

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-426
District Docket No. XIV-2016-0401E

IN THE MATTER OF
JEFFREY M. BENJAMIN
AN ATTORNEY AT LAW

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Decision

Argued: March 15, 2018

Decided: June 18, 2018

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a motion for reciprocal discipline, pursuant to R. 1:20-14(a), filed by the Office of Attorney Ethics (OAE). The motion was based on respondent's six-month suspension in New York for violating the following New York Rules of Professional Conduct: RPC 1.15(a) (misappropriation of client settlement funds); RPC 1.15(c) (failure to promptly disburse funds that the client was entitled to receive, equivalent to New Jersey RPC 1.15(b)), and RPC 1.4(a)(4) (failure

to promptly comply with a client's reasonable requests for information, equivalent to New Jersey RPC 1.4(b)).

For the reasons set forth below, we determine to impose a censure.

Respondent was admitted to the New Jersey and New York bars in 2000, and the Illinois bar in 1998. He has no history of discipline in New Jersey.

Based on a July 14, 2014 petition, the Supreme Court of New York, Appellate Division, Second Judicial Department (NY Court) authorized the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts (Grievance Committee) to institute and prosecute proceedings against respondent, charging him with the above violations. On June 9, 2015, following the filing of the petition, Special Referee David I. Ferber conducted a hearing, where the parties stipulated to various facts. On October 9, 2015, the special referee issued a report finding respondent guilty of the charged violations.

On October 26, 2015, the Grievance Committee petitioned the NY Court for an order to confirm the special referee's report and to impose discipline.

On May 4, 2016, the NY Court issued its Opinion and Order suspending respondent for six months, effective June 3, 2016.

Charge one of the petition alleged that respondent misappropriated client settlement funds, entrusted to him as a fiduciary incident to his practice of law. Charge two alleged that respondent failed to promptly pay his client the settlement funds that were in his possession. The basis for these charges follows.

At the age of eighty-nine, Alfonso Robano purchased a new 2011 vehicle, which he financed at a high interest rate through lender AmeriCredit Financial Services. Robano could not afford the monthly payments and, therefore, in November 2011, voluntarily surrendered the vehicle and agreed to pay the lender \$13,698.09, the amount of the deficiency between the proceeds of the sale of the vehicle and the balance on his account.

In January 2012, on her husband's behalf, Olga Roman-Robano retained respondent to pursue a claim against the automobile dealership for deceptive business practices. She paid respondent a \$5,500 retainer and \$500 for costs and expenses.

On March 1, 2012, respondent filed a complaint against the dealership. Tower National Insurance Company, the dealership's insurer, agreed to settle the case and forwarded a \$6,250 check to respondent, payable to both respondent and Robano. Respondent

failed to obtain Robano's signature on the check.¹ On July 26, 2012, respondent deposited the check into his business operating account. He conceded that the funds should have been deposited into his escrow account, and that, by depositing the funds into his business/operating account, he had mishandled them. Respondent claimed that he "simply was not paying attention to where that money was going" and deposited the funds into the wrong account. He asserted that he later intended to disburse the settlement either to the client or to the lender, once it was determined whether Robano owed the lender money. Respondent did not disburse the settlement funds to Robano until January 28, 2013, about six months after respondent had deposited the check.²

By September 17, 2012, fewer than two months after depositing the Robano settlement funds, respondent's business/operating account had a negative \$1,644.08 balance. He had used the settlement funds for his personal expenses – paying income taxes, rent, and other business expenses. Respondent

¹ At the hearing, respondent agreed that he had deposited the check with "his own signature or stamp." There is no allegation or evidence that he forged Robano's signature.

² At the hearing, the petitioner attempted to relate respondent's disbursement of the settlement funds to his knowledge of the filing of the grievance in January 2013. Respondent, however, claimed that he disbursed the funds after "getting back" on his feet and getting his practice up and running again.

claimed that he did so because, at the time, he was not paying attention to what was "going in and out" of the account, and did not realize that he was using his client's funds because he was not regularly checking his bank account. He thought he had sufficient funds in the operating account and did not "distinguish" between the funds in his personal account and his operating account. Respondent denied having stolen Robano's money.

In September 2012, when respondent discovered the negative balance in his business/operating account, he replenished the funds, but did not transfer them to his escrow account for safekeeping.

Respondent maintained that, at that time, he had very little experience with Interest on Lawyer Accounts, as he did not routinely hold escrow funds. He has since made efforts to educate himself on escrow accounting. He admitted, however, that he had been aware that jury verdicts were to be deposited into escrow accounts, as had occurred when he obtained a large jury verdict while working with another attorney.

Respondent attributed his failure to consistently monitor his accounts to his inability to handle the administration of his practice, and on distracting personal issues, including his wife's affliction with multiple sclerosis, and, at the end of

July and August (presumably 2012), moving his office and "partnering up with somebody." He simply was not paying attention to the account. He knew he had sufficient funds in his personal account, but was not monitoring his operating account.

