

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 09-323 and 09-324
District Docket Nos. XIV-2005-0474E
and VII-2007-0057E

IN THE MATTERS OF
MICHAEL R. HALBFISH
AN ATTORNEY AT LAW

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Decision

Argued: January 21, 2010

Decided: February 17, 2010

John McGill, III appeared on behalf of the Office of Attorney Ethics (DRB 09-323).¹

John A. Tunney appeared on behalf of respondent (DRB 09-323).

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

These two matters were before us on a recommendation for a reprimand (DRB 09-323) and a recommendation for an admonition (DRB 09-324), filed by the District VIII Ethics Committee

¹ DRB 09-324 (admonition) was reviewed on the written record, without oral argument.

("DEC"). The complaint in DRB 09-323 charged respondent with negligent misappropriation of client trust funds (RPC 1.15(a)) and recordkeeping violations (RPC 1.15(d) and R. 1:21-6). The complaint in DRB 09-324 charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep the client reasonably informed about the status of a matter), and RPC 1.16, presumably subsection (a)(2) (failure to withdraw from representation of a client when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client). We determine to impose a single censure for both matters.

Respondent was admitted to the New Jersey bar in 1997. He has no history of discipline.

DOCKET NO. DRB 09-323

As of July 19, 2005, respondent should have been holding \$52,222.56 in his trust account. As of that date, however, his account held only \$39,979.29, a shortage of \$12,243.27. On July 27, 2005, respondent issued a trust account check in the amount of \$39,000, representing the return of a real estate deposit. There were insufficient funds to cover the check because funds had been disbursed from the trust account after July 19, 2005,

leaving a balance of \$33,348.09 and causing an overdraft of \$5,651.91.

By letter dated August 10, 2005, Commerce Bank notified the Office of Attorney Ethics ("OAE") that an overdraft in the amount of \$5,651.91 had occurred in respondent's trust account. The overdraft had occurred five days earlier. By letters dated September 2 and September 22, 2005, the OAE asked respondent to provide a documented explanation for the overdraft. Respondent replied to the OAE by letters dated September 9 and October 23, 2005, but failed to provide sufficient information to fully explain the overdraft. At respondent's request, the OAE gave him additional time to submit the explanation, but he failed to do so.

In February 2006, the OAE conducted a demand audit of respondent's trust and business accounts. The audit covered the period from January 1, 2005 to February 1, 2006. The OAE's audit of the trust account revealed the following recordkeeping deficiencies:

1. he failed to maintain client ledgers [R. 1:21-(6)(c)(1)(B)];
2. some cancelled checks and stubs were non-descriptive [R. 1:21-6(c)(1)(G)];
3. some client matters were not identified on deposit slips [R. 1:21-(6)(1)(A)];
4. no receipts and disbursements journals were maintained [R. 1:21-6(c)(1)(A)];

5. no check book [sic] running balance was maintained [R. 1:21-6(c)(1)(G)];

6. attorney personal funds were commingled in trust account [RPC 1.15(a)];

7. Respondent failed to conduct and prepare monthly three-way reconciliations [R. 1:21-6(c)(1)(H)].

[HPR~~I~~V;Ex.23a.]²

Following the audit, the OAE asked respondent to submit a documented explanation for the cause of the overdraft, along with other information. Although respondent provided trust account records and client files on three occasions, he failed to explain the overdraft. In September 2006, the OAE repeated its request for information. Again, respondent supplied additional information, but did not explain the overdraft. By telephone calls in February and March 2007 and by letter dated March 8, 2007, the OAE again asked respondent to submit a documented explanation for the overdraft, as well as additional information. In a letter dated March 5, 2007, respondent explained that he had been unable to timely comply with the OAE's requests for a number of reasons, including illness, court

² HPR refers to the hearing panel report, dated August 18, 2009.

appearances, and "other challenges," the latter including a possible dissolution of his law partnership.³

In March 2007, respondent advised the OAE that he had retained Robert D. Gelman, CPA, to assist him in this matter. In April 2007, Gelman requested a sixty-day extension to reconcile respondent's trust account. Through correspondence in June and July 2007, Gelman provided preliminary trust account reports to the OAE and sought to explain the August 5, 2005 overdraft, respectively. The records provided revealed many positive and negative client ledger balances in respondent's trust account.

