SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-316
District Docket No. XIV-05-540E

IN THE MATTER OF	
JOHN D. ORTH	
AN ATTORNEY AT LAW	

Decision
Default [R. 1:20-4(f)]

Decided: April 3, 2008

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

This matter came before us on a certification of default filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-4(f), following respondent's failure to file an answer to the formal ethics complaint. We determine to impose a reprimand.

Although respondent filed a motion to vacate the default, we determined to deny it. In order to succeed on a motion to vacate a default, a respondent must satisfy a two-pronged test: offer a reasonable explanation for the failure to file an answer

and assert meritorious defenses to the charges. Respondent did neither.

Despite good service of the complaint, and the OAE's grant of respondent's two requests for extensions of time to file his answer, respondent's letter-motion is devoid of any reason why he was unable to timely file a verified answer to the complaint. Indeed, respondent's letter admits that he "can not set forth standard underlying basis for a default to be vacated [sic]." Moreover, respondent does not deny the material allegations of the complaint but, rather, respondent offers an explanation: his ignorance of the rule against keeping personal funds in an attorney trust account, and his preoccupation with his full-time employment with an insurance company. Respondent does challenge the charge that he failed to cooperate with the OAE, claiming that he provided the requested information during the investigation. Nevertheless, he fails to explain his ultimate failure to cooperate, that is, his failure to file a verified answer to the complaint despite being granted two extensions of time within which to do so.

We, therefore determined to proceed with the review of this matter as a default.

Service of process was proper in this matter. On June 20, 2007, Lee A. Gronikowski, Deputy Ethics Counsel, OAE, sent a

copy of the complaint to respondent via certified and regular mail to 239 Adams Avenue, River Edge, New Jersey 07661. The regular mail was not returned. The certified mail receipt was returned with an illegible signature.[1]

Respondent was given an extension of time in which to file an answer to August 3, 2007. Respondent confirmed the extension in an undated "fax" to Gronikowski.

Respondent was given a second extension of time until "the week of August 20th", which extension respondent confirmed by fax dated July 31, 2007, to Gronikowski.

On August 27, 2007, Gronikowski wrote to respondent to advise him that the matter would proceed as a default because he had failed to file an answer. The letter appears to have been sent only by regular mail. The record does not reveal whether the letter was returned to Gronikowski.

Respondent has not filed an answer to the complaint.

The complaint arises out of respondent's neglect in a real estate matter, his recordkeeping violations, and his failure to cooperate with disciplinary authorities. The complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.15(b) (failure to deliver funds promptly to a third party), and RPC 1.15(d) and R. 1:21-6(a)(1)

[1] Although the OAE's certification says the mail was accepted "apparently by Mr. Orth," the signature is not clear.

(recordkeeping violations) (count one); RPC 1.15(d) and R. 1:21-6(a)(2), and R. 1:20-1(c) (failure to update attorney registration information) (count two); and RPC 8.1(b) and R. 1:20-3(g)(3) (failure to cooperate with ethics authorities) (count three).

Respondent was admitted to the New Jersey bar in 1989. He has no history of discipline.

This disciplinary proceeding arose in October 2005, after respondent attempted to pay his 2005 annual attorney registration fee, a late fee, and a reinstatement fee to the New Jersey Lawyers' Fund for Client Protection ("CPF") using an attorney trust account check, which was drawn on the Bank of New York. The records filed with the OAE indicated that respondent maintained his attorney accounts at Wachovia bank. That information was inaccurate because respondent had failed to update his bank account information during the annual attorney registration process. In fact, respondent maintained his trust account at the Bank of New York. He did not maintain a business account.

The CPF referred this matter to the OAE. In addition to updating information about respondent's attorney trust account, the ensuing investigation revealed ethics infractions involving

two matters: the Robert and Sophia Mitacek refinancing and the Jose Reyes personal injury action.

In November 2002, while respondent was employed full-time at Liberty Mutual Insurance Company ("Liberty Mutual"), his in-laws, Robert and Sophia Mitacek, retained him to represent them in connection with a refinancing of their home mortgage loan. Respondent had previously represented the Mitaceks in their purchase of the property in 1995.