At the hearing, the following exchange took place when respondent's counsel tried to introduce evidence that respondent lacked motive to take the funds:

[Petitioner]: There is no charge of . . . some kind of theft here, although he has acknowledged he took fiduciary money and put it in his Operating Account and then depleted that money.

. . . .

[Respondent's Counsel] The charge here is misappropriation. That infers and implies that there was some sort of conscious act.

[Petitioner] No, it doesn't. Misappropriating funds means that you did not properly handle your funds.

[Respondent's Counsel] . . . Can we agree for the record that the charge here is only that he only didn't properly handle [sic].

[Petitioner] I will agree for the record that he misappropriated funds as to the practice of law and I will leave it to the Court to determine what that means.

[OAEb, Ex.E35-25 to 37-12.]³

³ OAEb refers to the OAE's November 30, 2017 brief and appendix in support of its motion for reciprocal discipline.

Respondent asserted that he had delayed turning over the settlement funds because of an ongoing "legal issue" relating to whether Robano would be held responsible for an approximate \$13,000 deficiency. He maintained that he had simply made a mistake and had not intended to keep the money from his client or the lender, noting that he did not need the funds because he had substantial funds in his personal account at his ready disposal. He replenished the money in his operating account once he realized that a deficiency existed, and kept the funds there until he turned them over to his client.

Respondent also admitted, as was alleged in charge three of the petition, that he failed to turn over the case's documents that his clients had requested, until February 11, 2013.

In his report, the special referee noted that, "[a]s the transcript of the Hearing reveals, the Respondent expressed remorse for his actions, although I am not convinced that they were merely inadvertent, as his counsel argued. However, I do believe that he will be much more diligent and act appropriately with client funds in the future, if similar circumstances should arise."

The NY Court pointed out that, although respondent agreed that the special referee's report should be confirmed, he disagreed with some evidentiary rulings and the special referee's

statement that "he 'was not convinced' that respondent's actions 'were merely inadvertent.'" The NY Court, however, found "ample evidence" to support the statement, including the fact that respondent deposited the settlement funds into his operating account, knowing that they belonged in the escrow account, and then proceeded to use the funds for personal purposes.

In assessing the appropriate measure of discipline, the NY Court considered that respondent engaged in serious misconduct by misappropriating client funds and delaying payment to an elderly client. It balanced that conduct against mitigating factors: respondent's conduct was an isolated incident; he expressed sincere remorse; similar conduct was not likely to reoccur; he fully cooperated with the ethics investigation; and he presented substantial evidence of his good character, including his pro bono activities in foreclosure clinics administered by the bar association, and charitable activities through his synagogue.

* * *

The OAE argued that respondent's misconduct in New York - failing to obtain his client's signature on the settlement check, depositing it into his operating account rather than his escrow account, and depleting the funds without promptly disbursing them to the client - equated to violations of RPC 1.15(a) (misappropriation) and RPC 1.15(b) (failure to promptly deliver

funds to a client), and that his failure to promptly comply with reasonable requests for information equated to a violation of RPC 1.4(b).

The OAE maintained that none of the exceptions to R. 1:20-14(a)(4) apply, and, therefore, a six-month suspension should be imposed. The OAE relied on the cases of In re Jones, 222 N.J. 301 (2015), In re White, 192 N.J. 443 (2007), and In re Duke, 174 N.J. 371 (2002) – all motions for reciprocal discipline in which New York disciplinary authorities charged attorneys with conversion of trust funds without charging the dishonesty rule (RPC 8.4(c)), and all resulting in a finding of negligent, rather than knowing, misappropriation.

The OAE noted that the New York petition had not charged respondent with dishonesty in connection with his use of his client's funds, and, further, had not characterized the misappropriation as either intentional or inadvertent. However, because the New York court acknowledged the existence of evidence to "support" the special referee's statement that he was not convinced that respondent's actions were merely inadvertent, the OAE argued that we should follow our holding in Jones and White, as the most "reasonable" approach, and impose a six-month suspension on respondent.

In aggravation, the OAE noted that respondent took advantage of an elderly, unsophisticated client. In mitigation, the OAE cited respondent's expression of sincere remorse, his cooperation with ethics authorities, the unlikelihood that he will engage in future unethical conduct, the lack of an ethics history in New York or New Jersey, and his evidence of good character and charitable undertakings.

The OAE recommended that, prior to reinstatement, respondent be required to submit proof to the OAE that he completed an accounting course and, for a two-year period after reinstatement, that he submit monthly reconciliations with supporting documentation.

By letter dated January 5, 2018, respondent urged that we either deny the OAE's motion for reciprocal discipline or, in the alternative, that we consider any reciprocal discipline "satisfied retroactively to coincide with the [New York suspension]." Respondent's basis for the latter option was that, anticipating a reciprocal sanction in New Jersey, he voluntarily ceased practicing law here, from June 3, 2016 through April 5, 2017. Respondent argued that it would be manifestly unfair to impose prospective discipline because the OAE failed to act for nearly eighteen months following his June 23, 2016 letter, notifying that office of his New York suspension. He asserted

that he also notified his clients of his suspension and has not practiced law in New Jersey for twenty months.

