

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-177

IN THE MATTER OF
MICHAEL H. KESSLER
AN ATTORNEY AT LAW

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Decision

Argued: September 11, 2003

Decided: October 22, 2003

Brian D. Gillet 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 was before us based on a disciplinary stipulation of facts entered into between the Office of Attorney Ethics (“OAE”) and respondent pursuant to R.1:20-15(f). Respondent stipulated to violations of RPC 1.1(a) (gross neglect), RPC 1.15(a) (commingling funds), RPC 1.15(d) (failure to abide by recordkeeping rules) and R.1:21-6 (recordkeeping violations), RPC 3.4(c) (knowingly disobeying an obligation under the rules

of the tribunal), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

Respondent was admitted to the New Jersey bar in 1969. He maintains a law office in Union, New Jersey.

In 1993, he was privately reprimanded for failure to prepare his client's will, failure to communicate with her, and failure to reply to the DEC's request for information about the matter. He received a reprimand in 1999 for failure to communicate with a client, failure to safeguard client funds, recordkeeping violations, and misrepresentation. The Court also ordered respondent to submit to the OAE a psychiatrist's report attesting to his fitness to practice law and, on a schedule established by the OAE, annual accountings of his books and records for a period of two years.

Respondent maintained attorney trust and business accounts at the Union Center National Bank ("Union Center"). On March 27, 2002, Union Center notified the OAE that on March 22, 2002, an overdraft had occurred in respondent's attorney trust account. Thereafter, on April 1, April 26, May 13, and May 16, 2002, the OAE requested that respondent submit an explanation for the overdraft in his account. When he did not reply, OAE Chief of Investigations, Gerald Smith, advised respondent on May 23, 2002, that the OAE would conduct an audit of his books and records for the period of January 1, 2002, to the date of the audit, June 13, 2002. The OAE investigation and audit revealed the following:

Ann Williams owed respondent \$3,500 in legal fees. She was to pay him \$200 per month to satisfy the amount. On November 23, 2001, she paid respondent \$200 for her

November installment. On December 24, 2001, she paid him \$400 for the December and January installments. Respondent deposited the \$400 check into his attorney trust account on December 28, 2001. The check was returned on January 3, 2002, for “non-sufficient” funds. Respondent’s trust account was charged a \$10 bank fee.

Respondent claimed that he had deposited the initial \$200 and \$400 checks into his trust account instead of his business account to protect the funds from being depleted by office expenses, so that he could apply the funds toward an outstanding debt to his late mother’s estate.

On January 31, 2002, respondent redeposited the check into his business account. On February 6, 2002, the check was again returned for insufficient funds and the bank charged him another \$10 bank fee. However, it mistakenly debited respondent’s trust account for the returned check and bank fee instead of his business account. At that time, the bank’s error did not cause an overdraft in respondent’s trust account because on January 15 and 19, 2002, respondent had deposited into his trust account \$7,817.42 and \$2,462, respectively, on behalf of his client Bertha Coley.

On March 22, 2002, an overdraft in the amount of \$380.18 occurred in respondent’s trust account when he presented a check in the amount of \$7,344.42 on Coley’s behalf because his trust account balance was only \$6,964.24. On March 25, 2002, respondent transferred \$400 from his business account to his trust account to cover the overdraft amount. Thereafter, at respondent’s request, Union Center faxed a letter to the OAE stating that it had erred when it debited respondent’s trust account instead of his business account, and that the error contributed to the overdraft.

At the audit, respondent stated that he had computerized his recordkeeping by using a Word Perfect table. He admitted that he did not maintain separate client ledger cards for each client, a trust receipts book, or a trust disbursements book. He also failed to maintain a running balance on his computerized table or in his trust account checkbook.

Respondent had been the subject of OAE audits in the past. At an October 11, 1994, demand audit, he was advised of numerous recordkeeping deficiencies. On November 3, 1995, he was again audited and informed of his recordkeeping deficiencies, some of which were the same as those cited at the previous audit. As a result of that audit, respondent was reprimanded and ordered to submit an annual accounting of his books and records, prepared by a certified public accountant, for a period of two years and until further order of the Court. In re Kessler, 157 N.J. 73 (1999).

Respondent failed to submit his annual accounting by the due date, January 31, 2000. The OAE, therefore, wrote to him on February 23, 2000, that if the report was not received by March 15, 2000, the Court would be notified that he had violated its order. Exhibit 23 to stipulation. The OAE received the 1999 annual accounting for respondent's trust and business accounts on May 22, 2000.

On March 26, 2001, the OAE again wrote to respondent that his annual accounting for 2000, due on January 31, 2001, was late. Respondent submitted the report to the OAE on August 15, 2001.

On September 12, 2001, the OAE advised respondent that he had to file an application with the Court to be relieved of the requirement of filing annual accountings with the OAE. Respondent failed to make such an application, and was, therefore, required

to continue submitting annual accountings. Once again, on February 12, 2002, the OAE advised respondent that his 2001 annual accounting, due January 31, 2002, was late.

