SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-249
District Docket No. XIV-07-495E

IN THE MATTER OF	
DOMINICK SANCHEZ	
AN ATTORNEY AT LAW	

Decision

Argued: November 20, 2008

Decided: December 19, 2008

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), following the Supreme Court of Florida's approval of

respondent's disbarment on consent, in March 2007, for his admitted violations of several Rules Regulating The Florida Bar.[1] The violations arose out of respondent's admitted mishandling of trust account funds in two client matters, recordkeeping violations, and failure to produce trust account records, pursuant to a subpoena. Respondent's conduct encompassed three matters.

The OAE contends that, in the absence of clear and convincing evidence that respondent was guilty of knowing misappropriation, a suspension of no fewer than six months is warranted. Moreover, the OAE requests that, when respondent seeks reinstatement in New Jersey, he be required "to affirmatively establish by clear and convincing evidence that his misuse of funds in [two client matters] were [sic] not knowing misappropriations."

For the reasons stated below, we determine to censure respondent, with the condition that, if he is removed from the

[1] In Florida, there are two types of disbarment: permanent and non-permanent. An attorney who is not permanently disbarred may seek readmission within five years after the date of disbarment, unless the Supreme Court imposes a longer term. Respondent was not permanently disbarred.

Supreme Court's ineligible list for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection (CPF), he provide the OAE with quarterly reconciliations of his attorney accounts for a two-year period.

Respondent was admitted to the New Jersey and Florida bars in 1999. At the relevant times, he maintained an office for the practice of law in Miami.

Respondent has no disciplinary history in New Jersey. Since September 2007, however, he has been on the ineligible list for failure to pay the annual attorney assessment to the CPF.

The facts are taken from the Disbarment on Consent document that was submitted to the Supreme Court of Florida for its approval. The facts recited in that document are sparse.

In the first disciplinary matter, respondent "represented to the Florida Bar that he was holding $20,086.51 in trust for the Kendall Regency Medical Center ("Kendall Regency") matter. He stated that the funds were received from his associate Abel Batista. In fact, respondent never received or possessed the monies. He eventually paid the monies to Kendall Regency "using other client funds."

In addition, a review of respondent's trust account bank statements uncovered "numerous overdrafts." Respondent's position was that the "irregularities in the trust account were caused by gross negligence and mismanagement of the trust account."

Based on these facts, respondent admitted that he had violated "Rule 5-1.1(b) (misappropriation) of the rules Regulating Trust Accounts."

In the second disciplinary matter, respondent "failed to produce trust account records pursuant to a duly issued subpoena." He admitted having violated "Rule 5-1.2(g) (failure to comply with subpoena) of the rules Regulating Trust Accounts."

In the third disciplinary matter, respondent "received $5,300.00 on behalf of John Virga and failed to remit that portion of the funds due Mr. Virga." Respondent admitted having violated "Rule 5-1.1(b) (misappropriation) of the Rules regulating Trust Accounts."

As stated previously, on March 15, 2007, the Supreme Court of Florida approved respondent's disbarment by consent. Respondent did not report his disbarment to the OAE, as required by R. 1:20-14(a)(1).

When respondent was first contacted by the OAE, he "indicated" that he would "more than likely agree to consent to disbarment" in New Jersey. Thereafter, the OAE had no further communication with respondent, who did not reply to its subsequent letters.

As indicated above, the OAE recommends a suspension of no fewer than six months, relying on the following cases: In re White, 192 N.J. 443 (2007) (on motion for reciprocal discipline, New York attorney who never read the recordkeeping rules and therefore never implemented their requirements was disbarred in that state for "serious and pervasive abuses with respect to his fiduciary obligations" and "ignorance and/or disregard of the rules regarding the proper maintenance of an escrow account render[ing] him a danger to the public;" the attorney commingled personal and trust funds, made twenty-seven ATM withdrawals from the trust account and negligently misappropriated at least $2,752.98 in trust account funds during a nine-month period; the attorney did not report his disbarment to the OAE); In re Librizzi, 117 N.J. 481 (1990) (attorney deposited the funds of three clients into his business account instead of trust account, made overpayments to three clients from the trust account, and issued trust account checks to himself which he

