

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-194
District Docket No. XIV-03-734E

IN THE MATTER OF :
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 :
OUSMANE DHU'L-NUN AL-MISRI :
 :
AN ATTORNEY AT LAW :
 :
 :

Decision

Argued: November 20, 2008

Decided: December 23, 2008

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

David Dugan appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline (reprimand) by Special Master Steven Menaker. A four-count complaint alleged that respondent grossly neglected a case, had numerous recordkeeping violations, commingled funds in his trust account, and practiced law while ineligible to do so

Lawyers' Fund for Client Protection ("CPF"). We determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1979. On September 30, 1996, he received an admonition (when he was known as Ronald A. Davis) for failing to communicate with a client and improperly depositing a former client's check into his trust account as a favor to the client, even though the check did not bear on a client matter. In the Matter of Ronald A. Davis, DRB 96-271 (September 30, 1996).

On December 20, 2002, respondent received a second admonition for gross neglect, lack of diligence, failure to utilize a written fee agreement, and failure to communicate with the client in a real estate matter. In the Matter of Ousmane D. Al-Misri, DRB 02-351 (December 20, 2002).

Respondent filed a pro se answer to the complaint in this matter, in which he admitted the factual allegations of the complaint, but denied having committed any ethics infractions. Prior to the hearing, respondent retained counsel and admitted all of the facts and charges contained in the five-count complaint.

Upon being sworn at the hearing before the special master, respondent again admitted the factual allegations and charges of unethical conduct contained in the complaint.

I. The Trust Account Check to the CPF and the OAE Audit

On November 5, 2003, respondent issued a trust account check to the CPF for his 2003 attorney assessment. The CPF rejected the payment and referred the matter to the Office of Attorney Ethics ("OAE") for an investigation.

The OAE wrote letters to respondent, dated December 11 and 31, 2003, seeking an explanation for the check. Respondent did not reply to those requests for information. Therefore, the OAE scheduled a January 23, 2004 demand audit of his attorney books and records for the previous year.

Prior to the audit, on January 7, 2004, respondent wrote to the OAE and explained that he had intentionally placed his personal funds in the trust account in order to protect them from seizure by a creditor. When respondent defaulted on a student loan, that creditor placed a lien on funds in his attorney business account. Respondent believed that placing his own funds in his trust account would enable him to conduct normal attorney business, without fear of the funds being

seized. Respondent was allegedly unaware that he could not use his trust account in that manner.

The January 23, 2004 demand audit of respondent's books and records revealed a number of deficiencies: a) an inaccurate trust account receipts and disbursements ledger; b) no running balance in the trust account ledger; c) deposit items that did not contain reference to a client matter; and d) a lack of required three-way reconciliations of the trust account.

Respondent admitted that, between May and December 2003, he had written numerous checks from his trust account for personal and business obligations, in addition to the CPF payment, including checks to Parkway Associated, Comcast, Nextel, Verizon, Irongate Parking, Triad Financial Group, Genesis Learning Center, The Chen School, Tyesha Harrell, Howard Toomer, Mecca Investments, Michael Pickney, and his secretary, Marcella Shabrina McNeil. Total disbursements to these payees amounted to \$8,241.94.

Respondent also conceded that he had not maintained sufficient personal funds in the trust account during that time to cover all of the disbursements. The OAE's forensic reconstruction showed that his seven cash deposits into the trust account, between September 19 and December 9, 2003

(\$3,258.01 plus an \$850 fee from a real estate matter), were insufficient to cover the outlay of funds from the account. In all, the OAE found, respondent had disbursed \$8,241.94 against a balance of \$7,868.01, thus leaving a shortfall of \$373.93.

Due to the poor condition of respondent's records, the OAE was unable to determine if respondent's actions had invaded other client funds in the trust account or had been paid solely with funds belonging to respondent.

Count one alleged violations of RPC 1.15(a) (commingling), RPC 1.15(d) (recordkeeping violations), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

II. The 2006-2007 Payments from the Trust Account

Respondent acknowledged that, following an earlier OAE audit in 1998, the OAE had sent him a contemporaneous letter cautioning him not to keep personal funds in his trust account.¹

Even after the 2004 demand audit and respondent's own January 7, 2004 certification, in which he acknowledged that he had acquired a "comprehensive understanding" of his obligations

¹ In 1998, respondent sent Office of Board Counsel a trust account check to pay DOC administrative costs associated with an earlier disciplinary matter.

regarding his trust account, in 2006 respondent again used his trust account to pay for personal obligations. In particular, he made a December 19, 2006 payment (\$50) to EZ Pass and a March 6, 2007 payment to the Home Depot (\$200).

