SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 10-118
District Docket Nos. XIV-2006-240E
and XIV-2007-084E

IN THE MATTER OF	
ELIANE RUSSOTTI	
AN ATTORNEY AT LAW	

Decision

Argued: June 17, 2010

Decided: September 30, 2010

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

Andrew J. Cevasco 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 on a recommendation by the District II-A Ethics Committee ("DEC") for the imposition of a three-year suspension, as a result of respondent's violations of

RPC 1.15(a) (failure to safeguard funds), RPC 1.15 (d) (recordkeeping violations), RPC 3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal), RPC 3.3(a) (4) (knowingly offering evidence that the lawyer knows to be false), RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Although the Office of Attorney Ethics ("OAE") had recommended to the DEC that it suspend respondent for a period of "one year to three years" and suggested that disbarment "may be considered under these circumstances," at oral argument before us, the OAE presenter strongly urged us to recommend her disbarment. For the reasons set forth below, we determine to impose a censure on respondent for her unethical conduct.

The alleged misconduct involved the following acts. Respondent falsely answered an interrogatory, in a lawsuit filed against her by the seller of a property in a residential real estate transaction, where respondent served as the settlement agent. In the same lawsuit, respondent produced copies of trust account checks related to that transaction, which had been

fabricated to reflect that they were negotiated when, in fact, they were not. Also, she produced a copy of a deposit slip that had been altered to reflect that the fabricated checks were deposited, when, in fact, they were not.

In addition, respondent did not comply with the OAE's repeated demands that she reconstruct her deficient books and records and provide proof of compliance with a Supreme Court order that required her to use a title insurance company to receive and disburse funds in all real estate transactions in which she acted as settlement agent. The order also required her to continue practicing under the supervision of a proctor. Finally, respondent failed to comply with the recordkeeping rules.

Respondent, who has always been a sole practitioner, was admitted to the New Jersey bar in 1994. At the relevant times, she maintained an office for the practice of law in Englewood.

Respondent has no disciplinary history. However, on May 9, 2007, the Supreme Court entered an order placing her under the supervision of a proctor and requiring "all disbursements from [her] attorney trust account" to be "co-signed by a practicing attorney approved by the [OAE]." On June 7, 2007, the Court entered an order continuing the proctorship and the co-signatory

requirement for trust account disbursements. These conditions were continued by order dated October 2, 2007. The following additional condition was imposed:

> . . . for all real estate transactions in which respondent otherwise would act as settlement agent, respondent shall use the services of a title company to receive and disburse funds and to perform all post-closing activities, effective immediately, and until further Order of the Court. . . .
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> [C,Ex.11.][1]

Each of these orders was entered after consideration of the OAE's motion for temporary suspension, which the Court consistently denied.

Respondent testified that her primary area of practice is commercial and residential real estate transactions. In 2005, she conducted eighty-to-one-hundred closings. She had three secretaries on staff, who wrote checks, prepared the loan documents, and made disbursements.

Respondent's practice began to slow down, in October 2006, due to the downturn in the real estate market. By the date of

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[1] "C" refers to the formal ethics complaint, dated February 11, 2008.

her testimony, November 25, 2008, she had almost no closings. She supported herself by handling the purchase and sale of liquor licenses and some landlord-tenant matters.

On November 10, 2005, respondent acted as settlement agent in a real estate transaction in which Stephanie Jones sold her East Orange house to Manikha Hussain for $350,000. Sometime after the sale, Jones sued respondent, claiming that she had not received any proceeds from the transaction. Attorney Judith E. Rodner represented Jones in the lawsuit, which was filed in Essex County and was captioned Jones v. Russotti. Respondent was represented by David Hoffman.

Rodner testified that, at the end of 2006, she served respondent with interrogatories, consisting of three questions. The first question read:

> If you have ever been a defendant in a lawsuit other than the present one, identify the case by name, court and docket number, and summarize the allegations against you and the outcome of the case, including the terms of any settlement.
>
> [Ex.C-1.]

