

SUPREME COURT OF NEW JERSEY  
Disciplinary Review Board  
Docket No. DRB 17-296  
District Docket Nos. XIV-2015-0029E  
and XIV-2015-0209E

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IN THE MATTER OF  
HOWARD J. BURGER  
AN ATTORNEY AT LAW

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Decision

Argued: November 16, 2017

Decided: February 12, 2018

Reid A. Adler appeared on behalf of the Office of Attorney Ethics.

Petar Kuridza 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 a reprimand filed by the District XII Ethics Committee (DEC). The two-count formal ethics complaint charged respondent with violations of RPC 1.15(a) (negligent misappropriation of client trust funds) and RPC 1.15(d) (failure to comply with

recordkeeping requirements) (count one); and RPC 1.2(d) (counseling or assisting a client in illegal or fraudulent conduct), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice) (count two).

The Office of Attorney Ethics (OAE) agrees that a reprimand is appropriate for the totality of respondent's misconduct. Respondent asserts that insufficient evidence exists for us to find him guilty of the charges set forth in count two, and, thus, requests the imposition of an admonition. For the reasons detailed below, we determine to impose a reprimand.

Respondent earned admission to the New York bar in 1970 and the New Jersey bar in 1974. During the relevant time frame, he maintained an office for the practice of law in Kenilworth, New Jersey. He has no prior discipline.

#### Count One

During the relevant time frame, respondent was a solo practitioner, maintaining both his attorney business and attorney trust accounts at Wells Fargo Bank (Wells Fargo). On April 22, 2013, the OAE randomly selected respondent for an audit. The audit revealed the following recordkeeping

deficiencies: schedule of client ledger accounts not prepared and not reconciled monthly; business account image-processed checks not in compliance with Court Order; improper electronic transfers from attorney trust account; and deceptive use of "& Associates" in law firm name.

The OAE directed respondent to rectify these recordkeeping deficiencies, and, on May 13, 2013, respondent represented to the OAE that he had done so. Subsequently, the OAE scheduled a demand audit for July 22, 2015. During that demand audit, the OAE discovered that respondent had failed to correct the prior recordkeeping deficiencies, as he had represented, and had committed additional recordkeeping violations.<sup>1</sup> Specifically, respondent failed to obtain and retain copies of the front and back of all cancelled attorney business account checks, and had improperly maintained a balance of \$5,013.70 in his "Burger v. Falk" attorney trust sub-account. Under the supervision of the OAE, respondent corrected all of the recordkeeping deficiencies and disbursed the funds from the "Burger v. Falk" sub-account, via three attorney trust account checks issued on March 14, 2016.

The OAE audits of respondent's practice revealed additional misconduct. Specifically, in 2014, respondent represented John

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<sup>1</sup> Respondent was not charged with a violation of RPC 8.1(a) in that respect.

Frederick, the buyer in a real estate transaction concerning property in Monroe, New Jersey. Respondent also served as the settlement agent for the transaction, which closed on October 24, 2014. To consummate the transaction, the seller agreed to provide \$2,400 to pay unanticipated condominium association fees due at closing. Respondent, however, failed to memorialize those association fees on the HUD-1 for the transaction, and failed to collect the funds to satisfy those fees. Nonetheless, respondent closed the transaction and disbursed funds, as set forth on the HUD-1, creating a \$2,400 shortage in his attorney trust account, which was not rectified until September 9, 2015, almost one year later. That shortage invaded trust funds that he was holding in behalf of at least eight other clients. Moreover, respondent did not recognize the \$2,400 shortage until the OAE alerted him, at which point he deposited \$2,400 of his personal funds into his attorney trust account.

### **Count Two**

On February 17, 2012, Keith Gorda retained respondent to represent him in connection with a matter involving the estate of his aunt, Bertha Gorda. Keith sought to recoup, on behalf of the estate, funds that he alleged his cousin and co-executor, Dr. Robert Irving, had misappropriated while serving as the

legal guardian of Bertha, prior to her death on January 19, 2011. In her will, Bertha had named Keith and Irving as co-executors of her estate. Keith and Irving were also heirs to the estate, which was worth more than \$217,000. Respondent was not retained to represent Keith in connection with his administration of the estate; indeed, Keith had retained another attorney, Robert Weinberg, in that role. Respondent's role was limited to an action to recoup the estate funds that Irving had allegedly misspent in connection with his administration of the guardianship of Bertha.

