DISCIPLINARY REVIEW BOARD

OF THE

SUPREME COURT OF NEW JERSEY

RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 962
TRENTON, NEW JERSEY 08625-0962
(609) 815-2300

January 24, 2018

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

Re: In the Matter of Yuexin Li
Docket No. DRB 17-356
District Docket No. XIV-2016-0186E

Dear Mr. Neary:

The Disciplinary Review Board reviewed the motion for discipline by consent (censure or such lesser discipline as the Board deems appropriate) filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-10(b)(1). Following a review of the record, the Board determined to grant the motion.

In the Board's view, as a matter of stare decisis, a censure is the appropriate discipline for respondent's violations of RPC 1.15(b) (failure to promptly deliver funds or other property belonging to the client); RPC 1.15(d) and R. 1:21-6 (recordkeeping); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

This case involves misconduct that the Board perceives as increasingly common in transactional real estate matters. Thus, in addition to imposing discipline on respondent for his conduct in this matter, and to address this troublesome practice, the Board recommends that the Court consider the issuance of a Notice to the Bar announcing more stringent treatment of conduct that involves the purposeful, systematic, and unauthorized

retention of excess recording fees, or the implementation of other deceptive, income-generating practices. Such treatment may include an analysis of the conduct under the principles of In re Wilson, 81 N.J. 451 (1979), and its progeny (knowing misappropriation of client and/or escrow funds).

From 2009 through 2016, in connection with his transactional real estate practice, respondent systematically collected inflated, "flat" recording fees from his clients, and then improperly retained the excess recording fees, in addition to his agreed fee listed on the HUD-1 form, in violation of RPC 1.15(b). Respondent did not have his client's authorization to retain the excess recording fees. Thus, respondent should have promptly returned those funds to his clients, rather than systematically retaining them as income. During that period, respondent knowingly overcharged 738 clients for recording costs totaling $119,660.

In all of those transactions, respondent knew that the final HUD-1 was not an accurate account of the transaction and that the settlement funds were not disbursed in accordance with the final HUD-1s. Yet, respondent adopted the HUD-1s in these transactions, in violation of RPC 8.4(c).[1]

In addition, from 2009 through 2016, respondent charged other improper fees to his clients, described in the HUD-1's as "title binder review fees" of $100 and "legal documentation and notary fees" of $50. Respondent admitted, however, that those costs, totaling $66,450, were excessive and were included in the flat legal fee he charged the clients for these transactions.

Finally, in connection with the OAE's audit, respondent admitted that he had committed multiple recordkeeping infractions, in violation of RPC 1.15(d) and R. 1:21-6.

As noted, respondent's misconduct is the latest example in a disturbing trend of disciplinary cases involving the improper retention of inflated recording fees in real estate

[1] The stipulation does not set forth sufficient facts to find that respondent prepared and executed the HUD-1's in these transactions. It does, however, support a finding that he was aware that the HUD-1's contained misrepresentations, but took no action to correct them.

transactions, deceptive fees practices, and misrepresentations on HUD-1's and to clients. In the past, however, fact patterns similar to this case have not been viewed through the lens of knowing misappropriation. Rather, they have been primarily analyzed as violations of RPC 1.15(b) and RPC 8.4(c).

Cases involving an attorney's failure to promptly deliver funds to clients or third persons, in violation of RPC 1.15(b), generally result in the imposition of an admonition or reprimand, depending on the circumstances. See, e.g., 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 promptly communicate with the clients; the Board considered that the attorney had no prior discipline); 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); 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 was 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); the attorney's psychological/psychiatric

difficulties, which had impeded his ability to represent his clients, were considered in mitigation; although the attorney had received two prior admonitions, an admonition was still imposed, 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); and 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)).

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 Rush, 225 N.J. 15 (2015) (reprimand for attorney who, in two real estate matters, improperly retained more than $700 in excess recording fees, and falsely attested that the HUD-1s he had signed were complete and accurate accounts of the funds received and disbursed as part of the transactions; the attorney was also guilty of lack of diligence, commingling, and recordkeeping violations; in mitigation, he stipulated to his misconduct and had no prior discipline); 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 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 Fortunato, 225 N.J. 3 (2016) (censure for attorney who engaged in the systematic, unauthorized retention of excess recording fees, couched as "services fees," in addition to his legal fee; the attorney also prepared and executed inaccurate HUD-1's, repeated violations of RPC 8.4(c); in mitigation, the attorney asserted that "I have seen many other attorneys do this, and I believe it may be the rule among [transactional real estate] attorneys rather than the exception"); In re Weil, 214 N.J. 45 (2013) (censure imposed on attorney who admitted 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); more than $150,000 in inflated costs and fees were collected; 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 Gahwyler, 208 N.J. 253 (2011) ("strong censure" imposed on attorney for 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 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 prior to the imposition of discipline 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).