Respondent answered "no" to this question. Rodner's investigation, however, revealed otherwise. Rodner testified:

> I did a Lexis search and was able to learn that there were four lawsuits all alleging

> fraud of some sort against her and others in other real estate transactions. One in particular was a case where the plaintiff's name was Reverend Alton Dunn, D-u-n-n, and the allegations were very similar to the ones in my case. They involved alleged authorizations by the person selling the property and so I contacted Reverend Dunn, I got his permission to get – to contact his attorney and to obtain his attorney's file in that case. My recollection is that there was a settlement by Miss Russotti and that she paid money. . . . And, in fact, when I submitted these interrogatories, I had also learned that at the time within a few weeks prior to my submission of these interrogatories to Miss Russotti she had been sued by another party who was represented by an attorney in Bergen County and . . . she had just been served within weeks of these questions. So at the time she did not, could not have known what the outcome was going to be. I have since learned that the case was settled without her involvement in that particular settlement but at the time, of course, she had no way of knowing.
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> [1T19-25 to 1T21-9.][2]

The remaining three lawsuits were captioned Schwade v. Russotti, Bell v. Russotti, and Barrett v. Russotti.

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[2] "1T" refers to the transcript of the DEC hearing on November 25, 2008.

At the disciplinary hearing in this matter, respondent was confronted with her answer to the interrogatory set forth above. She testified that she signed the interrogatory answers in January 2007. She offered a variety of reasons to explain the false answer.

According to respondent, at the time, she "must have read them too quick," or she "had too many things going on," or her office was under construction, or she had had hand surgery and was "in a lot of pain, had pain meds," such as Vicodin, Percocet, and Ultracet. Respondent explained that she had had three surgeries, in May and June 2006, and either in late 2006 or early 2007.

In May 2007, respondent submitted a certification in this disciplinary matter, stating that she had been careless in answering the interrogatories. Finally, at the disciplinary hearing, respondent added that she "didn't give it the importance [sic] because [she] wasn't a target defendant, [she] just got sucked into this litigation because of the other defendants basically so it wasn't anything that was done intentionally because it's all public record." Specifically, respondent asserted that her false answer to the interrogatory

could not have been an act of deception because the lawsuits were a matter of public record and could be located on line.

As to the outcomes of the lawsuits, respondent testified that the Dunn matter was settled without any contribution from her or her insurance company. The Barrett matter, respondent explained, was a foreclosure action where she had represented Barrett at the closing. After Barrett denied, in the foreclosure action, that he had signed any of the closing documents, respondent provided a certification stating that he was at the closing. As a result, she was dismissed from the lawsuit.

In the Schwade case, at issue was a prior conveyance that was alleged to have been fraudulent. Respondent was not involved in that conveyance. She was dismissed from the suit with prejudice and no money was paid on her behalf. Finally, in the Bell matter, which was pending at the time of her testimony before the DEC, respondent represented the seller/contractor of a "rehab" property and was "sucked" into that lawsuit when the purchaser sued the seller for poor workmanship. She believed that the matter would be concluded shortly, presumably without payment on her part.

According to respondent, she was not a "target defendant" in any of these cases. In the Dunn, Schwade, and Barrett matters, she was dismissed by way of stipulations of dismissal with prejudice.

In addition to respondent's answer to the interrogatory in the Jones matter, another issue concerned trust account checks that were written for certain disbursements at the Jones-Hussain closing. During discovery in the Jones matter, Rodner requested the production of copies of all checks relevant to the transaction, specifically, all checks identified on the trust account ledger card. Among other checks, respondent produced copies of the following Wachovia Bank trust account checks, which purportedly represented disbursements for the charges identified below:

11151	Attorney Fees	$1300
11152	Filing Fees	1400

According to Rodner, respondent expressly represented that these checks, payable to respondent, matched the checks recorded on the trust account ledger card for the Jones-Hussain real estate transaction.

After respondent failed to comply with Rodner's repeated attempts to obtain the bank deposit slip that matched the

checks, the canceled checks, and the bank statements, Rodner subpoenaed respondent's trust account records from Wachovia Bank. According to an affidavit of a Wachovia employee, checks 11151 and 11152 (among others), which respondent had produced to Rodner and claimed to have been issued at the Jones-Hussain closing, "were not processed at Wachovia Bank." In other words, Rodner stated, the checks "were never negotiated." Yet, respondent had produced a deposit slip showing the deposit of these checks into her business account on November 14, 2005.

Wachovia produced to Rodner the following two checks, payable to respondent for attorney and filing fees, which were actually negotiated in the Jones-Hussain matter:

9788	Attorney Fees	$1900
9790	Filing Fee	2000

Each of these trust account checks was $600 more than the checks produced by respondent in the Jones lawsuit. Moreover, a deposit slip subpoenaed from Wachovia reflected two business account deposits related to the Jones-Hussain transaction, in the amounts of $2000 and $1900, which were made on November 14, 2005. Thus, Rodner concluded, respondent never deposited checks 11151 ($1300) and 11152 ($1400) into her business account, but, instead, deposited the $2000 and $1900 checks.