At the hearing before the special master, respondent explained that the 2006 payments had been made in error. Unbeknownst to him, the bank had linked his trust account to an internet banking "drop-down menu." When making online bill payments, he was accidentally linked to the trust account. He insisted that he was unaware that he had made online payments from the trust account, believing that they had come from his business account. Respondent contacted the bank as soon as he became aware of the problem and had them correct it.

Count two charged respondent with having violated RPC 1.15(d) (recordkeeping violations) and RPC 3.4(c) (disobeying an obligation under the rules of a tribunal).

III. The Wilson and Jackson Matters

On June 11, 2003, respondent deposited \$2,500 into his trust account on behalf of a client, Claude Wilson. He then issued three trust account checks in connection with the matter, as follows: on June 16, 2003, a check to himself for \$500; on

June 20, 2003, a check to Pressler & Pressler for \$2,000; and on December 1, 2003, a check to Pressler & Pressler for \$150. Respondent disbursed a total of \$2,650 for the Wilson matter, against deposits of \$2,500. The OAE could not determine if the \$150 shortfall had invaded other client funds in the trust account or had been paid solely with respondent's personal funds.

While representing Bernard Jackson in another matter respondent made the following trust account deposits and withdrawals:

DATE	CK#	PAYEE	DEPOSIT	W/DRAWAL	BALANCE
04/11/03	1522	Jerry Fischer, ABD Dir.		5,000.00	(5,000.00)
04/12/03		Farm Family Cas. Co	3,410.43		(1,589.57)
04/12/03		Lynn Irby	1,600.00		10.43
04/18/03		return deposit item		1,600.00	(1,589.57)
04/24/03	1522	return check - NSF	5,000.00		3,410.43
04/25/03		Cash (Bernard Jackson)	500.00		3,910.43
04/26/03		Cash (Bernard Jackson)	700.00		4,610.43
04/29/03		Cash (Bernard Jackson)	240.00		4,850.43
05/06/03		Cash (Bernard Jackson)	100.00		4,950.43
05/29/03	1522	Re-deposit ck. #1522		5,000.00	(\$49.57)

[3C14.]²

Respondent's disbursement of funds in excess (\$49.57) of the funds on hand for Jackson either invaded the funds of other

² "3C" refers to count three of the ethics complaint.

clients or respondent's own funds on hand in the trust account at the time.

Once again, due to respondent's poor recordkeeping, the OAE was unable to determine if respondent had invaded client funds in the Wilson and Jackson matters or merely commingled his own funds and client funds in the trust account.

Count three charged respondent with having violated RPC 1.15(a) (failure to safeguard client funds) and RPC 1.15(d) (recordkeeping violations).

IV. The Davis Matter

On September 8, 2003, respondent represented Attikis Davis in the purchase of real estate in Long Branch. Although respondent prepared a mortgage and deed for the purchase, for the two years following the closing he neglected to record those documents in Monmouth County, finally accomplishing that task on September 7, 2005.

Count four alleged, and respondent admitted, that his conduct constituted gross neglect, in violation of RPC 1.1(a).

V. The CPF Matter

On September 5, 2003, respondent was suspended from the practice of law for failure to pay the annual attorney assessment to the CPF. Three days later, on September 8, 2003, he represented a client in a (McGee to Davis) transaction. Thereafter, on October 30, 2003, he represented a client in another (Jones to Albanese) transaction.

On December 10, 2003, respondent paid the overdue assessment and was removed from the ineligible list.

Count five alleged, and respondent conceded, that he had practiced law while ineligible, in violation of RPC 5.5(a).

With regard to count one (trust account check to CPF), the special master found respondent guilty of commingling, recordkeeping violations, and conduct involving dishonesty, fraud, deceit or misrepresentation for his deliberate attempt to hide personal assets from a creditor by placing them in his trust account.

As to count two (2006-2007 payments from trust account), the special master found respondent guilty of the charged recordkeeping violations, but dismissed for lack of clear and convincing evidence, the charge that respondent disobeyed an obligation under the rules of a tribunal.

