respondent was unable to identify the funds on hand for each client at any given time.

[C4¶1-C5.]³

According to Garibaldi, the OAE audit uncovered a \$5,300 negative balance on Maciurek's ledger card, caused by respondent's failure to post a trust account check on the final ledger card. As a result, respondent believed that he was holding more funds than he actually had. The OAE concluded that the invasion of the estate's funds had stemmed from a bookkeeping error and, therefore, was negligent, rather than intentional.

As to his recordkeeping irregularities, respondent explained that he did 200 to 300 real estate closings per year and thought that it would be too difficult to use an automated program; it would "cause all hell to break lose." Before the OAE audit, he manually performed the recordkeeping, including the

³ C refers to the ethics complaint.

balancing of his trust accounts. As a result, he was unable to determine whether he had "money left over" in his accounts. He was grateful for the OAE's help in getting his accounts in order.

The OAE auditor introduced respondent to the TAME program (trust accounting made easy). As of the DEC hearing, respondent had been using TAME for more than one year. He also retained Gelman to help him reconcile his accounts. Gelman currently performs monthly reviews of respondent's new trust account and ensures that respondent is in compliance with R. 1:21-6.

Also, respondent opened up a new trust account and, at the hearing below, vowed to go through the old trust account and every file for the last seven or eight years to try to resolve the inactive balances in the accounts. As of the DEC hearing, the inactive amounts had been reduced from \$393,698 to \$144,092.37. Even though respondent hoped to account for most of the funds, he realized that some of it might have to be deposited with the court.

Respondent conceded that, if he had been properly reconciling his accounts, the Maciurek estate's funds would have been available for distribution in 2002. His excuse for not timely finalizing the administration of the estate was that he

was busy with other work and had "put [his] head in the sand like an ostrich."

The DEC found clear and convincing evidence that respondent violated the charged Rules of Professional Conduct. It noted that, although the administration of the estate was not a simple task because of pending litigation begun by the estate's prior attorney, respondent had been retained in November 2000 to settle an estate that, admittedly, should have been finalized in 2002.

The DEC further noted that, although respondent had appropriately disbursed funds for taxes, bequests, and medical expenses, he had negligently overdrawn the estate account by \$5,283 because of his failure to deduct an expense in that amount. Finally, the DEC found that respondent had violated the recordkeeping rules set out in the complaint.

The DEC considered, as mitigation, that respondent fully cooperated with the OAE's investigation and audit; accepted responsibility for his actions; admitted the allegations of the complaint; changed his outdated manual method of bookkeeping used to maintain his old trust account; began using the TAME method of bookkeeping for his new trust account; made substantial efforts to reconcile the remaining open balances in his old trust account; maintained communication with the OAE,

providing it with updates on the reconciliation of the old trust account; and paid all bond fees for the estate.

The DEC also considered that respondent did not charge any fees for work he had done on the estate (with the exception of fees for the real estate closings); agreed not to charge the estate for past or future work; agreed to make restitution to the estate for his delay in wrapping it up; filed the estate inheritance tax return; was in the process of obtaining the appropriate tax waivers needed to remove the estimated tax obligation; applied for the "Certificate of Debt" to release the proceeds from the sale of property; and represented that he would obtain the appropriate waiver so that he may distribute the proceeds of the estate.

The DEC found that none of respondent's violations had been committed intentionally. Considering that respondent had taken steps to ensure that his trust accounts are in compliance with the recordkeeping rules and the above mitigating factors, the DEC determined that a censure is the appropriate discipline. The DEC made this recommendation under the mistaken belief that respondent has not been the subject of any prior ethics violations, since his admission to the bar in 1985.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of

unethical conduct is fully supported by clear and convincing evidence.

The clear and convincing evidence established, and respondent admitted, that he did not conclude the estate for nine years. He did not timely file the New Jersey inheritance tax return, did not obtain the necessary tax waiver, permitted a certificate of debt to be filed against the estate and its beneficiaries, did not determine the proper beneficiaries for certain bequests, and did not distribute certain bequests. Respondent's derelictions in this regard constitute gross neglect and lack of diligence.

Respondent also admitted that he failed to communicate with Maciurek; failed to safeguard funds by not posting a trust account check on the estate's ledger card, thereby causing a negligent misappropriation of the estate's funds; and failed to maintain proper records.