At a case management conference in the Jones lawsuit, respondent's attorney, David Hoffman, appeared with what he claimed to be the actual, physical checks 11151 and 11152. On June 12, 2008, Hoffman was deposed in the Jones matter and testified that, upon his request, he had been relieved as counsel for respondent in that case.[3]

At his deposition, Hoffman testified that, although he had the original checks 11151 and 11152 in his Jones file, he had only copies of the deposit slip, the transaction files, and the ledger card for the transactions. He did not ask to see the originals.

Hoffman agreed that checks 11151 and 11152 matched the entries on the ledger card for the Jones-Hussain transaction and that the deposit slip reflected that checks were deposited into respondent's trust account.

Hoffman testified that, when the discrepancy between these checks and Wachovia's records arose, Hoffman asked respondent to

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[3] The parties agreed to substitute the deposition of David Hoffman for testimony at the disciplinary hearing. It appears that Hoffman is now deceased.

talk to the bank's branch manager about the matter. He claimed, however, that he and respondent did not discuss the authenticity of checks 11151 and 11152 and the corresponding deposit slip. Just before the case management conference, where the motion to quash the subpoena to Wachovia was to be addressed, Hoffman asked respondent to obtain the original checks. Eventually, the original checks were delivered to Hoffman's office, though he could not recall when or by whom, other than that it was a "young lady" employed by respondent.[4]

According to Hoffman, the "original" checks 1151 and 1152 presented to him looked "real." He believed that, by examining these checks, the court would understand why the subpoena to Wachovia should be quashed. Yet, at the conference, a discrepancy between the checks and the deposit slip was discovered.

Rodner pointed out, at the conference, that the backs of checks 11151 and 11152 showed a different deposit date from that

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[4] It is unclear whether Hoffman's testimony about the "original checks" referred to the "original" copies or the actual checks.

reflected on the copy of the deposit slip.[5] When Hoffman asked respondent to explain herself, she was not able to do so. Hoffman suggested that respondent talk to the bank manager, which she agreed to do. Although respondent did not follow through for a long time, she eventually stated that she had contacted the branch manager, who was supposed to get back to her.

Ultimately, respondent did not get back to Hoffman. A subpoena uncovered the original deposit slip, which was different from the one produced by respondent in discovery. Even though ethics charges were brought against respondent, she continued to state that she would look into it, but did not follow through.

Rodner's testimony at the DEC hearing was consistent with Hoffman's deposition testimony. According to Rodner, she and Hoffman initially believed that checks 11151 and 11152 were genuine.

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[5] The backs of the checks show a date that appears as "NOV - 0 05," whereas the date on the deposit slip is "14NOV05."

For her part, respondent testified that the trust account checks that she gave to Hoffman, that is, checks 11151 and 11152, were located in the file for the Jones-Hussain transaction. When she pulled the checks from the file, she believed them to be genuine. She examined both sides, noting the endorsement and the deposit notation. However, she did not check them against her bank records or any other office record.

Respondent testified that she did not know how these checks got into the file. She said that they appeared to have been written by "an old secretary" of hers. She also did not know how the checks had come to be stamped on the back.

Respondent admitted that the endorsements and banking information on the backs of checks 11151 and 11152 matched the endorsements and banking information on the backs of checks 9790 and 9788. She did not know how this had occurred.

Respondent believed that a disgruntled employee may have altered the checks, but she did not know how it had been done. She testified that the "For deposit only" written on the back of the altered checks resembled that of former secretary Olga Kresova, who, respondent claimed, did not leave her employ on good terms. Respondent explained that Kresova missed a lot of days from work, without calling in, and was "[a]pparently . . .

doing drugs." When asked if she believed that Kresova had altered the checks, respondent stated, "Anything is possible."

Olga Kresova testified, at the DEC hearing, that she was employed by respondent from May 2004 through October or November 2006. She attributed the termination of her employment to her late repayment of a loan from respondent and her failure to call the office when she would be "out sick or something."

According to Kresova, she was "going through a lot of stuff" at the time. She agreed that she did not leave respondent's employ on good terms, but, she claimed, the decision was mutual.