deposited into his business account at times when the latter account reflected overdrafts; a random audit revealed that the attorney maintained a "shoebox" accounting system, that he had not reconciled his trust account in twelve years, and that he had reconciled the business account "only sporadically;" his recordkeeping was described as "totally inadequate," as he "essentially . . . had no record-keeping of his trust account;" the attorney had twenty-year unblemished disciplinary history); In re Gasper, 169 N.J. 420 (2001) (in a default matter, the attorney was a trustee for three beneficiaries under their grandmother's will, removed $26,500 in the first beneficiary's trust funds from a Merrill Lynch account, deposited only $24,000 into his trust account, disbursed $26,000 to the beneficiary, thereby invading $2000 of other clients' funds, carried a negative balance for the beneficiary's trust for sixteen-month period, failed to submit the required federal income tax K-1 forms for two years, and refused to honor the beneficiary's request to liquidate the trust; the attorney also made three improper disbursements from the trusts for the other beneficiaries in the form of an unauthorized loan to their father and to fund a payment to the first beneficiary; as a result of "clerical errors," the attorney also deposited into

his payroll account $1000 of the first beneficiary's trust funds and $2600 in funds that he was holding for other clients in a real estate matter; he also was inconsistent in maintaining client ledger cards, his disbursements journal was not in chronological order, and he did not perform quarterly reconciliations; finally, in another matter, the attorney failed to communicate with the client, failed to create a written fee agreement, failed to notify the client of his receipt of monies on her behalf, and failed to turn them over to her for two years; default nature of the matter and attorney's prior reprimand caused the discipline to be enhanced from three-month to six-month suspension); In re Uzodike, 159 N.J. 510 (1999) (in a default matter involving two complaints, respondent commingled trust and $25,000 in personal funds, negligently misappropriated $2,897.09 by invading the trust funds of clients, failed to maintain adequate records, failed to timely remit mortgage pay-offs in two matters, failed to file a discharge in two separate transactions and to record a mortgage, engaged in a pattern of neglect, failed to communicate with the client in two matters, and made false statements to the OAE about his lack of knowledge regarding a pre-existing mortgage; discipline enhanced from three-month suspension due to attorney's default); and In re

Brown, 123 N.J. 471 (1991) (for three years attorney maintained no trust account and failed to comply with "every trust recordkeeping requirement of R. 1:21-6," causing him to negligently misappropriate trust funds in two client matters and to fail to promptly deliver funds to a third party in another matter; the attorney also practiced while ineligible for failure to pay his CPF assessment for two years and failed to communicate with his client in another matter; recordkeeping violations were described as "inexcusable derelictions" and considered to be comparable to those in Librizzi).

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings in the Disbarment on Consent, which were approved by the Supreme Court of Florida.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the

> discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
>
> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

Subsection (E), however, applies in this matter because respondent's unethical conduct warrants substantially different discipline from that meted out in Florida. Simply stated, the record developed in the Florida disciplinary proceeding does not clearly and convincingly establish that respondent knowingly misappropriated trust funds, an offense that would call for disbarment in New Jersey.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another

jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

A proper assessment of what transpired in the three disciplinary matters in Florida is hampered by the bare bones recitation of facts in the Disbarment on Consent document. We will address the second disciplinary matter first, followed by the two matters involving trust account funds.

In the second disciplinary matter, the facts are limited to respondent's failure to produce trust account records pursuant to a subpoena, conduct that constituted a violation of Florida Rule 5-1.2(g). This rule has four subsections. The first subsection requires that Florida lawyers "maintain trust accounting records as required by these rules." The rule further provides that, "as a condition of the privilege of practicing law in Florida, [a lawyer] may not assert any privilege personal to the lawyer that may be applicable to production of same in these disciplinary proceedings." If an attorney fails to fully comply with a subpoena for the

production of trust account records, the attorney may be suspended "until such time as the member fully complies with the subpoena and/or until further order of the court."

The New Jersey Court Rules closest to this Florida rule are R. 1:21-6(h) and (i) and R. 1:20-3(g)(4). R. 1:21-6(h) commands an attorney to produce, in response to a subpoena duces tecum, any of the records required to be kept by lawyers in this state. R. 1:21-6(i) deems the failure to comply with such a subpoena a violation of RPC 1.15(d) (recordkeeping rule) and RPC 8.1(b) (failure to cooperate with disciplinary authorities). When an attorney fails to comply with a subpoena for the production of trust account records, the OAE may seek the attorney's temporary suspension, which will not be lifted until the attorney produces the requested records. R. 1:20-3(g)(4).

The facts presented in the Florida document support a finding that respondent violated Florida's and New Jersey's rules with respect to compliance with subpoenas seeking an attorney's trust account records.