As of October 1, 2002, respondent had an opening balance of $1,740.99 in his attorney trust account. The balance was comprised of $1,099, which respondent had collected, in 1995, to pay the title insurance premium when the Mitaceks purchased the property, and $641.99 of respondent's personal funds. Respondent, however, failed to remit the $1,099 to the title agent after the 1995 closing. He held the money intact in his trust account for approximately seven years. He should have collected an additional $735.68 from the Mitaceks for the 2002 refinancing. His failure to do so resulted in a trust account shortage as follows:

Reconstructed Trust Ledger Card – The Mitaceks' 2002 Refinancing

Date	Check	Description	Disbursements	Receipts Balance		Stipulation Exhibition No.
	undisbursed balance - 1995 purchase; title fee			$1,099.00		9 and 16
11/13/02		HSBC Mortgage Wire		$135,480.00	$136,579.00	15
11/14/02	No. 1001	GMAC Mortgage Corp.	$132,721.68		$3,857.32	15
12/02/02	No. 1002	Elite Title	$1,034.00		$2,823.32	16
12/02/02	No. 1003	Elite Title	$1,099.00		$1,724.32	16
03/12/03	No. 1005	Milan Mortgage	$2,210.00		<$485.68>	17
06/30/03	No. 1006	Mitacek Legal Fee	$250.00		<$735.68>	18

At the time of the negative balance in respondent's account, he had no other client funds in the account. Therefore, there was no invasion of client funds. The funds used to complete the Mitaceks' refinancing were respondent's legal fees from another matter (Reyes), which he had failed to disburse and which he had improperly retained in his trust account.

In June 1998, when respondent was employed at a law firm, he began representing Jose Reyes in connection with injuries he had received in June 1996. In 1999, respondent accepted a position as in-house counsel for Liberty Mutual. Nevertheless, the Reyes case continued to be respondent's responsibility after he changed employers. The matter settled in February 2003, while respondent was employed at Liberty Mutual. Respondent deposited the Reyes settlement proceeds of $43,333 in his trust account on February 4, 2003. Later that month, respondent disbursed $26,333 to Reyes, which represented the net settlement proceeds, after deducting respondent's legal fee of $17,000.

Respondent took the appropriate legal fee and disbursed the appropriate amount to his client.

On February 1, 2003, prior to receiving the Reyes settlement, respondent's trust account balance was $1,737.31, of which $12.99 was respondent's personal funds and $1,724.32 was held in trust for the Mitaceks. On February 4, 2003, after respondent deposited the Reyes settlement funds, the trust account balance was $45,070.31. On February 28, 2003, respondent's trust account had a closing balance of $18,737.31, comprised of $1,724.32 in trust for Mitacek and $17,012.99 of respondent's personal funds.

On March 7, 2003, respondent issued a trust account check for $2,210 to Milan Mortgage for the Mitacek refinancing, utilizing a portion of his $17,000 legal fee for Reyes, which was still in his trust account. On June 30, 2003, respondent issued a trust account check to himself for $250 for fees earned in the Mitacek refinancing. By issuing the above checks, respondent created a negative balance of $735.68 on the Mitacek's trust ledger card, which left him with personal funds of $16,277.31, or the balance of the Reyes fee, in his trust account.

When the OAE completed its investigation, it directed respondent to transfer the remaining Reyes fee to his business

account. In April 2007, respondent transferred $14,652.31 to a personal account, because he did not maintain a business account. He left $1,150 in personal funds in his trust account for bank charges, an amount in excess of the $250 generally accepted by the OAE.

The OAE's investigation also revealed that respondent had regularly used attorney trust account checks, drawn on personal funds on deposit in his trust account, to pay his CPF assessment. On October 3, 2002, prior to the Mitaceks' refinancing, respondent issued a $596 trust account check to the CPF for his 2002 annual fee. Respondent's October 2002 trust account bank statement also reflects a check printing charge of $20.50 on October 15, 2002. This left a $1,124.49 trust account balance, of which $25.49 was respondent's personal funds and $1,099 was the unpaid title insurance premium from the 1995 Mitacek transaction.

On September 23, 2003, respondent issued a trust account check to the CPF for $240 for his annual fee, which was drawn against his personal funds in the trust account, leaving a closing balance, on September 30, 2003, of $16,037.31, all personal funds.

On August 4, 2004, respondent paid his annual fee to the CPF with a trust account check for $215, leaving a trust account

balance of $15,822.31, all respondent's personal funds from the Reyes legal fee.

As noted previously, in October 2005 the CPF referred this matter to the OAE when respondent attempted to pay his annual registration fee with a trust account check, which was also drawn on his personal funds from the Reyes legal fee. Respondent told the OAE, during the investigation, that he had been unaware that he could not use trust account checks to pay his annual registration fee. Other improprieties were respondent's failure to update his banking information when he submitted his attorney registration data from year to year, and his failure to maintain an attorney business account after he changed banks.