Kresova denied that she wrote out the checks, although she had seen checks "like this." She denied that she wrote "for deposit only" on the backs of the checks.

Kresova was not asked many questions about the Jones-Hussain transaction. She testified to nothing more than that she remembered the names Hussain and Jones; she worked on the file; and she had sent a fax to the title company.

OAE investigator Gary Lambiase testified that checks 9788 and 9790 were not in the documents provided by respondent's counsel, in response to the OAE's request for all documentation used by her accountant to perform a three-way reconciliation for

respondent's trust account for November 2005. Yet, according to respondent's trust account bank statement for November 2005, these checks were cashed. Moreover, Lambiase noted that checks 11151 and 11152 are well beyond the sequence of the checks in the check register and are not even listed in the register for the month of November.

The HUD-1 form for the transaction contains figures that, arguably, total the amounts of checks 9788 and 9790. Check 9788, in the amount of $1900, purportedly represented payment of respondent's services. According to the HUD-1, respondent charged $450 for title examination, $600 for document preparation, and $850 for attorney fees. These figures total $1900, the amount of check 9788.

Also, according to the HUD-1, respondent charged a total of $950 for recording fees, $150 for a notice of settlement, and $900 in "administrative fees." These figures total $2000, the amount of check 9790, which was represented to be for the payment of filing fees.

Lambiase testified that he conducted the demand audit of respondent's records. He described respondent's records, which he first requested in August 2006, as "practically non-existent." Lambiase understood that respondent's accountant had

passed away. Respondent, he stated, had "a very good practice" and, therefore, a lot of records. Yet, due to the "practically nonexistent" records, she was unable to account for the funds that she held in trust. Lambiase subpoenaed some bank records, but, when he compared respondent's existing reconciliation with the bank's documents, "some of the numbers that I had from the bank that the other accountant gave me weren't in the reconciliation."

With respect to specific accounting deficiencies, Lambiase testified that respondent did not maintain trust and business account receipts and disbursements journals; the trust account ledger cards were incomplete and inaccurate; and she did not have records of three-way reconciliations.

Morever, Lambiase testified, the $1200 difference between the two checks that were cashed (9788 and 9790) and the two checks that were not (1151 and 1152) "had to come out of someplace." As of the date of Lambiase's testimony, there remained $3330 in undisbursed funds in the trust account for the Jones-Hussain closing.

When Lambiase reviewed the HUD-1 against respondent's records for the transaction, he determined that two items were never paid – the title insurance policy and an invoice to an

attorney named Cerruti, who owned the title company and was to receive a separate check from the title company, in the amount of $750. There were no checks cashed in December 2005. In addition, Lambiase did not know whether these checks were cashed later or whether they were a part of the $3300.

Respondent's records reflected a $750 trust account check issued to Cerruti (9787), on November 10, 2005, but, as of December 2005, it had not been paid. Similarly, check 9789 was issued to Castle Rock Title Agency, in the amount of $1980, but was not paid.[6]

As of November 2008, the OAE still did not have an understanding of the state of respondent's trust account in the summer of 2006. The OAE gave respondent extensions of time so that she could straighten out her records, but she failed to meet the deadlines.

Certified public accountant Patricia Rivera testified that she met with respondent, on September 30, 2008, to reconcile her

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[6] In a May 4, 2010 letter to Office of Board Counsel, respondent's counsel represented that the original checks issued to Cerrutti and Castle Rock were never negotiated and that they were replaced with check 10537 and 10539, which were issued on April 5, 2006 and cashed in that same month.

attorney trust account. As of her August 17, 2009 testimony, Rivera estimated that the account was "probably 98 percent reconciled."

Based on her review of respondent's records, Rivera determined that respondent's previous accountant, Bill Snyder, had stopped working on the records, sometime in 2004, and that no work had been done until another ledger was begun by another accountant, "Ideal," in July 2005.

According to Rivera, Ideal's recordkeeping was problematic. For example, "[accountant] used a two-sided general ledger system with subaccounts for the client ledgers and he lumped several separate closings into the same subaccounts." Although Ideal had done a substantial amount of work with respondent's records, "they could not do a three-way reconciliation because the ledgers just didn't balance." Rivera was unable to use any of Ideal's work because of the two-sided entry system and because she did not know the kind of software used by Ideal.

