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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-073
District Docket No. XIV-03-653E

IN THE MATTER OF :
 :
BARRY A. HOFFBERG :
 :
AN ATTORNEY AT LAW :

 :

Decision

Argued: April 21, 2005

Decided: June 21, 2005

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

Respondent appeared pro se.

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

This matter was before us on a disciplinary stipulation between the Office of Attorney Ethics ("OAE") and respondent. The stipulation incorporated by reference the investigative report of OAE Investigative Auditor Mary Jo Bolling. Respondent stipulated to having violated RPC 1.1 (a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.15 (failure to safeguard funds -

negligent misappropriation), R. 1:21-6(a) (requiring trust and business accounts in New Jersey) and (b) (account location) -- thus, RPC 1.15(d) -- and RPC 5.5(a) (unauthorized practice of law -- practicing law while ineligible for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection ("the Fund")).

Respondent was admitted to the New Jersey bar in 1993. The stipulation states that he has maintained offices for the practice of law at 240 Prospect Avenue, Suite 579, Hackensack, New Jersey 07601. He has no disciplinary history in New Jersey.

The OAE forwarded the stipulation to respondent on November 23, 2004. Thereafter, the OAE telephoned respondent to determine why he had not returned the signed stipulation in a timely manner. Respondent claimed that he had signed the stipulation and mailed it to the OAE's post office address.

Afterward, on January 19, 2005, the OAE sent a second copy of the stipulation to respondent, requesting that he sign it and return it immediately. When respondent failed to return it, the OAE prepared and served on respondent a formal complaint. The complaint was delivered by the post office on February 17, 2005. Thereafter, respondent mailed the signed stipulation to the OAE, which was received on February 22, 2005.

Robert L. Utsey, Esq., the grievant, represented the seller, Lois Cook, in a September 26, 2001 real estate closing. Respondent represented the purchaser, Manuel Asitimbay. At that time, respondent was ineligible to practice law in New Jersey because of his failure to pay the annual assessment to the Fund.

As of the date of the closing, the pay-off amount on Cook's mortgage with CIT Bank, valid until September 30, 2001, was \$98,086.48. On September 25, 2001, respondent received a wire transfer from Countrywide Home Loans, in the amount of \$178,081.82, representing Asitimbay's mortgage less costs associated with the closing.

According to respondent, he was unable to ascertain CIT's address from the closing instructions, which the bank had "faxed" to him. He, therefore, telephoned Utsey to obtain the correct address. Respondent claimed that he immediately sent the pay-off amount to CIT. Apparently, however, he sent the payment to the wrong address, as it was returned to him as undeliverable. After obtaining the correct address for CIT, he re-sent the pay-off check to CIT in the amount of \$91,086.48. CIT negotiated the check on November 2, 2001. In the interim, because Cook's mortgage had not been timely satisfied, interest had accrued on the pay-off amount.

As a result of Utsey's grievance, on January 30, 2004, the OAE conducted a demand audit of respondent's books and records. At that time, respondent informed the OAE that he did not maintain a New Jersey trust or business account. According to respondent, the above real estate transaction was his only New Jersey case, and he used his New York trust account for the transaction. Respondent did not maintain an attorney business account in any state.

The OAE's review and analysis of subpoenaed trust account records from respondent's bank confirmed respondent's explanation that a clerical error had contributed to the problem with the pay-off of Cook's mortgage. The audit also revealed that respondent did not properly maintain his New York trust account records, thereby causing the negligent misappropriation of some of the closing proceeds.

Specifically, respondent failed to maintain a client ledger for Asitimbay. The OAE's reconstruction of respondent's attorney trust account records and client ledger cards for his clients during the audit period disclosed that he had not paid Main Street Title the \$1,335 it was owed for the Cook/Asitimbay closing until November 17, 2003, almost two years after the closing had taken place. In addition, respondent had not disbursed \$2,362.47 from the closing. Therefore, from September

25, 2001 to November 17, 2003, respondent's trust account should have had at least \$3,697.47 from the closing proceeds belonging to either Asitimbay or third parties.

On July 10, 2003, although respondent should have been holding \$3,697.47 in his trust account from the Cook/Asitimbay closing, his trust account balance fell to \$3,587.42. The balance remained below \$3,587.42 until July 25, 2003, when respondent deposited \$15,000 in connection with the Julia Lightner matter. On August 14, 2003, the balance again fell below \$3,697.47. As of November 4, 2003, the balance in respondent's trust account fell to \$318.91, and remained below the amount he should have been holding from the Cook/Asitimbay closing until November 16, 2003, when he deposited \$17,500 on behalf of another client. According to the stipulation, "[f]or the remainder of the audit period all client funds remained intact."

As to his failure to timely pay the title company, respondent claimed that there was a discrepancy over the amount charged. According to the settlement statement, the amount owed to Main Street Title was \$925. Main Street's September 4, 2001 invoice, however, listed the amount owed as \$1,335. The OAE obtained information from Main Street that showed that invoices were sent to respondent prior to the closing, on September 4,

2001, and on February 12, May 13, and September 9, 2003. In addition, Main Street had telephoned respondent several times requesting payment, although in what amount is not known.