In August 2007, the OAE wrote to respondent, requesting a "candid explanation" for the overdraft and an "accurate accounting" of his trust account, to be provided by August 31, 2007. Respondent failed to comply with the OAE's request.

In September 2007, the OAE asked respondent to provide all previously requested information by October 12, 2007, as well as proof that he had taken steps to correct his recordkeeping deficiencies. The OAE instructed respondent to supply monthly

³ The partnership did not dissolve.

three-way reconciliations for the quarter ending on September 30, 2007. Respondent did not comply with the OAE's instruction.

In March 2006, following the overdraft in the trust account in question (trust account #1), respondent had opened a second trust account (trust account #2). Respondent advised the OAE that he is unable to reconcile trust account #2. He, therefore, opened trust account #3, "in an effort to start over with a clean slate."

As of the date of the DEC hearing, December 2008, respondent had failed to provide the OAE with an accurate explanation for the cause of the August 5, 2005 overdraft in trust account #1. He had also failed to reconcile trust accounts #1 and #2, as of that date.

The DEC noted several mitigating factors. Specifically, respondent made up the shortage in his trust account out of personal funds to avoid any actual harm to any client; he attempted to discover the reason for the shortage in trust account #1; there was no evidence that any of respondent's misconduct was deliberate or that the violations were committed for his personal gain.

In aggravation, the DEC noted that respondent was not timely in complying with the OAE's requests for information. As of the December 2008 hearing date, respondent was still unable

to explain the reason for the \$12,243.27 shortage in his trust account. In addition, neither trust account #2 nor trust account #3 had been reconciled. This was largely because respondent left the job of discovering the cause of the shortage to a forensic accountant. Respondent was unable to pay the accountant's fee, which caused the delay. In the DEC's view

[respondent] has demonstrated to this panel that the problem is not enough of a priority for him. In our view, he must do everything in his power, whether he performs the job himself or hires a professional to do it, to provide a reason for the shortage of account #1 and to reconcile accounts #2 and especially #3, which is an active account.

[HPR1X1].

The DEC concluded that respondent's negligent misappropriation of trust funds, commingling of funds, and recordkeeping deficiencies violated RPC 1.15(a), R. 1:21-6, and RPC 1.15(d). The DEC recommended that respondent be reprimanded. In addition, the DEC recommended that respondent provide 1) quarterly three-way reconciliations of trust account #3 to the OAE; 2) a three-way reconciliation of trust account #2 to the OAE by October 31, 2009; and 3) a three-way reconciliation and/or a detailed accounting and explanation for the shortage in trust account #1 by October 31, 2009. Finally,

the DEC recommended that respondent complete ten hours of accounting courses offered by the Institute for Continuing Legal Education, over a three-year period, and provide proof of completion to the OAE. The DEC suggested that, if respondent fails to comply with the conditions, the OAE could petition the Court for his temporary suspension.

At oral argument, the presenter informed us that, to date, respondent has not provided any of the information requested by the OAE.

DOCKET NO. DRB 09-324

In December 2004, Chester Modzelewski retained respondent to represent him in a civil matter. Modzelewski wanted to sue a swimming pool company for consumer fraud and breach of contract/faulty workmanship. Modzelewski gave respondent a \$3,000 retainer in December 2004.

In July 2005, Modzelewski sent a letter to respondent, expressing his concerns about the delay in his matter. The letter stated:

It has been approximately nine (9) months since we first met. In our initial conversation I expressed my feeling where this contractor may disappear and an expedient serving of the lawsuit would be of

the utmost importance. I would truly appreciate if you would initiate this lawsuit as soon as possible.

[Ex.C-2.]

In September 2005, respondent sent a letter to Modzelewski, enclosing a copy of the complaint that he had prepared. The complaint was not signed and did not bear a docket number or a filed date. Respondent's cover letter stated, "Enclosed please find a copy of the Complaint in connection with the above referenced matter. Thank you for your patience. I will keep you informed as this matter progresses (which should be fairly soon)." The letter did not state that the complaint had been filed. Respondent testified that he did not tell Modzelewski that the complaint had been filed.