In the other two matters, Kendall Regency and Virga, it is difficult to characterize respondent's disposition of the funds as knowing misappropriation or negligent misappropriation or some other offense. In the case of Kendall Regency, the

Disbarment on Consent document states only that (1) respondent lied to the Florida Bar, when he represented that he was holding $20,086.51 in trust "pertaining to the Kendall Regency . . . matter," even though he had never received or possessed the funds, and (2) he used "other client funds" to pay the $20,000 to Kendall Regency.

The document also states that there were "numerous overdrafts" in respondent's trust account, which respondent attributed to "gross negligence and mismanagement of the trust account." It is not entirely clear whether these recordkeeping issues were responsible for the missing Kendall Regency funds.

Based on these scant facts, respondent admitted to having violated Florida Rule 5-1.1(b), which the Consent on Disbarment characterizes as the "misappropriation" rule. Specifically, the rule provides:

> Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion.
>
> [Florida Rule 5-1.1(b).]

Essentially, the rule provides that funds received for a particular purpose may not be used for any other purpose and prohibits an attorney from using client funds to offset a claim for attorney's fees. Broadly, this rule appears to correspond to New Jersey's Wilson and Hollendonner rules (disbarment required for knowing misappropriation of client and escrow funds), as well as those provisions of RPC 1.15 dealing with the safekeeping of the property of clients and third persons.

As to the other two matters, Kendall Regency and Virga, the Disbarment on Consent is unclear in several respects. First, in Kendall Regency, it does not indicate what happened to the $20,000 that respondent never received or why he told the Florida Bar that he was holding the funds in trust. Second, the document does not indicate whether the funds were unaccounted for due to the recordkeeping violations or whether those violations were independent of the missing funds. All that is known from the facts is that respondent used the funds of other clients to pay the $20,000 to Kendall Regency, which he should have been holding for Kendall in the first place. It may be that respondent used the other clients' funds unknowingly and unintentionally as a result of poor recordkeeping, in which case the misappropriation would have been negligent. It may also be

that respondent knowingly misappropriated either Kendall Regency's or the other clients' funds. In any event, the lack of clarity in the document precludes any definitive determination on respondent's conduct vis-à-vis the $20,000. All that is known is that respondent used other clients' funds to pay $20,000 to Kendall Regency.

Similarly, with respect to the Virga funds, the document states only that respondent received $5300 on behalf of Virga, but failed to remit the funds to him. There was no recitation of facts supporting any recordkeeping difficulties that may have caused the funds not to be paid to the client. There is no suggestion of any kind as to why respondent did not turn over the monies to Virga, although the supporting documentation indicates that respondent told Virga that the funds were not available because his trust account had been seized. Here, too, there is not enough information for us to determine whether respondent knowingly or negligently misappropriated Virga's funds or whether some other reason prevented him from turning the monies over to his client.

Even though the Disbarment on Consent does not identify the nature of respondent's misappropriation, the Florida rule on disbarment provides some guidance on the issue of whether

respondent knowingly misappropriated Kendall Regency's, the "other" clients', or Virga's funds. However, the rule is not dispositive.

In Florida, disbarment "is the presumed sanction for lawyers found guilty of theft from a lawyer's trust account or special trust funds received or disbursed by a lawyer as guardian, personal representative, receiver, or in a similar capacity such as trustee under a specific trust document." In disbarments by consent, however, it is difficult to discern the facts underlying the charges because the attorney does not assert any defenses but, instead, merely surrenders membership in the bar.

That was the case here. Respondent did not present any defenses to the allegations, but simply consented to disbarment. For that reason, the facts presented in the Disbarment on Consent are so sparse as to preclude any determination with respect to the misappropriation of funds. At best, the information in the document supports the finding that respondent committed recordkeeping violations, failed to cooperate with disciplinary authorities, and negligently misappropriated client or escrow funds in the Kendall Regency matter. There is not

enough information to determine what transpired in the Virga matter.

There remains the determination of whether, as the OAE suggests, a six-month suspension is the appropriate measure of discipline for respondent's misconduct. Precedent shows that it is not. Instead, a censure is in order.

As mentioned above, in Florida, attorneys are subject to either permanent disbarment or non-permanent disbarment. A permanently disbarred attorney is precluded from readmission to the bar. An attorney who is not permanently disbarred may seek readmission "within 5 years after the date of disbarment or such longer period as the court might determine in the disbarment order and thereafter until all court-ordered restitution and outstanding disciplinary costs have been paid."