Respondent also had an additional \$2,362.47 in his trust account relating to the Cook/Asitimbay closing. He had no explanation for his failure to timely remit those funds to the appropriate persons or to return the funds to Asitimbay after the closing. The record does not reveal whether respondent ever provided any explanation to the OAE as to why those funds remained on deposit in his trust account or whether they were eventually distributed.

Finally, as to respondent's ineligibility to practice law in New Jersey, the Fund confirmed that respondent was ineligible from December 12, 1994 until January 30, 2004. Therefore, he was ineligible to practice in New Jersey at the time he represented Asitimbay.

The OAE recommended the imposition of discipline in the range of a reprimand to a censure.

Following a review of the record, we find that the facts set forth in the investigative report incorporated in the stipulation establish by clear and convincing evidence that respondent is guilty of unethical conduct.

Because of respondent's ineligibility to practice law at the time, he engaged in the unauthorized practice of law when he represented Asitimbay, thereby violating RPC 5.5(a). Moreover, after the closing, respondent failed to timely pay for title insurance. Despite receiving an invoice prior to the closing, on September 4, 2001, respondent neither attempted to resolve the alleged discrepancy, nor paid the title company until November 14, 2003, more than two years after the closing. Respondent also failed to timely remit the balance of the funds to Asitimbay. Respondent's conduct in this regard violated RPC 1.1(a) and RPC 1.3. In addition, although the investigative report did not include a violation of RPC 1.15(b) (failure to promptly deliver funds to a client or third person), we find that the stipulated facts not only gave respondent sufficient notice of a potential finding of a violation of this rule, but amply support such violation. Respondent also violated R. 1:21-6(a) and (b) by failing to maintain the required New Jersey trust and business accounts and, therefore, violated RPC 1.15(d), which requires attorneys to comply with R. 1:21-6. Finally, respondent's inadequate maintenance of records, commingling of funds in his trust account, and use of the trust account to pay personal expenses resulted in his negligent misappropriation of client trust funds, a violation of RPC 1.15(a).

The discipline imposed in matters involving similar violations has ranged from an admonition to a reprimand. See In re Stahl, Docket No. DRB 04-166 (June 22, 2004) (admonition for practicing law while ineligible (attorney filed a complaint for one client and appeared in court for another client), and failing to maintain a trust and business account; mitigating factors included the attorney's lack of knowledge of his ineligibility, his prompt action to correct his ineligible status and the absence of self-benefit; attorney was motivated by humanitarian reasons); In re Fishman, Docket No. 04-142 (June 22, 2004) (admonition where attorney, while ineligible to practice law, represented one client in a lawsuit and signed a retainer agreement in connection with another client matter; he also failed to maintain a trust and business account; mitigating factors considered were his lack of knowledge of his ineligibility, his contrition at the hearing, his quick action in remedying his recordkeeping deficiencies, and the lack of disciplinary history); In re Scott, Docket No. DRB 96-091 (May 2, 1996) (admonition where attorney did not remit certain fees to the title company and mortgage company until six months after the closing; failed to reply to her clients' numerous requests for information on potential unpaid closing costs and to deposit \$500 in cash into either her trust account or her business

account, from which closing proceeds would then be disbursed; did not submit to her clients proof of \$97 in "reimbursement for costs/fees," and did not reimburse them for that amount, violating RPC 1.3, RPC 1.4(a), RPC 1.15(b) and RPC 1.15(d)); In re Winkler, 175 N.J. 438 (2003) (reprimand where attorney commingled personal and trust funds, negligently invaded clients' funds, and did not comply with recordkeeping rules); In re Leff, 181 N.J. 333 (2004) (reprimand where attorney, who certified to the Court that he was completely retired from the practice of law, failed to wrap up four real estate transactions, which caused delays in the delivery of escrow funds, engaged in gross neglect, pattern of neglect, and lack of diligence by allowing as much as two years to elapse without disbursing escrow funds, and engaged in recordkeeping violations; attorney had a prior reprimand); and In re Jodha, 174 N.J. 407 (2002) (reprimand where attorney failed to promptly fulfill post-closing requirements by failing to record the deed, pay the title insurance premium and real estate taxes, and return escrow funds to his clients for twenty months; the attorney also delayed sending original documents to his clients, and was guilty of recordkeeping violations).

Because only one matter was involved and respondent has no ethics history, we determine that a reprimand is appropriate

discipline for his ethics violations. Members Spencer Wissinger, III and Ruth Jean Lolla believed that a three-month suspension more properly addressed respondent's ethics infractions, while Member Lee Neuwirth voted to impose a censure.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

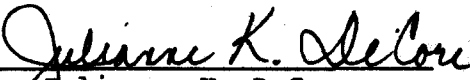
In the Matter of Barry A. Hoffberg
Docket No. DRB 05-073

Argued: April 21, 2005

Decided: June 21, 2005

Disposition: Reprimand

Members	Censure	Three-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Maudsley			X			
O'Shaughnessy			X			
Boylan			X			
Holmes			X			
Lolla		X				
Neuwirth	X					
Pashman			X			
Stanton			X			
Wissinger		X				
Total:	1	2	6			


Julianne K. DeCore
Chief Counsel