SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-199
District Docket No. XIV-2013-0565E

IN THE MATTER OF

ROBERT ALFONSO FORTUNATO

AN ATTORNEY AT LAW

Decision

Argued: September 15, 2015

Decided: February 2, 2016

Jason D. Saunders 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 by way of a disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent, submitted pursuant to R. 1:20-15(f). Respondent admitted violating RPC 1.15(b) (failure to promptly notify clients or third parties of receipt of funds in which they have an interest and to promptly disburse those funds), RPC 1.15(b)

(negligent misappropriation of clients' funds) (more properly, RPC 1.15(a)), RPC 1.15(d) and R. 1:21-6 (recordkeeping), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

The OAE recommended that we impose a reprimand on respondent. On August 17, 2015, respondent submitted a letter brief in which he offered mitigation for his conduct but did not address the appropriate discipline to be imposed. For the reasons set forth below, we determine that a censure is the appropriate sanction for respondent's misconduct.

Respondent was admitted to the New Jersey bar in 1996. He is currently engaged in the solo practice of law in Rochelle Park, Bergen County, New Jersey. He was a solo practitioner in North Bergen, Hudson County, during the timeframe relevant to this matter.

Respondent and the OAE entered into a disciplinary stipulation, dated May 6, 2015, which sets forth the following facts in support of respondent's admitted ethics violations.

During the relevant timeframe, respondent maintained two attorney trust accounts, one with Bank of America and one with Valley National Bank. On October 31, 2013, the OAE received an overdraft notice from Bank of America, indicating that attorney trust account check #10035, issued by respondent on October 16,

2013, in the amount of $275,969.60, had been presented against insufficient funds, resulting in an overdraft of $38,456.00.

On November 7, 2013, respondent provided the OAE with a written explanation for the overdraft. Respondent had represented Templo Fuete De Vida Corp ("De Vida") in the purchase of real estate located in West New York, New Jersey. At the October 16, 2013 closing, De Vida provided respondent with a certified check, in the amount of $308,313.30, to consummate their purchase. Respondent claimed that, given the late hour of the closing, the certified check could not be deposited that day.

On that same date, despite his inability to deposit De Vida's check, respondent issued the aforementioned $275,969.60 trust account check to the seller, representing its proceeds from the transaction. Respondent instructed the seller not to deposit the trust account check until the next day, October 17, 2013. Although the seller complied with respondent's instructions, respondent forgot to timely deposit De Vida's certified check. Consequently, Bank of America's negotiation of the seller's trust account check resulted in an overdraft of $38,456.00 and the invasion of $237,513.60 in client funds that were maintained in respondent's trust account on behalf of forty-two other clients.

On August 13, 2014, the OAE conducted a demand audit of respondent's trust accounts. The audit revealed that respondent had failed to perform monthly three-way reconciliations of his trust accounts and to maintain trust account receipts and disbursements journals. Additionally, as closing agent in several real estate transactions, respondent had collected estimated government recording costs from clients and third parties, paid the actual recording costs associated with those transactions, and kept the balance of the excess recording costs, rather than disbursing those funds to his clients or to the proper third parties. Respondent openly admitted this practice, couching his retention of these excess funds as a "service fee" charged for recording the documents in those transactions. These "service fees," however, were never disclosed to the clients or third parties on the final HUD-1 executed for each transaction.

In the stipulation, respondent admitted to multiple transactions where he kept such excess recording costs as a "service fee." First, in the Berrios matter, respondent acted as the closing agent for his clients, who were purchasing real estate in Ridgefield Park, New Jersey. According to the HUD-1 in that transaction, respondent's fee was $975 and the estimated recording costs for the deed and the mortgage were $650.

The actual recording costs, however, were only $196. Respondent, thus, received $454 more than the amount shown on the HUD-1 as his fee. The $454 in excess recording fees should have been refunded to his clients rather than disbursed to respondent.

Next, in the Loaiza matter, respondent acted as the closing agent for his client, who was purchasing real estate in North Bergen, New Jersey. According to the HUD-1 in that transaction, respondent's fee was $975 and the estimated recording costs for the deed and the mortgage release were $375. The actual recording costs, however, were only $73, as no costs were actually incurred for the mortgage release. Respondent, thus, received $302 more than the amount shown on the HUD-1 as his fee. He should have refunded those excess recording costs to his client or the seller.

Third, in the F&P Property, LLC matter, respondent acted as the closing agent for his client, the buyer of real estate in North Bergen, New Jersey. According to the HUD-1 in that transaction, respondent's fee was $2,000 and the estimated recording costs for the deed, the mortgage, and the mortgage release were $950. The actual recording costs, however, were only $325. Respondent, thus, received $625 more than the amount shown on the HUD-1 as his fee. He should have refunded those excess recording costs to his client or to the seller.