In October 2005, Modzelewski wrote to respondent, asking him to provide more information about his case and a signed copy of the complaint.⁴ Respondent did not comply with Modzelewski's request. In January 2006, Modzelewski sent another letter to

⁴ Modzelewski testified that, when he received respondent's September 2005 letter enclosing a copy of the complaint, he either called or wrote to respondent requesting a docket number. Modzelewski's request for a docket number could evidence either his understanding that the complaint had been filed with the court or his suspicion that the complaint had not been filed. This is not clear from the record.

respondent, questioning the caliber of the representation that he had received and demanding a refund of the retainer, if respondent did not provide evidence of work completed on his behalf within ten days.

On January 26, 2006, two days after Modzelewski's letter, respondent filed the complaint. Approximately four months had passed since respondent had sent the unsigned copy of the complaint to Modzelewski. In February 2006, respondent provided Modzelewski with the docket number for his case.

Modzelewski testified that, from the time he retained respondent, he repeatedly stressed his belief that time was of the essence because he feared that the defendant pool company would go out of business. On August 12, 2006, nearly seven months after respondent filed the complaint, he unsuccessfully attempted service on the defendant. On that same date, the court dismissed the complaint without prejudice, for lack of prosecution. Respondent received a notice, two months prior to the dismissal, advising him that the complaint would be

dismissed if no activity took place in the case. Respondent did not advise Modzelewski of the dismissal.⁵

In January 2007, respondent attempted service on the defendant pool company. The county sheriff's office reported that the defendant was no longer at the address provided. In the spring of 2007, respondent made another attempt to ascertain the location of the pool company.

Modzelewski testified that, on four to six occasions, respondent had told him that the reason for his delay in handling the matter was due to problems with his staff, specifically, his secretaries' departure from the firm. In April 2007, Modzelewski sent a letter to respondent, advising him that he was dissatisfied with the representation and demanding a refund of his \$3,000 retainer. Modzelewski testified that, although he had asked for a refund of his

⁵ In a letter to respondent, dated December 20, 2006, Modzelewski stated: "In September 2006 you advised me Pool Liner Systems had forty-five (45) days to respond to your motion before the court. Forty-five days have come and gone and I have not received any notification of what the outcome was." Modzelewski reiterated this concern in an April 2007 letter to respondent. It appears from this language that respondent may have misrepresented to Modzelewski the status of his complaint, which had been dismissed in August 2006. Respondent was not charged with violating RPC 8.4(c), however. Neither was this issue explored during the DEC hearing.

retainer, he had not specifically used language terminating respondent's services. Modzelewski understood, however, that, as of the DEC hearing, respondent was no longer representing him. Modzelewski did not know the status of his lawsuit at that time.

Respondent testified that he did not believe that he had been discharged as Modzelewski's counsel. In March 2008, he filed a new complaint in the matter and in July 2008 he served the defendant. He testified that he decided to file a new complaint to make a "better impression" on the defendant. He sent Modzelewski a copy of the complaint, as well as proof of service. As of the date of the DEC hearing, respondent's motion to enter default on Modzelewski's behalf was pending before the court.

Apparently, when Modzelewski learned, during the DEC hearing, about the pending motion in his case, he "agreed to withdraw his complaint with prejudice" and to allow respondent to represent him through the conclusion of his motion to enter default. The representation would end after the motion was decided. Respondent agreed to repay Modzelewski the \$3,000 retainer in \$500 monthly installments, beginning on May 1, 2009.

At the start of the second day of hearings, the panel chair explained that the panel had been advised that they "are not allowed to resolve these type [sic] of matters." The hearing, thus, resumed.

Respondent testified that he obtained an order entering default on Modzelewski's behalf in January 2009, provided Modzelewski with a copy of the order, and understood that he was to take no further action in the matter. By the DEC hearing date, respondent had given Modzelewski a promissory note for the return of the retainer and had made an initial payment.⁶ Respondent prepared a substitution of attorney form, which was awaiting Modzelewski's signature.