On March 9, 2012, on respondent's advice, Keith opened a new savings account for Bertha's estate, at Wells Fargo, intending that both he and Irving would be co-signatories, and that future disbursements in behalf of the estate would require both of their signatures. Three days later, Keith transferred \$187,378.01 from the original estate account to the new estate savings account, leaving \$30,000 in the original account "in case bills had to be paid" by Irving.

In an April 12, 2012 letter, attorney Gerard C. Tamburino informed respondent that he represented Irving, who had disbursed a \$5,000 retainer fee to Tamburino and respondent, totaling \$10,000, from the original estate account. Tamburino further asserted that Keith's transfer of the \$187,378.01 in

estate funds had been accomplished without Irving's consent and demanded the return of those funds to the original estate account.

On April 17, 2012, respondent replied to Tamburino's letter, confirming that Keith had transferred the estate funds at his direction, inviting Irving to join the account as a co-signatory, and representing that "[i]n the interim, no funds will be dispersed [sic] from either account. I suggest you have Dr. Irving contact Mr. Gorda with regard to arranging for Dr. Irving's name to be added to the account with the understanding that no check can be cashed without both signatures." During the ethics hearing, Tamburino testified that he and Irving had relied on respondent's written representation that Keith would disburse no estate funds without either Irving's prior consent or a court order.

By letter dated May 22, 2012, respondent asked Tamburino to refund to the estate the \$5,000 retainer fee that Irving had paid. Respondent represented that he would follow suit after Tamburino remitted his fee. In the letter, respondent asserted that the \$10,000 in retainer fees should not have been disbursed from the estate account without Keith's prior approval.

The parties were unable to settle their differences. Accordingly, on August 28, 2012, respondent filed a complaint

against Irving, in behalf of Keith, in the Superior Court of New Jersey, Union County, Chancery Division, alleging that Irving had misappropriated funds while serving as Bertha's legal guardian.

On October 26, 2012, the Honorable Frederic S. Kessler issued an order directing Irving to submit an accounting of his guardianship expenditures. The order further provided that "[n]either party shall make any further disbursements of any estate assets pending further order of the Court" and that "[t]he Court shall not render any decision as to legal fees or executor's commissions until all other issues have been resolved."

During the ethics hearing, Tamburino testified that Judge Kessler had issued that order because both Keith and Irving had accused each other of improperly disbursing estate funds, and that neither Judge Kessler nor Judge Dupuis had modified or amended that order. Keith received a copy of Judge Kessler's order and reviewed it with respondent. Keith testified, however, that he interpreted the order as a prohibition on the disbursement of estate funds to Bertha's heirs, but not a prohibition on other disbursements made in the administration of the estate. Despite that purported interpretation, Keith disbursed estate funds, under a cover letter from respondent, to

Mary Margaret Lukowitz, one of Bertha's heirs, without the consent of the court. Keith testified that respondent had advised against his making that disbursement, but, after Keith determined to proceed, respondent assisted him in documenting it. Keith made the disbursement because Mary's child required serious medical treatment.

Subsequent to Judge Kessler's order, respondent accepted and cashed five cashier's checks from Keith, all drawn on Bertha's estate funds. Respondent claimed that, in each instance, he had not asked Keith to identify the source of funds for the checks.<sup>2</sup>

Specifically, on December 26, 2012, two months after Judge Kessler had issued the order prohibiting disbursements from the estate account, respondent accepted a \$4,636.84 cashier's check from Keith, drawn on Bertha's estate funds. On June 14, 2013, respondent accepted a second cashier's check, in the amount of \$3,234, also drawn from the estate account.

On September 4, 2013, respondent submitted a Certification of Services to Judge Kessler, requesting payment of legal fees from Bertha's estate account. In the certification, respondent acknowledged having received the \$3,234 check from Keith, but

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<sup>2</sup> The OAE did not charge respondent with violating RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal) in respect of this conduct. Rather, the OAE charged violations of RPCs 8.4(c) and (d).



made no representation regarding the check's source of funds. During the ethics hearing, respondent agreed that he had submitted this request to the court due to Judge Kessler's standing order prohibiting the disbursement of estate funds. On September 19, 2013, Judge Kessler authorized the payment of legal fees of \$2,628.84 to respondent, to be paid from Irving's share of Bertha's estate.