Finally, in the Perez matter, respondent acted as the closing agent for his clients, who were purchasing real estate in Guttenberg, New Jersey. According to the HUD-1 in that transaction, respondent's fee was $1,500 and the estimated recording cost for the deed was $300. The actual recording cost, however, was only $73. Respondent, thus, received $227 more than the amount shown on the HUD-1 as his fee. He should have refunded those excess recording costs to his clients.

Respondent, thus, admitted that, in each of the above-described real estate transactions, he acted as the closing agent and retained excess recording fees as a "service fee," in addition to his fee shown on the HUD-1, when those funds should have been reimbursed either to his client or to a third party. Respondent further admitted that, in all of these transactions, despite not disclosing these "service fees," he executed the HUD-1, as closing agent, confirming that it was "a true and accurate account of this transaction . . . [and that respondent] caused or will cause the funds to be disbursed in accordance with this statement."

The OAE asserts, in aggravation, that the above facts demonstrate that respondent engaged in a pattern of misrepresentation, both by failing to return excess recording fees to his clients or third parties and by failing to disclose

the purported "service fees," in addition to his agreed upon fee, on the final HUD-1s.

In mitigation, the OAE and respondent jointly submit that respondent has demonstrated that his conduct, which caused the trust account overdraft, was attributable, in part, to the impact and side effects of the chemotherapy treatment that respondent was undergoing at that time to treat cancer. In his letter brief, respondent also offered, as mitigation, with respect to the RPC 1.15(b) and RPC 8.4(c) violations, that he believed that charging a "service fee" for recording real estate closing documents was ethical until the OAE confronted him about the practice. Respondent stated that "I have seen many other attorneys do this, and I believe it may be the rule among closing attorneys rather than the exception."

Following a de novo review of the record, we find that the facts contained in the stipulation clearly and convincing support respondent's admitted ethics violations.

In each of the above-described real estate transactions, respondent, acting as both the buyer's attorney and the closing agent for the transaction, collected estimated recording fees from the parties and then retained the excess recording fees, as an undisclosed "service fee," in addition to his fee listed on the HUD-1. Respondent should have refunded the excess fees to

the appropriate parties rather than disbursing them to himself. None of the parties to the transactions had agreed to permit respondent to retain those funds as additional fees and, in fact, none of them knew of the excess charges. As the closing agent for each transaction, respondent executed the final HUD-1s confirming that they were true and accurate accounts of the transactions and affirming that he had "caused or will cause the funds to be disbursed in accordance with this statement." In all of those transactions, however, the HUD-1 was neither an accurate account of the transaction nor a true reflection of the disbursement of the settlement funds. Thus, by his execution of the HUD-1s in these transactions, respondent engaged in multiple instances of misrepresentation vis-à-vis both his clients and third parties, in violation of RPC 8.4(c). Moreover, respondent violated RPC 1.15(b) by retaining the inflated recording costs, instead of promptly notifying his clients or third parties of his receipt of funds to which they were entitled and promptly disbursing those funds to them.

In addition, respondent failed to timely deposit the buyer's certified check in connection with the De Vida closing, which resulted in an overdraft of $38,456.00 and the invasion of $237,513.60 in client funds that were maintained in his Bank of America trust account for forty-two other clients. By his

conduct, he was guilty of negligent misappropriation of client funds, in violation of RPC 1.15(a).[1]

Finally, after the OAE's audit, respondent admitted that he had not performed monthly three-way reconciliations of his trust accounts and had not maintained trust account receipts and disbursements journals, in violation of RPC 1.15(d) and R. 1:21-6.

The discipline imposed for misrepresentations on closing documents ranges from a reprimand to a term of suspension, depending on the seriousness of the conduct, the presence of other ethics violations, the harm to the clients or third parties, the attorney's disciplinary history, and other mitigating or aggravating factors. See, e.g., In re Barrett, 207 N.J. 34 (2011) (reprimand for attorney who falsely attested that the HUD-1 he signed was a complete and accurate account of the funds received and disbursed as part of the transaction); In re Mulder, 205 N.J. 71 (2011) (reprimand for attorney who certified that the HUD-1 that he prepared was a "true and accurate account of the funds disbursed or to be disbursed as part of the

[1] Although the stipulation erroneously cited RPC 1.15(b), rather than RPC 1.15(a), this was clearly a typographical error. The stipulated facts unequivocally indicate that respondent admitted and intended to admit that his conduct amounted to negligent misappropriation, in violation of RPC 1.15(a).