The only issue left for determination is the proper quantum of discipline.

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary

history. See, e.g., In re Russell, N.J. (2009) (admonition for attorney whose failure to file answers to divorce complaints against her client caused a default judgment to be entered against him; the attorney also failed to explain to the client the consequences that resulted from her failure to file answers on his behalf); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (admonition where the attorney's inaction in a personal injury action caused the dismissal of the client's complaint; the attorney took no steps to have it reinstated; in addition, the attorney failed to communicate with the client about the status of the case); In the Matter of Anthony R. Atwell, DRB 05-023 (February 22, 2005) (admonition for attorney who did not disclose to the client that the file had been lost, canceled several appointments with the client for allegedly being unavailable or in court when, in fact, the reason for the cancellations was his inability to find the file, and then took more than two years to attempt to reconstruct the lost file); In re Uffelman, 200 N.J. 260 (2009) (reprimand for attorney guilty of gross neglect, lack of diligence, and failure to communicate with a client; the client was forced to shut down his business for three months because of the attorney's inaction); and In re Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to

communicate with the client, and failed to memorialize the basis of the fee; prior admonition and six-month suspension).

Respondent is also guilty of recordkeeping violations and negligent misappropriation of client funds. Generally, reprimands are imposed on attorneys guilty of this type of misconduct. See, e.g., In re Seradzky, 200 N.J. 230 (2009) (because of poor recordkeeping practices, the attorney negligently misappropriated \$50,000 of other clients' funds by twice paying settlement charges in the same real estate matter; prior private reprimand); In re Weinberg, 198 N.J. 380 (2009) (attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account; because he did not regularly reconcile his trust account records his mistake went undetected until an overdraft occurred); In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated \$103,750.61 of trust funds as a result of his failure to reconcile his trust account; he was also guilty of recordkeeping violations); and In re Conner, 193 N.J. 25 (2007) (in two matters, the attorney inadvertently deposited client funds into his business account instead of his trust account, an error that led to his negligent misappropriation of clients' funds; the attorney also failed to promptly disburse funds to which both clients were entitled).

A reprimand may result even if the attorney's disciplinary record included prior recordkeeping violations, so long as there are mitigating factors. See In re Regojo, 185 N.J. 398 (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; two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered).

Here, we considered that only one client matter was involved and that respondent's conduct was most likely the result of having a heavy caseload. We also considered that respondent readily acknowledged his wrongdoing, expressed contrition, took efforts to resolve the estate, offered to make the estate beneficiaries whole, retained an accountant, and has agreed to provide copies of his accountings to the OAE. On the other hand, by neglecting the estate for more than seven years, respondent deprived elderly beneficiaries of needed funds. In addition, he has an ethics history: a 2004 admonition for gross neglect, lack of diligence, and failure to communicate with a

client and a 2004 reprimand for conflict of interest, gross neglect, and failure to communicate with a client.

After balancing the mitigating and the aggravating factors, we conclude that a censure is the suitable degree of discipline in this case. See, e.g., In re Giampapa, 195 N.J. 10 (2008) (censure for attorney who, in one client matter, exhibited gross neglect, lacked diligence, and failed to communicate with the client; two prior private reprimands and an admonition; a significant aggravating factor was the attorney's pattern of failure to cooperate with disciplinary authorities). Although respondent's ethics offenses also include recordkeeping improprieties and negligent misappropriation, Giampapa's misconduct was more serious because it was aggravated by his pattern of failure to cooperate with ethics authorities.

We also determine to require respondent to submit to the OAE, for a two-year period and on a quarterly schedule, monthly reconciliations prepared by an OAE-approved accountant. In addition, we determine to require respondent to submit to the OAE proof that he has filed the New Jersey inheritance tax return, has obtained the necessary tax waiver, and has received a warrant of satisfaction for the certificate of debt.

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

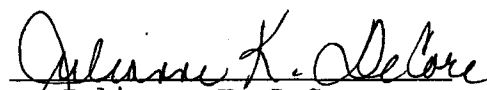
In the Matter of Terry J. Finkelstein
Docket No. DRB 09-264

Argued: October 15, 2009

Decided: December 8, 2009

Disposition: Censure

<i>Members</i>	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:			9			


Julianne K. DeCore
Chief Counsel