By way of explanation for his delay in handling Modzelewski's matter, respondent testified that, during the time

⁶ Respondent's counsel stated that respondent would have repaid Modzelewski sooner, but that Modzelewski had filed the ethics grievance, prior to his request for the retainer. Respondent was concerned that repayment "might create an appearance that he was trying to buy Mr. Modzelewski off at the hearing." Modzelewski testified, similarly, that respondent advised him that it was inappropriate for him to return the retainer, after the grievance had been filed. Respondent testified, however, that he had told Modzelewski that the request for a refund was not fair because he had completed work on the file and had spent money on the matter. In fact, the grievance was filed in September 2007. As seen by exhibit C-7, Modzelewski asked for the return of his money in April 2007.

of the representation, his partner was "out,"⁷ he had difficulty finding and keeping a secretary, and he focused on his cases already in litigation that "needed immediate responsiveness." He did not think it was wise to file a new lawsuit at that time because, particularly early in the process, he liked to litigate aggressively, hoping to achieve a settlement. Respondent testified further that his mother had been ill during the time in question, a circumstance that required his attention.

In mitigation, respondent's counsel noted that respondent was repaying the retainer fee, had the default entered on Modzelewski's behalf, and would have completed the case, had his services not been terminated. In counsel's view, there was no "real harm" to Modzelewski.

The DEC concluded that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 1.16(a)(2). The DEC found that respondent's "staffing issues would not reasonably cause" the one-year delay in filing a complaint, the two-year delay in attempting service of the complaint, or the failure to advise Modzelewski of the status of his case. In the DEC's view,

⁷ Respondent's partner (and counsel in this disciplinary proceeding) was suspended from the practice of law for six months, effective October 29, 2004. He was reinstated in December 2005.

respondent knew of his inability to properly pursue Modzelewski's case and, rather than so advise his client, he continued the representation, to the client's detriment.

The DEC pointed out that respondent had filed the second complaint on Modzelewski's behalf over eighteen months after the first complaint was dismissed for lack of prosecution and a year after respondent's last attempt to serve the first complaint on the defendant. Moreover, the DEC noted, whether the default that respondent obtained would result in any recovery by Modzelewski was in question, in part because of respondent's delay in pursuing the case. In sum, the DEC found that there was no question that respondent had neglected Modzelewski's file.

In addition, the DEC concluded that, although respondent had communicated with Modzelewski, his communications were neither "frequent enough, nor substantive enough" to allow Modzelewski to have an understanding of the status of his case. In the DEC's view, if respondent was unable to handle the work due to his secretarial problems, his partner's suspension, "and perhaps other unrevealed reasons," he should have refunded Modzelewski's money and returned his file.

The DEC recommended that respondent be admonished for his conduct in this matter.

Following a de novo review of the record, we find that the DEC's findings in both of the matters were supported by clear and convincing evidence.

In DRB 09-323, the complaint charged respondent with negligent misappropriation and recordkeeping violations, in violation of RPC 1.15(a), R. 1:21-6, and RPC 1.15(d). There is no doubt that respondent's recordkeeping was deficient and that he negligently misappropriated client funds. Four years after the overdraft occurred in his trust account, he remains unable to find its cause.

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., 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); In re Weinberg, 198 N.J. 380 (2009) (motion for discipline by consent granted; 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; the attorney had no prior final discipline); 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; the attorney was also found guilty of recordkeeping violations); 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 clients were entitled); In re Winkler, 175 N.J. 438 (2003) (attorney commingled personal and trust funds, negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account \$4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account); In re Blazsek, 154 N.J. 137 (1998) (attorney negligently misappropriated \$31,000 in client funds and failed to comply with recordkeeping requirements); In re Goldstein, 147 N.J. 286 (1997) (attorney negligently misappropriated clients' funds and failed to maintain proper trust and business account records); and In re Liotta-Neff, 147

N.J. 283 (1997) (attorney negligently misappropriated close to \$5,000 in client funds after commingling personal and client funds; the attorney left \$20,000 of her own funds in the account, against which she drew funds for her personal obligations; the attorney was also guilty of poor recordkeeping practices).

A reprimand may still result even if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions. In re Toronto, 185 N.J. 399 (2005) (attorney negligently misappropriated \$59,000 in client funds and committed recordkeeping violations; the attorney had a prior three-month suspension for 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 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 negligently misappropriated client funds as a result of numerous recordkeeping violations and commingling personal and clients' funds; the attorney had received a prior reprimand).