Rivera purchased the Easy Trust software program and dedicated eighty hours to her reconciliation effort. Respondent's staff was cooperative, but it was difficult for Rivera to gather additional information, due to respondent's illness, which kept her out of the office. Because respondent's

staff was inexperienced, respondent required more time to carry out Rivera's directions. Rivera conducted the reconciliation with actual bank records and actual checks and stubs and bank statements.

As of Rivera's August 17, 2009 testimony, she had reconstructed the reconciliation from August 2005 to August 2006. However, a discrepancy remained with the beginning balance in the spring of 2005. She estimated that the entire reconciliation could be completed by January 2010.

Respondent testified that, when she started practicing law, an accountant named William Snyder assisted her with the bookkeeping until his death, at the end of 2005. At that time, Laura Ingraffia, with whom Snyder had affiliated after he became ill, in 2004, took over his duties.

According to respondent, Ingraffia did not perform the reconciliations of her attorney records, even though respondent sent her the information and requested that she undertake that task. Eventually, respondent hired Ideal Associates and requested that Ideal get all the records directly from Ingraffia. Respondent called Ideal two-to-three times a week to ask about the status of the reconciliations. Each time, she was

told that Ideal was "working on it" or that there were computer issues — "it was always something."

Respondent explained what happened after the OAE notified her that there were deficiencies with respect to her trust account:

> Well, we had gotten Ideal Associates. Also Lee [Gronikowski, the OAE presenter] had recommended that I stop working on the current . . . trust account, open up a new account and call his office to try to get a different type of software program, which we did. We got the trust ledger program which will do the three-way [reconciliations] and also would pull the information from the closing statements and the ledger cards and that did not work out at all.
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> [1T80-16 to 25.]

After about five months of continuous problems, respondent discontinued the program. At this point, the trust account reconciliations were done manually by Dave Pollizzotto, the office manager at respondent's counsel's law firm. Respondent claimed, however, that Pollizzotto, too, was unable to figure out the software program.

The state of respondent's records and her refusal or inability to cooperate with the OAE's multiple deadlines and extensions for her to get them in order led to a number of motions for temporary suspension filed by the OAE. In the first

motion, filed in April 2007, the Court required, as part of its order to show cause, that respondent practice law under the supervision of a proctor and have all disbursements from her trust account co-signed by another attorney. In June 2007, the Court denied the motion for temporary suspension without prejudice, but ordered respondent to cooperate fully with the OAE and comply with its "requests and directives in connection with its investigation."

In September 2007, the OAE wrote to the Court and, again, requested respondent's temporary suspension, inasmuch as she still had not complied with the OAE's request for her trust and business account records from June 1, 2004 through October 2006. In addition, respondent had failed to comply with the OAE's request for complete records for March through June 2007. The OAE wrote to her proctor, but he did not respond. Respondent's counsel, presumably Hoffman, claimed that respondent was having difficulty reconciling her trust account for the period encompassing October 2005 to October 2006. The OAE complained that its initial demand letter had been issued in August 2006 and that respondent still had not complied with it.

The OAE's motion was denied again. In its order, however, the Court required respondent to use a title company in her

place, in all transactions in which she was to act as settlement agent. Further, she was to continue to practice under the supervision of a proctor and to have all trust account disbursements approved by a co-signatory.

On October 9, 2007, the OAE wrote to respondent's proctor, attorney John A. Solimano, and requested the following:

> Please confirm in writing how your client intends to implement this Order in her practice. Please include the name of the title insurance company or companies she intends to use. In addition, please have your client or the title insurance agent provide the Office of Attorney Ethics with the financial details of each transaction, including evidence of all receipts and disbursements made in connection with each closing.
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> [C,Ex.13.]

On October 19, 2007, respondent's counsel in this matter replied to the above letter and informed the OAE that respondent "has been utilizing and will continue to utilize the services of Apple Title Agency." With respect to the OAE's request for the details of all transactions, including evidence of receipts and disbursements, respondent's counsel stated that, because respondent would not be acting as settlement agent, she would not have access to the information requested by the OAE.

In January 2008, the OAE wrote to respondent's proctor and informed him that the OAE had "no proof of her compliance" with the Court's order, quoting from its October 9, 2007 letter.

Respondent testified that, when the OAE first sought her temporary suspension, in April 2007, she agreed to work under the supervision of Solimano. According to respondent, she has cooperated with Solimano and has complied with all of the requirements of the proctorship, including his requests for information.

Respondent arranged for Apple Title to act as closing agent with respect to disbursements and receipts at all real estate transactions. Moreover, her attorney in this matter sent the OAE a case-listing report for all transactions in which respondent was involved, between October 2007 and February 2008, as well as the HUD-1s for those transactions.