settlement of this transaction;" specifically, the attorney certified that a $41,000 sum listed on the HUD-1 was to satisfy a second mortgage; in fact, there was no second mortgage encumbering the property; the attorney's recklessness in either making or not detecting other inaccuracies on the HUD-1, on the deed, and on the affidavit of title was viewed as an aggravating factor; mitigating circumstances justified only a reprimand); In re Agrait, 171 N.J. 1 (2002) (reprimand for attorney who, despite being obligated to escrow a $16,000 deposit shown on the HUD-1, failed to verify it and collect it; in granting the mortgage, the lender relied on the attorney's representation regarding the deposit; the attorney also failed to disclose the existence of a second mortgage prohibited by the lender; the attorney's misconduct included misrepresentation, gross neglect, and failure to communicate to the client, in writing, the basis or rate of his fee); In re Gahwyler, 208 N.J. 253 (2011) ("strong censure" imposed on attorney who made multiple misrepresentations on a HUD-1, including the amount of cash provided and received at closing; attorney also represented the putative buyers and sellers in the transaction, a violation of RPC 1.7(a)(1) and (b); mitigating factors included his unblemished disciplinary record of more than twenty years, his civic involvement, and the lack of personal gain); In re Gensib, 206 N.J. 140 (2011)

(censure for attorney who failed to inform his clients that he was inflating the cost of their title insurance to cover possible later charges from the title insurance company, failed to convey his fee, in writing, to his clients, failed to safeguard client funds, and had a prior reprimand for improperly witnessing a document); In re Weil, 214 N.J. 45 (2013) (censure imposed on attorney who admitted to inflating the costs for title and survey charges and recording fees for mortgages, deeds, and cancellation of mortgages in 174 real estate matters and then placing those inflated figures in the HUD-1s relative to those transactions, in violation of RPC 8.4(c); the attorney was also guilty of commingling, in violation of RPC 1.15(a); in aggravation, the attorney had been the subject of a prior reprimand); In re De La Carrera, 181 N.J. 296 (2004) (three-month suspension in a default case in which the attorney, in one real estate matter, failed to disclose to the lender or on the HUD-1 the existence of a secondary mortgage taken by the sellers from the buyers, a practice prohibited by the lender; in two other matters, the attorney disbursed funds prior to receiving wire transfers, resulting in the negligent invasion of clients' trust funds); In re Nowak, 159 N.J. 520 (1999) (three-month suspension for attorney who prepared two HUD-1s that failed to disclose secondary financing and misrepresented the sale price and other

information; the attorney also engaged in a conflict of interest by arranging for a loan from one client to another and representing both the lender (holder of a second mortgage) and the buyers/borrowers); In re Fink, 141 N.J. 231 (1995) (six-month suspension for attorney who failed to disclose the existence of secondary financing in five residential real estate transactions, prepared and took the acknowledgment on false HUD-1 statements, affidavits of title, and Fannie Mae affidavits and agreements, and failed to witness a power of attorney); In re Alum, 162 N.J. 313 (2000) (one-year (suspended) suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits;" the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false HUD-1 statements showing repair credits allegedly due to the buyers; in this fashion, the clients were able to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years before and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended); In re Newton, 157 N.J. 526 (1999) (one-year suspension for attorney who prepared false and misleading HUD-1 statements, took a false jurat, and engaged in multiple conflicts of interest in real estate transactions); and In re Frost, 156 N.J. 416 (1998) (two-

year suspension for attorney who prepared misleading closing documents, including the note and mortgage, the Fannie Mae affidavit, the affidavit of title, and the settlement statement; the attorney also breached an escrow agreement and failed to honor closing instructions; the attorney's ethics history included two private reprimands, a three-month suspension, and a six-month suspension).

Generally, a reprimand is imposed for negligent misappropriation of client funds and recordkeeping deficiencies. See, e.g., In re Arrechea, 208 N.J. 430 (2011) (negligent misappropriation of client funds in a default matter; the attorney also failed to promptly deliver funds that a client was entitled to receive and ran afoul of the recordkeeping rules by writing trust account checks to himself and making cash withdrawals from his trust account, practices prohibited by R. 1:21-6; although the baseline discipline for negligent misappropriation is a reprimand and, in a default matter, the otherwise appropriate level of discipline is enhanced, a reprimand was viewed as adequate because of the attorney's unblemished professional record of thirty-six years and his cardiac and serious cognitive problems (mild dementia)); In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had

collected in five real estate transactions; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee; no prior discipline); and In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney disbursed excess trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies, but the attorney had not been disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years).