With respect to count three (Wilson and Jackson matters), the special master found that respondent commingled personal and client funds in the trust account, failed to safeguard client funds, and committed various recordkeeping violations.

Regarding count four (Davis matter), the special master concluded that respondent's failure to record the deed and the mortgage for over two years post-closing constituted gross neglect.

Finally, as to count five (CPF), the special master determined that respondent had practiced law while ineligible to do so for failure to pay the annual attorney assessment to the CPF.

The special master recommended a reprimand with conditions: that respondent attend ICLE courses in trust and business accounting, submit quarterly reconciliations of his trust account for two years, and "perform 100 hours of community legal service."

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. In all but two instances, the special master's findings of misconduct were correct.

Respondent conceded, in counts one, two and three, that he had commingled funds (RPC 1.15(a)) by intentionally placing personal funds in his trust account. He did so in order to prevent a creditor from reaching his personal assets, as the creditor had already done through his attorney business account. In this regard, respondent violated RPC 8.4(c).

Respondent then paid personal obligations from the trust account, including a 1998 payment for costs in a disciplinary matter and his 2003 annual assessment to the CPF.

As a result of the check to the CPF, the OAE conducted a demand audit of respondent's attorney trust and business accounts in early 2004. The OAE found numerous recordkeeping deficiencies, which respondent admitted, including, inaccurate trust account receipts and disbursements ledger, no running balance in the trust account ledger, deposit items that did not contain reference to a client matter, and failure to prepare three-way reconciliations of the trust account. Respondent admitted that the recordkeeping deficiencies violated RPC 1.15(d).

With regard to RPC 3.4(c), the special master was correct to dismiss the charge that respondent disobeyed an obligation under the rules of a tribunal. It appears that respondent's two

2006 payments to EZ Pass and the Home Depot were unintentional, rather than a deliberate disregard of the OAE's instruction that he cease using his trust account for the payment of his own obligations (which in any event, would have been a violation of RPC 8.1(b), rather than RPC 3.4(c), because the OAE is not a tribunal). There is no clear and convincing evidence in the record to the contrary. Thus, we dismiss this charge.

We also dismiss the charge that respondent failed to safeguard client funds. In three instances, respondent's trust account had shortfalls in small amounts (\$373, \$150, and \$49). Because of respondent's poor recordkeeping practices, the OAE was unable to determine if the shortfalls had been cured by clients' funds or respondent's own funds. We cannot find, thus, that respondent failed to safeguard clients' funds by negligently misappropriating them.

As to count four, for two years respondent grossly neglected the post-closing aspects of a real estate matter for his client, Attikis Davis. In so doing, he violated RPC 1.1(a).

Finally, in late 2003, respondent practiced law (count five) in two separate real estate matters while ineligible for failure to pay the 2003 CPF annual assessment, a violation of RPC 5.5(a).

In all, respondent was guilty of gross neglect (RPC 1.1(a)), commingling (RPC 1.15(a)), numerous recordkeeping violations (RPC 1.15(d)), conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)), and practicing law while ineligible (RPC 5.5(a)).

An attorney who, like respondent, squirreled away personal funds in his trust account to avoid a personal levy, received a three-month suspension. See In re Olitsky, 149 N.J. 27 (1997) (attorney intentionally commingled client funds, business funds, and personal funds in order to avoid a levy by the Internal Revenue Service, thereby defrauding the government; the attorney also failed to safeguard client funds and to maintain proper trust and business accounting records; prior private reprimand and admonition).

Here, respondent also practiced law while on the ineligible list, an offense that is generally met with an admonition if the attorney is unaware of the ineligibility (as here) or advances compelling mitigating factors. See, e.g., In the Matter of William C. Brummel, DRB 06-031 (March 21, 2006) (attorney practiced law during a four-month period of ineligibility; the attorney was unaware of his ineligible status); In the Matter of Frank D. DeVito, DRB 06-116 (July 21, 2006) (attorney practiced

law while ineligible, failed to cooperate with the OAE, and committed recordkeeping violations; compelling mitigating factors justified only an admonition, including the attorney's lack of knowledge of his ineligibility); In the Matter of Richard J. Cohen, DRB 04-209 (July 16, 2004) (attorney practiced law during nineteen-month ineligibility; the attorney was unaware of his ineligibility); In the Matter of William N. Stahl, DRB 04-166 (June 22, 2004) (attorney practiced law while ineligible and failed to maintain a trust and a business account; mitigating factors were the attorney's lack of knowledge of his ineligibility, his prompt action in correcting his ineligibility status, and the absence of self-benefit; in representing the clients, the attorney was moved by humanitarian reasons); and In the Matter of Samuel Fishman, DRB 04-142 (June 22, 2004) (attorney, while ineligible to practice law, represented one client in a lawsuit and signed a retainer agreement in connection with another client matter; the attorney also failed to maintain a trust and a business account; mitigating factors were the attorney's lack of knowledge of his ineligibility, his contrition at the hearing, his quick action in remedying the recordkeeping deficiency, and the lack of disciplinary history).