In its January 29, 2010 report, the DEC concluded that respondent violated all RPCs with which she was charged. First, the DEC found that respondent's "no" answer to the interrogatory, asking whether she had ever been a defendant in a lawsuit was false because, at the time, she either was or had been named a defendant in four different civil actions. Moreover, the DEC noted, respondent either "could not offer

explanations or offered explanations, which, quite frankly, were not sufficient." Thus, the DEC concluded, respondent had violated RPC 3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal), RPC 3.3(a)(4) (knowingly offering evidence that the lawyer knows to be false), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Second, respondent violated the same rules, when, through counsel, she submitted to the court the altered trust account checks and the altered deposit slip, which respondent had given to him and which were never negotiated. In reaching this conclusion, the DEC noted that, when respondent appeared before the Supreme Court, on June 5, 2007, pursuant to the Court's order to show cause, she could offer no explanation as to how these documents had been altered.

Third, the DEC found, as the OAE's demand audit concluded, that respondent's records were deficient; that, despite several extensions, she failed to reconstruct her records; and that, despite the Court's June 5, 2007 order conditioning her continued ability to practice law on, among other things, her full cooperation with the OAE, she failed to comply fully with

the OAE's directive that she reconstruct her records. These acts violated RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority).

Fourth and finally, the DEC found that respondent's recordkeeping was deficient because she (1) did not maintain trust and business receipts and disbursement journals, (2) did not maintain accurate and complete trust account ledger cards, (3) did not record trust account transactions, (4) did not maintain a running balance in her trust account checkbook, (5) did not reconcile the trust account, and (6) did not account for trust funds or identify clients for whom she held funds in trust. According to the DEC, these deficiencies violated RPC 1.15(a) and RPC 1.15(d).

The DEC noted one mitigating factor, that is, respondent's unblemished disciplinary history. The following aggravating factors were identified: (1) failure to cooperate with disciplinary authorities; (2) lack of remorse; (3) failure to "remediate despite opportunities to do so;" (4) placing blame on others whom she could not identify; and (5) "[l]ack of acknowledgment of her own fault for the various transgressions perpetrated."

The DEC recommended a three-year suspension.

Following a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence.

Some, but not all, of the DEC's findings were supported by clear and convincing evidence. With respect to the interrogatory in the Jones matter, we find that respondent misrepresented that she had never been named a defendant in a lawsuit. Although she attempted to offer reasons to excuse this misrepresentation, none of them were compelling.

Respondent's false interrogatory answer violated RPC 8.4(c) and RPC 8.4(d). RPC 8.4(c) prohibits an attorney from engaging in "conduct involving dishonesty, fraud, deceit and misrepresentation." RPC 8.4(d) prohibits an attorney from engaging in "conduct that is prejudicial to the administration of justice." Without doubt, respondent's answer was a misrepresentation. Moreover, the answer was prejudicial to the administration of justice, insofar as the false answer had the potential of denying plaintiff's counsel knowledge that may have been relevant to the prosecution of her client's civil case against respondent.

Notwithstanding that respondent's answer to the interrogatory was a misrepresentation, we find that she did not

violate either RPC 3.3(a)(1) or RPC 3.3(a)(4). RPC 3.3(a)(1) and (4) provide, in pertinent part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> . . . .
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. . . .

RPC 3.3 is titled "Candor Toward the Tribunal." It clearly applies to statements and representations made to a court and evidence offered to a court. In this case, respondent's misconduct was limited to her submission of the false interrogatory answer to counsel for the plaintiff in the civil action. There was no evidence, at the disciplinary hearing, that this interrogatory answer was ever submitted to a court.

Before we can determine whether respondent violated RPC 3.3(a)(1), RPC 3.3(a)(4), RPC 8.4(c), and RPC 8.4(d) by providing the fabricated checks and deposit slip to Hoffman, we must first decide whether it was she who altered these documents or whether she had knowledge of the alteration.

Undoubtedly, trust account checks 9788 and 9790, in the amounts of $1900 and $2000, which were subpoenaed from Wachovia,

were the checks issued at the closing. The business account deposit slip subpoenaed from Wachovia, as well as the November 2005 statement for the Wachovia trust account, leave no question that respondent negotiated these checks on November 14, 2005. Finally, Wachovia certified that checks 11151 (for $1300) and 11152 (for $1400), which respondent claimed to have been the checks issued at the closing, were never negotiated.