Despite respondent's consent in Florida to what would be the equivalent of a five-year suspension in New Jersey, the underlying facts, on their face, do not support the imposition of a reciprocal term of discipline in New Jersey for what amounts to recordkeeping violations, failure to cooperate with disciplinary authorities and, perhaps, negligent misappropriation. In fact, even assuming that respondent

committed all of these violations, the discipline ordinarily would not be greater than a reprimand.

Negligent misappropriation and recordkeeping violations typically result in the imposition of a reprimand. See, e.g., 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 both clients were entitled); In re Lehman, 182 N.J. 589 (2005) (attorney negligently misappropriated trust funds and failed to comply with recordkeeping requirements); 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 $4100 in legal fees from his trust account before the deposit of corresponding settlement funds; the attorney believed that he was withdrawing against a "cushion" of his own funds left in the account); and In re Rosenberg, 170 N.J. 402 (2002) (attorney

negligently misappropriated client trust 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 needed, without determining if he had sufficient fees from a particular client to cover the withdrawals).

A reprimand may still be imposed even if the negligent misappropriation and the recordkeeping violations are accompanied by failure to cooperate with disciplinary authorities. See, e.g., In re Glatman, 191 N.J. 84 (2007) (attorney negligently misappropriated funds, failed to disburse funds promptly, committed recordkeeping violations, and failed to cooperate with disciplinary authorities; he was also guilty of gross neglect and lack of diligence) and In re Hinds, 138 N.J. 277 (1994) (attorney negligently misappropriated client funds, committed recordkeeping violations, and failed to cooperate with disciplinary authorities; he also exhibited gross neglect and lack of diligence).

The above cases make it clear that the six-month suspension requested by the OAE cannot be justified. Moreover, the cases on which the OAE relies are so factually-distinguishable as to

be inapplicable. In those matters, the attorneys' misconduct involved either deplorable recordkeeping practices or recordkeeping violations along with multiple acts of other misconduct.

Unlike the attorneys in those cases, there is no evidence that respondent did not familiarize himself with the recordkeeping rules in Florida, or that he failed to implement a compliant accounting system, or that his procedures were entirely inadequate, or that he had abdicated all responsibility for recordkeeping, or that his recordkeeping deficiencies continued for an extended period of time. There certainly was no evidence that, whatever his recordkeeping deficiencies, respondent was a danger to the public. His other violations were minimal compared to those of the attorneys in the cases cited by the OAE. In New Jersey, his misconduct would not support discipline stronger than a censure, which we determine to impose, based on the aggravating factor of respondent's failure to report his Florida disbarment to the OAE, as required by R. 1:20-14(a)(1).

Although it may seem incongruous to impose only a censure on an attorney who consented to disbarment in another state – be it permanent or temporary -- we have not hesitated to impose

substantially less discipline in situations in which the attorney was disbarred in a sister jurisdiction. In In re Skripek, 156 N.J. 399 (1998), for example, an attorney who was disbarred in New York, after submitting his resignation from the New York bar during an ethics investigation following a judicial ruling of civil contempt for his failure to obey a court order, received a reprimand in New Jersey. When we reviewed the motion for reciprocal discipline we concluded that a finding of contempt alone does not subject an attorney to a seven-year suspension in New Jersey, much less disbarment. In re Skripek, DRB 96-430 (June 8, 1998) (slip op. at 13-14). This was particularly so inasmuch as respondent's resignation precluded a disciplinary adjudication of his misconduct. Id. at 16.

Because we determine that a suspension is not warranted in this case, the OAE's request that his reinstatement should be conditioned on proof that he did not knowingly misappropriate funds in the Kendall Regency and Virga matters becomes moot. Were we to suspend respondent, however, we find that this is not a burden that is properly placed on a respondent in New Jersey's disciplinary system. Rather, it is up to the OAE to prove that a respondent knowingly misappropriated client or trust funds. In this case, it could have done so by bringing this matter

before us as a presentment, rather than by motion for reciprocal discipline.

In sum, we determine to censure respondent with the condition that, if he is removed from the ineligibility list and reinstated to the practice of law, he must provide the OAE with quarterly reconciliations of his attorney accounts for a two-year period.

Members Baugh and Boylan voted to impose a reprimand. Member Stanton did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dominick Sanchez
Docket No. DRB 08-249

Argued: November 20, 2008

Decided: December 19, 2008

Disposition: Censure

Members	Disbar	Censure	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh			X			
Boylan			X			
Clark		X				
Doremus		X				
Lolla		X				
Stanton						X
Wissinger		X				
Total:		6	2			1

Julianne K. DeCore
Chief Counsel