DISCIPLINARY REVIEW BOARD

OF THE

SUPREME COURT OF NEW JERSEY

BONNIE C. FROST, ESQ., CHAIR
EDNA Y. BAUGH, ESQ., VICE-CHAIR
PETER J. BOYER, ESQ.
BRUCE W. CLARK, ESQ.
HON. MAURICE J. GALLIPOLI
THOMAS J. HOBERMAN
EILEEN RIVERA
ANNE C. SINGER, ESQ.
ROBERT C. ZMIRICH

RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 962
TRENTON, NEW JERSEY 08625-0962
(609) 815-2920

ELLEN A. BRODSKY
CHIEF COUNSEL

PAULA T. GRANUZZO
DEPUTY CHIEF COUNSEL

MELISSA URBAN
FIRST ASSISTANT COUNSEL

TIMOTHY M. ELLIS
LILLIAN LEWIN
BARRY R. PETERSEN, JR.
COLIN T. TAMS
KATHRYN ANNE WINTERLE
ASSISTANT COUNSEL

September 22, 2017

Mark Neary, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625-0962

Re: **In the Matter of John T. Rihacek**
Docket No. DRB 17-251
District Docket No. XIV-2016-0304E

Dear Mr. Neary:

The Disciplinary Review Board reviewed the motion for discipline by consent (reprimand or such lesser discipline as the Board may deem appropriate) filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-10(b). Following a review of the record, the Board determined to grant the motion. In the Board's view, a reprimand is the appropriate measure of discipline for respondent's violations of RPC 1.5(a) (unreasonable fee), RPC 1.5(c) (improper contingent fee and failure to provide an accurate settlement statement to the client), RPC 1.15(a) (negligent misappropriation of client funds), and RPC 1.15(d) and R. 1:21-6(d) (recordkeeping deficiencies).

Specifically, at all relevant times herein, respondent was a partner in the law firm of Pavliv & Rihacek, in Howell, New Jersey. The law firm maintained an attorney trust account at Provident Bank, another trust account at Bank of America (BOA) (the ATAs), and two attorney business accounts, one at each of those banks (the ABAs).

Respondent undertook most of the recordkeeping duties for the law firm. Both he and his law partner, Alex Pavliv, who is the

subject of a similar consent to discipline, performed law firm recordkeeping tasks, including drafting checks on the law firm's accounts.

Between 2015 and September 2016, the OAE conducted several compliance audit visitations in respect of the law firm's attorney books and records. Although the law firm produced certain books and records for the first audit interview on February 5, 2015, the attorneys could not account for all of the client funds in the Provident and BOA ATAs. The Provident ATA contained old client balances and a negative client balance, and there were no reconciliations or listings of client balances presented for the BOA ATA.

A second audit visitation, on February 19, 2015, revealed the following:

> [T]he OAE's reconstructed reconciliations for the Provident ATA and the Bank of America ATA were reviewed with respondent and Pavliv. In addition to funds deposited to the Provident ATA and disbursed from the Bank of America ATA, a debit (negative) client balance for the Anderson matter totaling <$650.00> in the Provident ATA was documented and discussed in detail with respondent and Pavliv. It was determined that a deposit on the client ledger card dated 10-18-13 referencing check #12376 from "Awning Design" in the amount of $650.00 did not appear on the bank statement, but had been disbursed by the firm, bringing the Anderson client ledger card to <$650.00>. Exhibit 3. The remaining deficiencies noted were reviewed with respondent and Pavliv.
>
> [S¶5.][1]

The OAE and the law firm coordinated efforts thereafter to resolve those, and other recordkeeping issues that persisted beyond a third (November 2015) audit until September 14, 2016, when the OAE conducted its fourth and final demand audit interview. That meeting was attended by respondent, Pavliv, and their bookkeeper, Debbie Chapman. They produced all of the records requested by the OAE, with one exception, but furnished those items later that same month. The OAE's September 2016 audit

[1] S refers to the June 26, 2017 disciplinary stipulation.

confirmed that the firm had brought its books and records into compliance with the Rules.

Respondent stipulated that, in the Anderson matter above, a $650 check destined for the ATA went missing. Therefore, when respondent disbursed an ATA check to Anderson for $1,050, it caused a $650 shortage, thereby invading other client funds held in the ATA.

Similarly, in a real estate matter for client Stemmermann, a $55,000 deposit was made, comprising checks for $54,000 and $1,000, the latter of which was misplaced in a desk drawer and not deposited in the ATA until its discovery, over seven months later. In the interim, the full $55,000 was disbursed on account of the real estate closing, thereby invading $1,000 of other client funds held in the ATA. Respondent stipulated that the invasions constituted negligent misappropriations, in violation of RPC 1.15(a).

In addition, in two personal injury contingent fee matters, respondent failed to comply with R. 1:21-7(d), which requires the attorney's fee in such cases to be calculated on the net sum of the recovery after deducting disbursements in connection with the institution and prosecution of the claim. In both the Eyre and Wornstaff matters, respondent calculated his fee on the gross settlement amount, in violation of the Rule, resulting in excessive fees of $3,867.46 in Eyre and $500 in Wornstaff.