The demand audit was continued on January 10, 2003. At that time, the OAE notified respondent that the 2001 annual accounting had not been filed and the 2002 annual accounting was due on January 31, 2003. As of the date of the stipulation, April 29, 2003, respondent had not submitted either report.

The OAE's investigation also revealed that respondent's recordkeeping practices failed to meet the requirements of R.1:21-6(b) because he did not maintain:

- 1) trust receipts or disbursements journals;
- 2) client ledger cards; or
- 3) a running balance on his computerized table or in his trust account checkbook.

Respondent admitted that his failure to deposit earned fees into his business account constituted commingling of funds in violation of R.1:21-6(a)(2) and RPC 1.15(a); his failure to abide by the recordkeeping rules violated R.1:21-6 and RPC 1.15(d); his failure to timely adhere to the Court's deadlines for filing his annual accountings and to submit annual accountings for 2001 and 2002 violated RPC 3.4(c); and his failure to cooperate with disciplinary authorities violated RPC 8.1(b) and RPC 8.4(d).

Respondent also admitted that his failure to correct recordkeeping deficiencies noted in the 1994 –1995 audits violated RPC 1.1(a), RPC 1.15(d) and R.1:21-6; and his failure to abide by recordkeeping requirements in connection with his 2002 audit also violated R.1:21-6 and RPC 1.15(d).

The stipulation listed respondent's prior discipline — a private reprimand in 1992 and a reprimand in 1999 as an aggravating factor. The only mitigating factor listed was that the overdraft created in respondent's trust account was caused by a bank error.

Following a de novo review of the record we are satisfied that, by clear and convincing evidence, the stipulated facts support a finding that respondent's conduct was unethical.

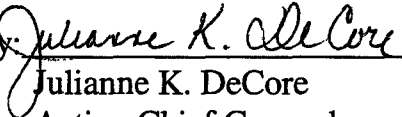
The OAE suggested that the appropriate range of discipline was between a reprimand and a three-month suspension citing In re Carroll, 165 N.J. 566 (2000) (three-month suspension where attorney failed to correct nine trust and business account recordkeeping deficiencies found as a result of a random audit of his records, failed to cooperate with disciplinary authorities which resulted in the matter proceeding as a default; attorney was privately reprimanded, admonished twice and suspended for a period of three-months); In re Dashoff, 142 N.J. 555 (1995) (three-month suspension where attorney failed to maintain proper trust and business account records, repeatedly failed to bring his records into compliance despite directions from the OAE and failed to cooperate with disciplinary authorities; prior ethics history included a private reprimand and a reprimand); In re Waters, a/k/a Waters-Cato, 139 N.J. 498 (1995) (three-month suspension where attorney was grossly negligent in failing to maintain required trust and business accounts; attorney had prior private reprimand); and In re Macias, 121 N.J. 243 (1990) (reprimand for failure to cooperate with the OAE for failing to correct certain accounting deficiencies after having been directed to do so).

In In re Colasanti, 171 N.J. 77 (2002), the attorney was reprimanded for violations of RPC 1.15 (a) (negligent misappropriation), RPC 1.15(d), and R. 1:21-6. As the result of the trust overdraft program, the OAE conducted a select audit of Colasanti's records and identified seven deficiencies in his attorney account, including client ledger cards with debit balances and an absence of quarterly reconciliations. Five of the record keeping deficiencies discovered during the audit had not been corrected from a random audit of Colasanti's prior firm. See also In the Matter of Joseph S. Caruso, Docket No. 96-076 (May 21, 1996) (admonition imposed where the improper recording of a deposit led to a trust account shortage and the attorney committed a number of violations in the maintenance of his trust account); and In the Matter of Bette R. Grayson, Docket No. 97-338 (May 27, 1998) (admonition imposed where the attorney had deficient recordkeeping practices and failed to prepare quarterly reconciliations of client ledger accounts, resulting in the negligent misappropriation of client trust funds in eleven matters).

Based on the fact that a bank error created the overdraft in respondent's account, that he took steps to correct the overdraft, and on his admissions of wrongdoing, eight members determined that a reprimand was sufficient discipline for respondent's misconduct. One member did not participate.

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

Disciplinary Review Board

By: 
Julianne K. DeCore
Acting Chief Counsel

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

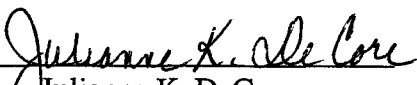
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Disposition: Reprimand

<i>Members</i>	<i>Disbar</i>	<i>Suspension</i>	<i>Reprimand</i>	<i>Admonition</i>	<i>Dismiss</i>	<i>Disqualified</i>	<i>Did not participate</i>
<i>Maudsley</i>			X				
<i>O'Shaughnessy</i>			X				
<i>Boylan</i>							X
<i>Holmes</i>			X				
<i>Lolla</i>			X				
<i>Pashman</i>			X				
<i>Schwartz</i>			X				
<i>Stanton</i>			X				
<i>Wissinger</i>			X				
Total:			8				1


Julianne K. DeCore
Acting Chief Counsel