In isolation, cases involving an attorney's failure to properly deliver funds to clients or third persons, in violation of RPC 1.15(b)), usually results in the imposition of an admonition or reprimand, depending on the circumstances. See, e.g., In the Matter of Jeffrey S. Lender, DRB 11-368 (January 30, 2012) (admonition; in a "South Jersey" style real estate closing in which both parties opted not to be represented by a personal attorney in the transaction, the attorney inadvertently over-disbursed a real estate commission to MLSDirect, neglecting to deduct from his payment an $18,500 deposit for the transaction; he then failed to rectify the error for over five

months after the over-disbursement was brought to his attention; violations of RPC 1.3 and RPC 1.15(b); we considered that the attorney had no prior discipline); In the Matter of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) (admonition imposed on attorney who, in three personal injury matters, did not promptly notify his clients of his receipt of settlement funds and did not promptly disburse their share of the funds; the attorney also failed to properly communicate with the clients; we considered that the attorney had no prior discipline); and In re Dorian, 176 N.J. 124 (2003) (reprimand imposed on attorney who failed to use escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities; attorney previously admonished for gross neglect, failure to communicate, failure to withdraw, and failure to cooperate with disciplinary authorities, and reprimanded for gross neglect, lack of diligence, and failure to communicate).

Even when the RPC 1.15(b) violation is accompanied by other infractions, an admonition may still result. See, e.g., In the Matter of Brian Fowler, DRB 12-036 (April 27, 2012) (after the attorney had been retained to represent an estate, he was to collect funds due on a note given to the estate; for a three-year period, he collected the funds but failed to deposit at least nineteen checks and did not supply an accounting as

required; he also failed to reply to more than a dozen inquiries from the client about the funds; violations of RPC 1.4(b) and RPC 1.15(b); we were mindful of the attorney's psychological/psychiatric difficulties, which had impeded his ability to represent his clients; although the attorney had received two prior admonitions, we nevertheless considered an admonition appropriate, in light of the mitigating factors); In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (for three years attorney did not remit to client the balance of settlement funds to which the client was entitled, a violation of RPC 1.15(b); the attorney also lacked diligence in the client's representation, failed to cooperate with the investigation of the grievance, and wrote a trust account check to "cash," violations of RPC 1.3, RPC 8.1(b), and R. 1:21-6(c)(1)(A); significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (attorney did not promptly disburse to a client the balance of a loan that was refinanced; in addition, the attorney did not adequately communicate with the client and did not promptly return the client's file; violations of RPC 1.15(b), RPC 1.4(b), and RPC 1.16(d)); and In the Matter of Walter A. Laufenberg, DRB 07-042 (March 26, 2007) (following a real estate closing, attorney did

not promptly make the required payments to the mortgage broker and the title insurance company; only after the mortgage broker sued the attorney and his client did the attorney compensate everyone involved; violations of RPC 1.1(a) and RPC 1.15(b)).

By far, respondent's most troubling conduct relates to his pattern of misrepresentation in respect of the estimated recording fees. Like the attorneys in Weil and Gensib, respondent routinely inflated recording charges and knowingly executed inaccurate HUD-1 statements, misrepresenting the accounting and disbursements for the transactions. We reject respondent's rationalization of the retention of these funds as a "service fee." He performed no additional post-closing work to earn the excess fees and made no attempt to disclose them to his clients. Even if he had performed additional post-closing work, he still misrepresented the actual costs and his disbursements on the HUD-1s.

In mitigation, respondent readily admitted his unethical conduct, entering into a stipulation, and he was also undergoing chemotherapy treatment at the time of his failure to deposit the De Vida certified check.

Based on the totality of respondent's conduct, with the lion's share of the discipline prompted by respondent's pattern of retaining escrowed recording fees for his own pecuniary benefit and by his pattern of misrepresentation, we determine to impose a censure. In addition, respondent has overstated and retained fees and costs totaling more than $1,600 in four client matters, which he must return to those clients or third parties within thirty days. Moreover, in light of respondent's characterization of this "service fee" practice to represent "the rule among closing attorneys . . . rather than the exception," we are led to believe that respondent may have engaged in this practice on prior occasions. Thus, in addition to returning the identified excess costs to his clients and/or third parties, we require respondent to review his records over the period of the last seven years and to identify to the OAE, within one year, any other cases/closings in which respondent has overstated and then retained fees and costs different from those set forth in the relevant HUD-1s. Certainly, respondent should take notice that, should he persist in his "service fee" practice, more severe discipline will follow.

Vice-Chair Baugh and Member Clark 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
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert A. Fortunato
Docket No. DRB 15-199

Argued: September 15, 2015

Decided: February 2, 2016

Disposition: Censure

Members	Disbar	Suspension	Censure	Disqualified	Did not participate
Frost			X		
Baugh					X
Clark					X
Gallipoli			X		
Hoberman			X		
Rivera			X		
Singer			X		
Zmirich			X		
Total:			6		2

Ellen A. Brodsky
Chief Counsel