On December 17, 2013, respondent submitted a second Certification of Services to Judge Kessler, in support of a request for the award of \$18,299.16 in legal fees, reduced by the \$2,628.84 previously paid to him. On December 18, 2013, respondent submitted a motion, returnable at a scheduled January 23, 2014 court appearance, seeking an order directing that Irving pay all of respondent's legal fees.

Thereafter, Judge Kessler retired, and the matter was assigned to the Honorable Katherine R. Dupuis. On January 29, 2014, Judge Dupuis entered a case management order, which set forth scheduling deadlines, but did not address respondent's latest request for legal fees.

On March 8, 2014, respondent accepted a \$14,979.24 cashier's check from Keith, the third such check drawn on Bertha's estate funds.

On April 29, 2014, Tamburino sent respondent a demand for production of documents, including bank statements, for Bertha's estate. According to respondent, Keith provided him with the bank statements for the new Wells Fargo accounts, and that he "probably looked at them," but not closely. Respondent sent Tamburino bank statements only for months in which transactions occurred. Keith testified that the bank statements sent to Tamburino included copies of all checks paid to respondent for legal fees. After receiving the statements, Tamburino called respondent several times, seeking an explanation for Keith's disbursement of estate funds, but received no return calls.

During an August 13, 2014 status conference before Judge Dupuis, Tamburino asserted that the bank statements produced in reply to his demand indicated that, from April 2012 through April 2014, Keith had improperly disbursed \$45,975.59 from Bertha's estate.

On August 19, 2014, Tamburino formally demanded that respondent provide an accounting of the funds Keith had disbursed from Bertha's estate, and copies of all bank records for the estate accounts into which Keith had transferred more than \$187,000 in estate funds. Neither respondent nor Keith provided that accounting. Tamburino testified, however, that, during a telephone conversation in September 2014, respondent

admitted that Keith had paid him approximately \$35,000 in legal fees from Bertha's estate funds, to date.

On September 16, 2014, respondent accepted a \$9,017.50 cashier's check from Keith, the fourth such check drawn on Bertha's estate.

During the ethics hearing, the panel questioned respondent's acceptance of the fourth cashier's check, given his knowledge that Keith had been using Bertha's estate funds to pay him. Respondent replied that, when Judge Dupuis took over the pending litigation, she "clearly implied, although didn't issue an order, saying that the prior orders were no longer in effect. That was the clear implication of what she said."

Respondent admitted that, as of September 2014, he was aware that Keith had been disbursing funds from Bertha's estate; moreover, he conceded that, between his receipt of the third and fourth checks, before Judge Dupuis took over the guardianship lawsuit, he was aware that Keith had been drawing on Bertha's estate funds to pay his legal fees. Respondent never instructed Keith to cease drawing from the estate to pay legal fees.

On November 16, 2014, respondent filed another Certification of Services, again requesting payment of his legal fees from Irving's share of estate funds. On January 13, 2015, after hearing oral argument on both attorneys' requests for

legal fees, Judge Dupuis issued an order permitting respondent to retain the \$36,866.74 that Keith had paid him from the estate, via the first four cashier's checks, and permitting Tamburino to retain the \$5,000 that Irving had paid him from the original estate account, adding that "any outstanding fees shall be paid by [the respective attorneys'] client[s]."

Judge Dupuis did not rule on the issue of whether respondent had violated Judge Kessler's 2012 order by accepting the checks for fees from Keith. Rather, she had limited the litigation solely to the guardianship issues raised in Keith's complaint against Irving, and directed that any arguments over estate funds be addressed via a new complaint concerning the conduct of the co-executors to the estate.

After trial, Judge Dupuis ruled in Keith's favor in respect of the guardianship lawsuit, concluding that Irving had improperly expended more than \$37,000, and ordering Irving to reimburse that sum to Bertha's estate. Judge Dupuis further ordered that respondent's more than \$36,000 in legal fees, which had been paid from the estate funds, would stand. In the summer of 2015, the estate was finalized, and all distributions were made to the heirs. In Tamburino's view, the heirs' shares were decimated by respondent's \$56,000 in legal fees against a \$200,000 estate.

On February 23, 2015, Tamburino again demanded an accounting of all disbursements from Bertha's estate subsequent to Keith's transfer of more than \$187,000 in estate funds to the Wells Fargo accounts. Respondent produced no such accounting. Tamburino neither appealed Judge Dupuis' decision, nor filed a new lawsuit in respect of Keith's transfer and subsequent disbursements of estate funds. According to Tamburino, his client was satisfied with Judge Dupuis' ruling, and was not willing to fund further litigation.