Respondent denied fabricating or altering checks 11151 and 11152. She contended that she did not know who had done so, although she speculated that it was a disgruntled employee, perhaps Kresova, who did not leave her employ on the best of terms. Respondent offered no further explanation. Kresova's testimony, too, shed no light on the issue.

It is troubling that, when it became apparent to respondent's attorney in the Jones matter that the checks had been either fabricated or altered and when he repeatedly instructed respondent to talk to the bank manager about what had happened, she repeatedly failed to comply with his instruction. It is difficult to believe that respondent, having been questioned about her submission of these two checks in a lawsuit, would not seek an explanation immediately or, at least

in short order, upon learning of the problem, particularly when instructed to do so by her own attorney.

Yet, it cannot be found that respondent fabricated or altered these checks, in the absence of clear and convincing evidence. R. 1:20-6(1)(B) (formal charges of unethical conduct "shall be established by clear and convincing evidence").

Clear and convincing evidence is

> that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.
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> [In re Seaman, 133 N.J. 67, 74 (1993).]

In this case, even though there is a strong suspicion that respondent was the person who fabricated or altered the checks and the deposit slip, the proofs fall short of the clear and convincing standard that she did so. Respondent testified that it was her staff who wrote out the checks. No other witness contradicted her testimony.

As to the OAE's claim that respondent failed to cooperate with its attempt to reconstruct her bookkeeping records, we find no clear and convincing evidence of that violation. Respondent

and Rivera testified about respondent's efforts to comply with the OAE's demand. They testified about the various accountants whom respondent had hired, but who failed to competently carry out their duties. Rivera testified that she was continuing her effort to finally get respondent's books in order, which was certainly a difficult task, given Lambiase's testimony that the records were practically non-existent.

Respondent's failure to produce for the OAE the requested financial details of each transaction in which Apple Title has acted as settlement agent is a different matter, however. While it is true that these documents are not in her possession, it is equally true that she could obtain copies of them and turn them over to the OAE. Her failure to do so is a lack of cooperation with that office, a violation of RPC 8.1(b).

Finally, we find that respondent violated RPC 1.15(d), which requires attorneys to comply with the recordkeeping rules set forth in R. 1:21-6. Lambiase identified the various deficiencies in respondent's recordkeeping system, including the lack of receipts and disbursements journals, incomplete and inaccurate trust account ledger cards, and the lack of three-way reconciliations. Included within this finding is respondent's inability to account for trust funds and to identify clients for

whom trust funds were held. The OAE's complaint identified this as a violation of RPC 1.15(a), but it is more properly a violation of RPC 1.15(d).

To conclude, respondent violated RPC 1.15(d), RPC 8.1(b), RPC 8.4(c), and RPC 8.4(d).

The Court has consistently imposed at least a reprimand for misrepresentations. See, e.g., In re Kasdan, 115 N.J. 472 (1989) (reprimand for intentionally misrepresenting to a client the status of a lawsuit); In re Sunberg, 156 N.J. 396 (1998) (reprimand for lying to the OAE about the fabrication of an arbitration award; the attorney also failed to consult with a client before permitting two matters to be dismissed; mitigating factors included the attorney's unblemished disciplinary record, the passage of time since the incident, the lack of personal gain and harm to the client, the aberrational nature of the attorney's misconduct, and his remorse); In re Powell, 148 N.J. 393 (1997) (reprimand for misrepresenting to the district ethics committee that an appeal had been filed; the attorney was also guilty of gross neglect, lack of diligence, and failure to communicate with his client); and In re Kantor, 165 N.J. 572 (2000) (reprimand for misrepresenting to a municipal court judge that the attorney's vehicle was insured on the date it was

involved in an accident when, in fact, the policy had lapsed for nonpayment of premium when the attorney's girlfriend had misplaced the envelope containing the bill and the payment and, consequently, never mailed it).