In addition, respondent grossly neglected post-closing aspects of a real estate transaction, an infraction that, coupled with other less serious infractions, such as recordkeeping violations, will ordinarily yield an admonition or reprimand. See, e.g., In the Matter of Diane K. Murray, DRB 98-342 (September 26, 2000) (admonition for failure to record a deed and to obtain title insurance for fifteen months and two and a half years after the closing, respectively; the attorney also failed to reply to the client's numerous requests for information about the matter and to reconcile her trust account records in a timely fashion; the attorney violated RPC 1.1(a), RPC 1.3, RPC 1.4(a), and RPC 1.15(d)); In the Matter of Laura P. Scott, DRB 96-091 (May 2, 1996) (admonition for attorney who did not remit certain fees to the title company and to the mortgage company until six months after the closing; the attorney also 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 the closing proceeds would then be disbursed; finally, the attorney did not submit to her clients proof of \$97 in "reimbursement for costs/fees" and did not reimburse them for that amount; the attorney violated RPC 1.3, RPC 1.4(a), RPC 1.15(b), and RPC

1.15(d)); In re Stoller, 183 N.J. 24 (2005) (reprimand for attorney who, for a period of almost five years, failed to record mortgages and deeds in two real estate matters and, in addition, failed to maintain records of the transactions for a period of seven years; the attorney's cavalier attitude toward circumstances that he created and failure to take remedial action were considered aggravating factors; violations of RPC 1.1(a), RPC 1.3, and RPC 1.15(a)); In re Jodha, 174 N.J. 407 (2002) (reprimand for attorney who did not promptly complete post-closing procedures; the attorney did not record the deed, pay the title insurance premium, pay the real estate taxes or refund escrow funds to his client until nine to twenty months after the closing; the attorney also failed to correct accounting deficiencies noted during a 1998 random audit by the OAE).

An attorney who, like respondent, both practiced law while ineligible and neglected the post-closing aspects of a real estate transaction received a reprimand. See In re Mandle, Jr., 167 N.J. 609 (2001) (reprimand for attorney who, while practicing law under the supervision of a proctor, failed to represent a client diligently by not recording a deed and mortgage for five months after the closing and not properly disbursing the closing funds, instead allowing them to remain stagnant in his trust

account; the attorney also failed to cooperate with the investigation of the ethics matter; two prior reprimands).

The RPC 8.4(c) violation here is closest to Olitsky (three-month suspension), which was decided before "censure" was a recognized form of discipline. In aggravation, like attorney Olitsky, respondent has prior discipline (two prior admonitions). In addition, respondent had received several warnings from the OAE over the years about using his trust account, but used it anyway for his personal obligations.

However, mitigation is present as well. Respondent cooperated fully with ethics authorities, admitted his misconduct, and no harm came to any client as the result of his misdeeds. In addition, counsel pointed out that respondent, a twenty-year sober, but recovering alcohol and/or drug abuser, has devoted many years to service in the community in behalf of similarly troubled individuals and lawyers, through AA/NA and a lawyers assistance program.


Giving great weight to respondent's mitigation, we voted to impose a censure. In the absence of respondent's dedication to recovering alcohol and substance abusers, we would have determined that respondent should be suspended for three months.

In addition, we require respondent to provide the OAE with quarterly reconciliations of his trust account for two years, as recommended by the special master.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

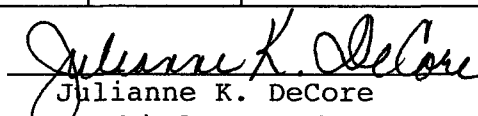
In the Matter of Ousmane Al-Misri
Docket No. DRB 08-194

Argued: November 20, 2008

Decided: December 23, 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:		8				1


Julianne K. DeCore
Chief Counsel