On or about January 23, 2015, however, Tamburino filed the underlying grievance against respondent in connection with Keith's disbursements of estate funds. After reviewing the RPCs, Tamburino concluded that he was required to file the grievance, or could be guilty, himself, of an ethics violation. He explained that, during the pendency of the guardianship litigation, although he suspected misconduct had occurred vis-à-vis Keith's disbursement of Bertha's estate funds to respondent, he endeavored to address that aspect of the case before Judge Dupuis. When Judge Dupuis refused to address the misconduct, even after Tamburino wrote an August 2014 letter formally making accusations and filed corresponding motions, he felt compelled to file the grievance.

On March 13, 2015, respondent accepted a \$20,985.33 cashier's check from Keith, the fifth such check drawn on Bertha's estate funds. Respondent claimed that he presumed that Keith had made that payment from Keith's portion of the estate. Respondent admitted that he believed that Keith had violated the court order, and that he should have advised Keith to cease paying him using estate funds. Indeed, during his testimony, respondent admitted that, by the time he received the third or fourth check from Keith, he knew the source of the funds to be estate money.

During the ethics hearing, however, respondent argued that this fifth payment from estate funds was not in violation of Judge Dupuis' court order, because he represented the class of six heirs on the Gorda side of the estate, and, thus, his "clients" were paying his legal fees. Respondent conceded, however, that he had not executed agreements to provide legal services to the other five members of that class, but, rather, had reached an agreement only with Keith. Nevertheless, he called Keith the "point person and spokesman" for the heirs. Keith testified that he had retained respondent exclusively for the recoupment action, not for the administration of the estate; respondent's retainer agreement with Keith was in Keith's individual capacity, and made no mention of the estate.

In mitigation, respondent testified that, in his forty-seven years of practice, he had never been the subject of an ethics complaint. Moreover, he maintained that "[n]ever a penny has been taken from my trust account," despite the passage of "tens of millions of dollars" through the account. He asserted that, for a five-year period prior to the random audit, his bookkeeper had been distracted and often unavailable, given her husband's battle with, and ultimate death from, lung cancer. He disclosed that, during the relevant time frame, one of his granddaughters had died, and another one had been gravely ill. Respondent requested that the panel make no finding of negligent misappropriation, despite his stipulation to the facts of such a violation, fearing that he would lose his position as the director of a community bank. Finally, respondent expounded on his positive involvement with his synagogue and numerous charitable organizations, including Gay Men's Health Crisis, Children's Hospital, and the non-profit group FARE - Food Allergy Research and Education.

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The DEC found that respondent violated RPC 1.15(d) by engaging in the following recordkeeping infractions: schedule of client ledger accounts not prepared and not reconciled monthly; business account image-processed checks not in compliance with

Court Order; improper electronic transfers from attorney trust account; and deceptive use of "& Associates" in law firm name. Moreover, the DEC determined that respondent had improperly maintained a balance of \$5,013.70 in his "Burger v. Falk" attorney trust sub-account.

The DEC further found respondent guilty of violating RPC 1.15(a), citing respondent's admission that he negligently created a \$2,400 shortage in his attorney trust account in connection with the Frederick real estate transaction, while serving as Frederick's attorney and as settlement agent for the closing. The DEC rejected respondent's request that he not be found guilty of negligent misappropriation, despite his stipulation to it, in order to preserve his position as the director of a local community bank.

In addition, the DEC found respondent guilty of violating RPC 1.2(d), determining that, by the time he accepted the fourth cashier's check from Keith in respect of his legal fees, he knew that the checks had been drawn on Bertha's estate, in violation of a standing court order, and that he had an obligation to counsel his client against such conduct. Specifically, the DEC found that "respondent knew that [Keith] was under a misapprehension regarding disbursements" from the estate account and, thus, "had a responsibility to correct him and halt the



violation" of the court order. Although not directly addressing the alleged violation of RPC 8.4(c), the DEC concluded that respondent "compounded" his misconduct via his numerous attempts to justify his acceptance of these estate funds.

Finally, the DEC appears to have concluded that respondent's conduct violated RPC 8.4(d), characterizing that infraction as "closely related" to the RPC 1.2(d) violation. Although the DEC did not expressly make a finding of a violation of this RPC, it included in its report a brief survey of precedent wherein attorneys were found guilty of this Rule for knowingly disobeying court orders, and were reprimanded.