When an attorney makes a misrepresentation while under oath, however, the discipline imposed is more severe. See, e.g., In re Monahan, 201 N.J. 2 (2010) (censure for attorney's misrepresentation in two certifications submitted to a federal district court; the attorney misrepresented that he had not filed an appeal because he was seriously ill and unable to work; mitigating factors included the attorney's unblemished ethics history of twenty-three years; his use of prescription drugs for the treatment of pneumonia at the time he drafted and signed the certifications; his cooperation with disciplinary authorities; his contrition and remorse; and the lack of personal gain); In re Poley, 196 N.J. 156 (2008) (censure imposed on attorney who pleaded guilty to fourth degree false swearing, in violation of N.J.S.A. 2C:28-2a; the attorney had lied under oath during a hearing for a temporary restraining order as the result of a domestic violence dispute); In re Perez, 193 N.J. 483 (2008) (on motion for final discipline, the attorney was suspended for three months for false swearing; the attorney, then the Jersey

City Chief Municipal Prosecutor, lied under oath, at a domestic violence hearing, that he had not asked the municipal prosecutor to request a bail increase for the person charged with assaulting him); In re Coffee, 174 N.J. 292 (2002) (on motion for reciprocal discipline, three-month suspension imposed for attorney's submission of a false affidavit of financial information in his own divorce case, followed by his misrepresentation at a hearing under oath that he had no assets other than those identified in the affidavit); and In re Brown, 144 N.J. 580 (1996) (three-month suspension imposed on attorney who, during the trial in the plaintiff-hospital's collection suit for recovery of expenses incurred in the treatment of the attorney's drug and alcohol dependency, testified untruthfully that he had never used cocaine, had never been treated for cocaine dependency, his treatment at the hospital had been limited to alcoholism, and the treatment had been fewer than the number of days billed; we noted that the attorney's misrepresentations at trial were made nearly five years after his alleged successful completion of a rehabilitation program). But see, In re Manns, 171 N.J. 145 (2002) (reprimand for misleading the court in a certification in support of a motion to reinstate a complaint as to the date the attorney learned

that the complaint had been dismissed, as well as lack of diligence, failure to expedite litigation, and failure to communicate with the client; special circumstances considered).

Although three-month suspensions have been imposed for lying under oath, of late the Court has censured attorneys guilty of this offense. Thus, in this case, a censure would be the appropriate measure of discipline for respondent's false interrogatory answer.

Recordkeeping irregularities ordinarily are met with an admonition, so long as they have not caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009) (for extended periods of time, attorney left in his trust account unidentified funds, failed to satisfy liens, allowed checks to remain uncashed, and failed to perform one of the steps of the reconciliation process; no prior discipline); In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution); In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (numerous recordkeeping deficiencies); In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (failure to use trust account and to maintain required

receipts and disbursements journals, as well as client ledger cards); In the Matter of Christopher J. O'Rourke, DRB 00-069 (December 7, 2000) (attorney did not keep receipts and disbursements journals, as well as a separate ledger book for all trust account transactions); and In the Matter of Arthur N. Field, DRB 99-142 (July 19, 1999) (attorney did not maintain an attorney trust account in a New Jersey banking institution). But see In re Colby, 193 N.J. 484 (2008) (reprimand for attorney who violated the recordkeeping rules; although the attorney's recordkeeping irregularities did not cause a negligent misappropriation of clients' funds, he had been reprimanded for the same violations and for negligent misappropriation as well).

Ordinarily, admonitions are imposed for failure to cooperate with disciplinary authorities, if 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 04-512 (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); In the Matter of Jon Steiger, DRB 02-199 (July 22, 2002) (attorney did not reply to the district ethics committee's numerous communications regarding a grievance); In the Matter of Grafton E. Beckles, II, DRB 01-395 (December 21, 2001) (attorney did not cooperate with disciplinary authorities during the investigation and hearing of a grievance); In the Matter of Andrew T. Brasno, DRB 97-091 (June 25, 1997) (attorney failed to reply to the ethics grievance and failed to turn over a client's file); and In the Matter of Mark D. Cubberley, DRB 96-090 (April 19, 1996) (attorney failed to reply to the ethics investigator's requests for information about the grievance).

Although the totality of respondent's misconduct, that is, the misrepresentation in the interrogatory answer, the recordkeeping violations, and the failure to cooperate with the OAE, suggests a measure of discipline greater than a censure, we took into account respondent's unblemished disciplinary history of eleven years before the first act of misconduct. We, therefore, found that a censure was sufficient discipline in this case.

Members Doremus, Wissinger, and Zmirich voted to impose a three-month suspension.

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 Matter of Eliane Russotti
Docket No. DRB 10-118

Argued: June 17, 2010

Decided: September 30, 2010

Disposition: Censure

Members	Disbar	Three-month 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:		3	6			

By Julianne K. DeCore
Chief Counsel