Although respondent communicated with the OAE, he was not cooperative. In December 2005, OAE Disciplinary Auditor Arthur Garibaldi wrote to respondent requesting his documented explanation as to why he had issued trust checks for payment of personal expenses and why he had failed to report changes in his attorney accounts. Respondent replied to Garibaldi's letter, but failed to provide sufficient documentation to support his explanation. After respondent failed to comply with Garibaldi's subsequent request for documents, OAE Chief of Investigations Gerald J. Smith wrote to him, scheduling a demand audit for

April 24, 2006. At respondent's request, the demand audit was adjourned until May 2, 2006. Although respondent appeared at the OAE on the scheduled date for the demand audit and brought some of the requested materials, he failed to provide the Reyes file. Garibaldi wrote to respondent asking that certain documentation be provided by May 22, 2006. On May 23, 2006, respondent delivered the Reyes file to the OAE, but failed to provide any other items repeatedly requested.

On May 25, 2006, Garibaldi wrote to respondent requesting all of the outstanding items by June 1, 2006. On June 6, 2006, respondent provided a written reply, with documents. On July 11, 2006, OAE Deputy Ethics Counsel Gronikowski wrote to respondent requesting that additional data be provided by no later than July 28, 2006. When respondent failed to reply by September, Garibaldi phoned him requesting an explanation. On three dates in October 2006, respondent replied to the OAE's requests for information.

Following a review of the record, we find that the facts recited in the complaint support the charges of unethical conduct. Because of respondent's failure to file an answer, the allegations of the complaint are deemed admitted, R. 1:20-4(f)(1).

Respondent maintained excessive funds of his own in his trust account, thereby commingling personal and trust funds. An admonition is the appropriate measure of discipline for such violation. In re Farynyk, 143 N.J. 302 (1996). There, the attorney had accumulated almost $431,000 in legal fees in his trust account, which we considered to be the "passive commingling of personal and client trust funds" in violation of RPC 1.15(a). In the Matter of Edward M. Farynyk, DRB 95-168 (February 20, 1996) (slip op. at 1). The commingling in Farynyk was discovered during a random compliance audit. Ibid.

In the absence of misappropriation of client funds, recordkeeping violations also generally warrant an admonition. See, e.g., In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (random audit uncovered "numerous recordkeeping deficiencies"); In the Matter of Marc D'Arienzo, DRB 00-101 (June 28, 2001) (attorney did not use trust account in connection with his practice and did not maintain any of the required receipts and disbursements journals or client ledger cards); and In the Matter of Nedum C. Ejiogu, DRB 99-070 (December 28, 1999) (select audit uncovered numerous recordkeeping deficiencies, in addition to a failure to comply with the rule governing contingent fee agreements).

Where there is no misappropriation of any kind, an admonition results even when the attorney commingles personal and trust funds and commits recordkeeping violations, as here. See, e.g., In the Matter of Eric J. Goodman, DRB 01-225 (July 20, 2001) (attorney commingled personal and trust funds and committed several recordkeeping deficiencies, in violation of RPC 1.15(a) and RPC 1.15(d); he also lacked diligence in failing to promptly distribute estate proceeds to the beneficiaries after the fiduciary bond was issued, in violation of RPC 1.3); and In the Matter of Lionel A. Kaplan, DRB 02-259 (November 18, 2002) (attorney commingled law firm funds and trust funds, committed recordkeeping violations, and failed to supervise the bookkeeper who was responsible for the recordkeeping violations).

But for respondent's lack of cooperation and his default, this matter would be analogous to the Goodman case, which resulted in an admonition. Respondent, however, failed to cooperate with disciplinary authorities and allowed this matter to proceed as a default. In a default matter, the discipline is enhanced to reflect a respondent's failure to cooperate with disciplinary authorities as an aggravating factor. In re Nemshick, 180 N.J. 304 (2004) (conduct meriting reprimand upgraded to three-month suspension due to default; no ethics

history). We, therefore, determine that a reprimand is the appropriate measure of discipline.

Chair O'Shaughnessy and members Lolla, Neuwirth, and Baugh 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, Vice Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John D. Orth
Docket No. DRB 07-316

Decided: April 3, 2008

Disposition: Reprimand

Members	Suspension	Reprimand	Admonition	Disqualified	Did not participate
O'Shaughnessy					X
Pashman		X			
Baugh					X
Boylan		X			
Frost		X			
Lolla					X
Neuwirth					X
Stanton		X			
Wissinger		X			
Total:		5			4

Julianne K. DeCore
Chief Counsel