In mitigation, the hearing panel noted that respondent had no disciplinary history. The DEC did not find any aggravation applicable. The DEC recommended that respondent be reprimanded.

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Following a de novo review, we are satisfied that the record clearly and convincingly establishes that respondent was guilty of unethical conduct.

During the course of its April 22, 2013 random audit, the OAE discovered multiple recordkeeping violations to which respondent stipulated. The OAE directed respondent to correct those deficiencies. Respondent subsequently informed the OAE that he had done so. In July 2015, however, when the OAE

conducted a demand audit of his books and records, it discovered that, not only had respondent failed to correct the deficiencies, as he had represented, but, also, he committed additional recordkeeping violations. Specifically, respondent admitted that he had, for years, improperly maintained a \$5,013.70 balance in his "Burger v. Falk" attorney trust sub-account. Respondent's admitted recordkeeping infractions violated RPC 1.15(a) and (d).

The OAE's investigation also revealed that, in 2014, respondent had served as buyer's counsel and settlement agent in the Frederick matter. Respondent admitted that he closed the transaction, despite having failed to collect adequate funds for required association fees, thereby creating a \$2,400 shortage in his attorney trust account, and invading funds belonging to eight other clients. The shortage was not rectified until almost one year later. Respondent's conduct in this regard constituted negligent misappropriation, an additional violation of RPC 1.15(a).

In the Gorda matter, over a period of three years, respondent accepted more than \$56,000 in legal fees from estate funds. He did so knowing that both Judge Kessler and Judge Dupuis had issued orders prohibiting his client and his co-executor from disbursing estate assets. Specifically, Judge

Kessler's order expressly precluded disbursement of estate assets pending his further order. Judge Dupuis' order allowed respondent to keep the fees his client previously had paid him from estate funds, without making a finding on the propriety of his acceptance of those funds, but required future fees to be paid by the attorneys' respective clients, not from estate funds.

Notwithstanding both of those orders, respondent accepted fees from his client, knowing, early on, that estate assets were the source of those payments. Not once did he specifically inform Judge Kessler or Judge Dupuis of that fact, despite having made at least two fee applications to the court for fees he already had received from estate funds. We reject respondent's disingenuous attempt to justify his acceptance of the last fee payment — that he was accepting payment from his clients (the heirs of Bertha's estate). Respondent did not represent the estate or the heirs of Bertha's estate. Indeed, he had no fee agreement with them. Rather, he entered into a fee agreement only with Keith, whom he represented in an action to recover funds his co-executor allegedly had misappropriated from the decedent while serving as her legal guardian.

Respondent's bald assertion — that, once Judge Dupuis assumed responsibility over the action, Judge Kessler's prior

orders no longer were in effect – is equally disingenuous. The record contains no support for that assertion. Indeed, respondent himself could offer no concrete support for that conclusion. Rather, he testified, "that was the clear import of what she said." We do not accept respondent's baseless and after-the-fact justification for knowingly having accepted fee payments from estate assets.

By accepting fee payments from Keith, knowing the true source of those funds, and by his failure to disclose that fact to the court, respondent engaged in deceitful conduct, in violation of RPC 8.4(c). However, the record does not clearly and convincingly establish whether and to what extent judicial resources were expended as a result of respondent's misconduct. Therefore, we dismiss the alleged violation of RPC 8.4(d).

Similarly, we do not find that the record clearly and convincingly establishes that respondent violated RPC 1.2(d) by counseling or assisting Keith in conduct that was illegal, criminal, or fraudulent. We, therefore, dismiss that alleged violation. Although respondent's conduct in accepting payments from his client that he knew represented estate funds may have violated RPC 3.4(c) and RPC 8.4(a) (violating or attempting to violate the RPCs through the acts of another), he was not

charged with a violation of those RPCs. Thus, we may make no finding in that respect. See R. 1:20-4(b).

In sum, respondent is guilty of violations of RPC 1.15(a) and (d) and RPC 8.4(c).