Further, in Wornstaff, respondent failed to document, in the settlement statement, conversations with the client in which he had explained numerous costs "covered" by the firm on her behalf, thereby failing to provide the client with a settlement statement that accurately reflected the remittance to the client and the method of its determination.

Respondent also stipulated to his failure to maintain proper ATA and ABA receipts and disbursements journals; client ledger cards and ledger sheets; a running balance in the trust account check register and proper bank reconciliations; schedules of client ledger account balances; all checking account records for a period of seven years; and fully compliant ATA and ABA processed checks, violations of RPC 1.15(d) and R. 1:21-6. Lastly, respondent made non-compliant wire transfers, in violation of R. 1:21-6(C)(1)(A).

Respondent stipulated that, by virtue of the foregoing, he charged two unreasonable fees by calculating them on the gross, rather than the net settlement amount (RPC 1.5(a)); charged an

improper contingent fee and failed to provide the client with an accurate settlement statement (RPC 1.5(c) and R. 1:21-7(g)); negligently misappropriated client funds (RPC 1.15(a)); and violated the recordkeeping requirements of RPC 1.15(d) and various subsections of R. 1:21-6, described above.

Although the stipulation stated that there were no aggravating factors for the Board's consideration, it cited a September 20, 2005 random audit conducted when respondent was a solo practitioner, wherein some of the same recordkeeping deficiencies were reported. He was not the subject of any disciplinary action as a result of that audit.

In mitigation, respondent has no prior discipline since his admission to the bar thirty-five years ago.

Generally, a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation of client funds. See, e.g., In re Cameron, 221 N.J. 238 (2015) (after the attorney had deposited into his trust account $8,000 for the satisfaction of a second mortgage on a property that his two clients intended to purchase, he disbursed $3,500, representing legal fees that the clients owed to him for prior matters, leaving in his trust account $4,500 for the clients, in addition to $4,406.77 belonging to other clients; when the deal fell through, the attorney, who had forgotten about the $3,500 disbursement, issued an $8,000 refund to one of the clients, thereby invading the other clients' funds, a violation of RPC 1.15(a); upon learning of the overpayment, the attorney collected $3,500 from one of the clients and replenished his trust account; a demand audit of the attorney's books and records also uncovered "various recordkeeping deficiencies," a violation of RPC 1.15(d)); In re Wecht, 217 N.J. 619 (2014) (attorney's inadequate records caused him to negligently misappropriate trust funds, violations of RPC 1.15(a) and RPC 1.15(d)); and 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 in which he represented a client; 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).

Charging an unreasonable fee ordinarily warrants an admonition, if it is limited to one incident. See, e.g., In the Matter of Angelo Bisceglie, Jr., DRB 98-129 (September 24, 1998) (admonition for attorney who billed a Board of Education for work not authorized by that Board, although it was authorized by its

president; the fee charged was unreasonable, but did not reach the level of overreaching) and In the Matter of Robert S. Ellenport, DRB 96-386 (June 11, 1997) (admonition for attorney who received $500 in excess of the contingent fee permitted by the Rules).

If the charge is so excessive as to evidence an intent to overreach the client, then the more severe discipline of a reprimand is required. See, e.g., In re Doria, 230 N.J. 47 (2017) (attorney refused to return any portion of a $35,000 retainer after the client terminated the representation; the Board upheld a fee arbitration determination awarding the client the return of $34,100 of the $35,000 retainer; the Board determined that the fee was so excessive as to evidence an intent to overreach; thereafter, the attorney promptly returned the $34,100 to the client) and In re Read, 170 N.J. 319 (2000) (attorney charged grossly excessive fees in two estate matters and presented inflated time records to justify the high fees; strong mitigating factors considered).

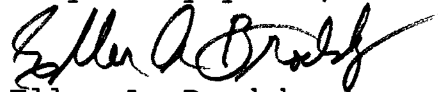
Here, respondent's fees in two personal injury matters were only moderately excessive ($3,867.46 in Eyre and $500 in Wornstaff), due to the improper calculation of fees using gross settlement amounts. This infraction, viewed alone, likely would warrant no more than an admonition.

In light of respondent's thirty-five year career without prior discipline, the Board determined that a reprimand satisfactorily addresses the totality of his misconduct.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated June 26, 2017.
2. Stipulation of discipline by consent, dated June 26, 2017.
3. Affidavit of consent, dated June 29, 2017.
4. Ethics history, dated September 22, 2017.

Very truly yours,



Ellen A. Brodsky
Chief Counsel

EAB/paa
Enclosures
c: See Attached List

c: w/o enclosures (via e-mail)
Bonnie C. Frost, Chair
Disciplinary Review Board
Charles Centinaro, Director
Office of Attorney Ethics
(via interoffice mail and e-mail)
Steven J. Zweig, Deputy Ethics Counsel
Office of Attorney Ethics
Marc David Garfinkle, Esq.
(via regular mail and e-mail)
Isabel McGinty, Statewide Ethics Coordinator
Office of Attorney Ethics