An aggravating factor here is that, as of the date of oral argument before us, respondent had not submitted the records/information requested by the OAE.

As to the matter under DRB 09-324, respondent undertook the representation of a client and failed to give that client's matter the attention it deserved. It may well have been outside forces, such as his law partner's suspension from practice, that prevented respondent from devoting his time to Modzelewski's

case. Nevertheless, Modzelewski was entitled to respondent's best efforts on his behalf. Clearly, he did not receive them. Like the DEC, we find that respondent's failure to withdraw from the representation, if he was indeed handicapped by office setbacks, was a violation of RPC 1.16(a)(2). We find that, altogether, respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 1.16(a)(2) in this matter.

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 flowing from her failure to file answers on his behalf); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (admonition imposed where 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; also, the attorney failed to communicate with the

client about the status of the case); In re Dargay, 188 N.J. 273 (2006) (admonition for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; prior admonition for similar conduct); In the Matter of Ben Zander, DRB 04-133 (May 24, 2004) (admonition for attorney whose inaction caused a trademark application to be deemed abandoned on two occasions; the attorney also failed to comply with the client's requests for information about the case); In the Matter of Ben Payton, DRB 97-247 (October 27, 1997) (admonition for attorney found guilty of gross neglect, lack of diligence, and failure to communicate with the client; the attorney filed a complaint four days after the expiration of the statute of limitations and then allowed it to be dismissed for lack of prosecution; the attorney never informed the client of the dismissal; the attorney also failed to reply to the client's numerous requests for information about the case); In re Uffelman, 200 N.J. 231 (2009) (reprimand imposed; the attorney was guilty of gross neglect, lack of diligence, and failure to communicate with a client; although the attorney had no disciplinary record, the reprimand was premised on the extensive harm caused to the client, who was forced to shut down his business for three months because of the attorney's failure to

represent the client's interests diligently and responsibly); In re Zeitler, 165 N.J. 503 (2000) (reprimand for attorney guilty of lack of diligence and failure to communicate with clients; extensive ethics history); In re Gordon, 139 N.J. 606 (1995) (reprimand for lack of diligence and failure to communicate with the clients in two matters; in one of the matters, the attorney also failed to return the file to the client; prior reprimand); In re Wildstein, 138 N.J. 48 (1994) (reprimand for misconduct in three matters, including gross neglect, lack of diligence, and failure to communicate with clients); and In re Garbin, 182 N.J. 432 (2005) (reprimand by consent for attorney who failed to send her client a copy of a motion to enforce litigant's rights filed in his divorce action and failed to inform him of the filing of the motion, which proceeded unopposed; the court then found her client in violation of the final judgment of divorce; the attorney also failed to return the file to either her client or new counsel; prior admonition).

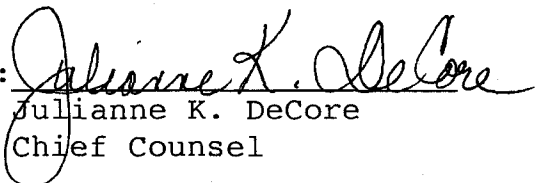
In mitigation, we considered that only one client matter is in question and that respondent has no disciplinary history.

For the totality of respondent's conduct, recordkeeping violations, and negligent misappropriation, aggravated by his failure to cooperate with the OAE; failure to communicate with

Modzelewski; lack of diligence and gross neglect in handling Modzelewski's case; and failure to withdraw from Modzelewski's representation when faced with office difficulties, we determine that a censure is appropriate. We also determine to require respondent to submit to the OAE, within ninety days of the date of the Court order, all records and information previously requested by that office. We recommend that failure to comply with such requirement may cause respondent to be temporarily suspended on motion by the OAE, until respondent's full compliance. We also determine to require respondent to submit to the OAE, on a quarterly basis and for a period of two years, monthly reconciliations of his attorney records, certified by a CPA approved by the OAE.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD


In the Matters of Michael D. Halbfish
Docket Nos. DRB 09-323 and DRB 09-324

Argued: January 21, 2010

Decided: February 17, 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:			9			


Julianne K. DeCore
Chief Counsel