Here, the scale of respondent's admitted misconduct is alarming. Over the course of more than six years, he purposely overcharged his real estate clientele for both recording fees and legal services. In turn, he reaped more than $186,000 in ill-gotten, additional income. Like the attorneys in Fortunato, Weil, and Gensib, respondent systematically inflated recording costs and knowingly sanctioned inaccurate HUD-1 statements, misrepresenting the accounting and disbursements for the transactions. As a result, his clients were cheated and he was monetarily enriched.

Respondent's misconduct is similar in scope and dollar amount to that of the attorney in Weil, albeit without any of the aggravating factors present in that case. It embodies,

however, misconduct on a much larger scale than that of the attorney in Rush. The Board, therefore, determined to impose a censure in this matter and, further, to require respondent to refund the identified excess costs and fees, totaling $186,050, to his former clients within one year from the date of any Order entered by the Court in this matter.

Because current precedent neither supports nor provides adequate notice to the practicing bar of such an outcome, the Board declined to remand this matter for reconsideration of whether respondent's conduct amounts to knowing misappropriation. Rather, the Board determined to recommend that the Court consider anew the disciplinary approach to the type of misconduct presented by this case. As set forth above, over the past six years, the Court has repeatedly confronted schemes similar to respondent's improper conduct. This fact pattern has become all too familiar, and begs the callous attempt at mitigation posited by the attorney in Fortunato - "I believe it may be the rule among [transactional real estate] attorneys rather than the exception."

In the Board's view, the purposeful scheme of what is, functionally, theft from one's clients or third parties, featured in this case, is virtually indistinguishable from established forms of knowing misappropriation routinely resulting in disbarment, pursuant to In re Wilson, supra, 81 N.J. 451, In re Hollendonner, 102 N.J. 21 (1985), and their progeny. If such misconduct is not distinguishable, and if the elements of knowing misappropriation are proven, might the ultimate sanction of disbarment better serve to protect the public? The Board suggests that, especially in a case featuring the scope and breadth of theft of client funds seen here, the potential treatment of such misconduct as knowing misappropriation is a deserving outcome and is necessary to deter similar future misconduct. It is for these reasons that the Board respectfully requests that the Court consider issuance of a Notice to the Bar addressing such misconduct and its potential future treatment.

Member Boyer concurs with the imposition of a censure, but would afford respondent a three-year period to refund the excess fees and costs.

Member Singer would deny the motion, determining that a six-month to one-year term of suspension would be more appropriate discipline for respondent's extensive, long lasting (over six years), grossly dishonest behavior, which included his knowingly signing many false HUD-1 settlement statements containing the false or inflated charges. In aggravation, respondent's systematic overcharges harmed hundreds of clients for his own enrichment.

Member Singer does not, however, agree with the majority's recommendation that the Court issue a Notice to the Bar that this type of conduct may be considered knowing misappropriation of client funds, which requires automatic disbarment, reasoning that, (a) were the Wilson rule to be applied to such conduct, it would become difficult to limit the application of that rule whenever an attorney's dishonest conduct causes financial harm to a client; and (b) a suspension, rather than a censure, sends a strong message to the Bar without expanding the circumstances justifying mandatory disbarment.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated September 29, 2017;

2. Stipulation of discipline by consent, with exhibits, dated September 29, 2017;

3. Affidavit of consent, dated September 28, 2017; and

4. Ethics history, dated January 24, 2018.

Very truly yours,

Ellen A. Brodsky
Chief Counsel

Enclosures

c: see attached list

c: Bonnie C. Frost, Chair
Disciplinary Review Board (via e-mail, w/o enclosures)
Charles Centinaro, Director
Office of Attorney Ethics (via interoffice mail and e-mail, w/o enclosures)
Christina Blunda Kennedy, Deputy Ethics Counsel,
Office of Attorney Ethics (via e-mail, w/o enclosures)
Iram P. Valentin, Respondent's Counsel (via regular mail and e-mail, w/o enclosures)
Daniel R. Hendi, Director
New Jersey Lawyers' Fund for Client Protection
(via e-mail, w/o enclosures)
Carol Johnston, Secretary
Advisory Committee on Professional Ethics
(via e-mail, w/o enclosures)