Generally, a reprimand is imposed for negligent misappropriation of client funds, even when accompanied by other, non-serious infractions, such as recordkeeping deficiencies, commingling, or failure to promptly deliver funds to clients. See, e.g., In re Arrechea, 208 N.J. 430 (2011) (in a default matter, attorney negligently misappropriated client funds when he removed them from the trust account for his own purposes, believing that he had sufficient personal funds in the account against which to draw; attorney "routinely commingled" personal and client funds in the trust account; he also failed to promptly deliver funds to his client and violated the recordkeeping rules by writing trust account checks to himself for cash and making cash withdrawals from the account; significant mitigating factors included the attorney's cognitive issues and unblemished disciplinary record since his admission to the bar in 1975); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed 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 re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated \$13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered); and In re Winkler, 175 N.J. 438 (2003) (attorney commingled personal and trust funds, negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account \$4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account).

Respondent, however, is guilty of other infractions. Discipline ranging from a reprimand to a suspension generally has been imposed for misrepresentations to a court and/or lack of candor to a tribunal. See, e.g., In re Marraccini, 221 N.J. 487 (2015) (reprimand imposed on attorney who attached to approximately fifty

eviction complaints, filed on behalf of a property management company, verifications that had been pre-signed by the manager, who had since died; the attorney was unaware that the manager had died and, upon learning that information, withdrew all complaints; violations of RPC 3.3(a), RPC 8.4(c), and RPC 8.4(d); mitigation considered); In re Schiff, 217 N.J. 524 (2014) (reprimand for attorney who filed inaccurate certifications of proof in connection with default judgments; specifically, at the attorney's direction, his staff prepared signed, but undated, certifications of proof in anticipation of defaults; thereafter, when staff applied for a default judgment, at the attorney's direction, staff completed the certifications, added factual information, and stamped the date; although the attorney made sure that all credits and debits reflected in the certification were accurate, the signatory did not certify to the changes, after signing, a practice of which the attorney was aware and directed; the attorney was found guilty of lack of candor to a tribunal and failure to supervise nonlawyer employees, in addition to RPC 8.4(a) and RPC 8.4(c)); In re Duke, 207 N.J. 37 (2011) (attorney received a censure for failure to disclose his New York disbarment on a form filed with the Board of Immigration Appeals, a violation of RPC 3.3(a)(5); the attorney also failed to communicate with the client and was guilty of recordkeeping deficiencies; prior

reprimand; the attorney's contrition and efforts at rehabilitation justified only a censure); In re Hummel, 204 N.J. 32 (2010) (censure imposed on attorney in a default matter for gross neglect, lack of diligence, failure to communicate with the client, and misrepresentation in a motion filed with the court, a violation of RPC 3.3(a) and RPC 8.1(b); the attorney had no disciplinary record); In re Norton and Kress, 128 N.J. 520 (1992) (three-month suspension each for municipal prosecutor and defense counsel who failed to disclose to the court the improper reason for the arresting officer's refusal to proceed with prosecution for driving while intoxicated); and In re Forrest, 158 N.J. 428 (1999) (six-month suspension imposed on attorney who, in connection with a personal injury action involving injured spouses, failed to disclose the death of one of his clients to the court, to his adversary, and to an arbitrator, and advised the surviving spouse not to voluntarily reveal the death; violations of RPC 3.3(a)(5), RPC 3.4(a), and RPC 8.4(c); the attorney's motive was to obtain a personal injury settlement).

Given the above disciplinary precedent, a reprimand is the baseline sanction for respondent's negligent misappropriation. His additional misconduct certainly could justify the enhancement of the sanction to a censure. Respondent's stubborn refusal to concede his deceitful conduct in the Gorda matter, despite his prior admissions




to the OAE and the existence of two court orders prohibiting his conduct, is troubling. On balance, however, given respondent's otherwise unblemished disciplinary record, since 1974, we determine that a reprimand sufficiently addresses his misbehavior.

Member Gallipoli voted to impose a censure.

Chair Frost was recused. Vice-Chair Baugh and Member Zmirich 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  
Bruce W. Clark, Member

By:   
Ellen A. Brodsky  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Howard J. Burger  
Docket No. DRB 17-296

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Argued: November 16, 2017

Decided: February 12, 2018

Disposition: Reprimand

<b>Members</b>	Reprimand	Censure	Recused	Did not participate
Frost			X	
Baugh				X
Boyer	X			
Clark	X			
Gallipoli		X		
Hoberman	X			
Rivera	X			
Singer	X			
Zmirich				X
<b>Total:</b>	5	1	1	2

  
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Ellen A. Brodsky  
Chief Counsel