* * *

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:

(A) the disciplinary or disability order of the foreign jurisdiction was not entered;

(B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;

(C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;

(D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies because the unethical conduct warrants substantially different discipline.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

Respondent engaged in serious misconduct. He failed to promptly remit to his elderly client funds he (or his designee) was entitled to receive, a violation of RPC 1.15(b). Rather, respondent deposited those funds into his operating account, instead of his escrow/trust account, and used them for his own purposes, without his client's consent. Although the record does not establish that respondent knowingly used his client's funds without authorization, it does clearly establish that he intentionally deposited those funds into his operating account and, thereafter, without clear evidence of design or intent, failed to hold them inviolate. Thus, respondent is guilty of a failure to appropriately safeguard his client's funds, resulting in negligent misappropriation, a violation of RPC 1.15(a). Finally, respondent admitted, and the New York court found, that

he failed to respond to his client's reasonable requests for information and documents, a violation of RPC 1.4(b).

Although the OAE has urged us to follow the determinations in Jones and White, we find those cases to be distinguishable. In Jones, the attorney was charged with, among other things, six counts of conversion of escrow funds, commingling, charging excessive fees, misrepresentations, recordkeeping violations, and lack of candor with ethics authorities. The attorney admitted many of the factual allegations of the petition filed against him, but maintained that his conduct had not been intentional. In the Matter of Daryll Boyd Jones, DRB 14-263 (March 10, 2015) (slip op. at 4). The special referee determined that intent was not a necessary element of conversion. Id. at 5. The NY Court imposed a five-year suspension, noting that Jones evidenced a fundamental ignorance of the rules regarding the proper maintenance of an escrow account and lacked candor with the Grievance Committee. Id. at 12-13.

In Jones, the OAE argued before us that, under R. 1:20-14(a)(4)(E), the attorney's conduct warranted substantially different discipline – disbarment – because he was guilty of six charges of "knowing misappropriation of client funds." However, citing In re White, 192 N.J. 443 (2007), In the Matter of James White, DRB 06-344 (June 21, 2007), we found that Jones'

conversion of escrow funds was not analogous to knowing misappropriation because, in New York, conversion did not necessarily equate to knowing misappropriation or stealing. Rather, we noted that, in White, we had observed that, when New York disciplinary authorities charge knowing misappropriation, the petition alleges failure to safeguard funds, as well as the equivalent of New Jersey's RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). We determined that, standing alone, "the failure to safeguard funds covers a wide spectrum of improprieties, some as minor as failure to deposit client funds in the trust account within a reasonable time." Jones, DRB 14-263 (March 10, 2015) (slip op. at 26). In White, the dishonesty rule was not charged. Thus, we found, and the Court agreed, that the New York record had not established a case of knowing misappropriation. White, (slip op. at 19); and Jones, (slip op. at 26).⁴

⁴ White received a six-month suspension, rather than a reprimand, because he committed other serious violations (converting client funds, commingling trust and personal funds, making twenty-seven ATM withdrawals, negligently misappropriating at least \$2,752.98 in trust funds during a nine-month period, and engaging in recordkeeping violations). Aggravating factors included that White made no attempt to maintain adequate records or to review recordkeeping rules, even after disciplinary proceedings were instituted; that his refusal to review, learn, or implement recordkeeping requirements caused the misuse of escrow funds; and that his recordkeeping was virtually nonexistent.

In the Jones matter, we found that the record was deficient in establishing that the misappropriation/conversion was knowing, as opposed to negligent. In assessing appropriate discipline, we considered that Jones' recordkeeping was "virtually non-existent and he displayed a 'fundamental ignorance' of the recordkeeping rules," and made no effort to familiarize himself with them, thereby negligently invading client funds, and he engaged in a persistent lack of candor with New York ethics authorities. Although we voted to impose a six-month suspension, the Court imposed a retroactive five-year suspension.

See, also, In re Duke, 174 N.J. 371 (2002) (reprimand for attorney disbarred in New York; the attorney was found guilty of converting trust funds, commingling, improperly drawing an escrow check to cash, recordkeeping violations, and failure to timely cooperate with New York disciplinary authorities; we found, and the Court agreed, that the attorney was guilty only of negligent misappropriation).

Thus, in our view, Jones and White involved more expansive misconduct, along with significant aggravating factors. Therefore, we do not consider them dispositive in respect of the discipline to be imposed in this case.

Rather, generally, a reprimand is imposed for the negligent misappropriation of client funds, even in the face of other minor

aggravating circumstances, i.e., other ethics violations, an ethics history, or the default nature of the proceedings. See, e.g., In re Gonzalez, 225 N.J. 603 (2016) (attorney guilty of negligent misappropriation and failure to comply with recordkeeping requirements; prior admonition); In re Arrechea, 208 N.J. 430 (2011) (negligent misappropriation in a default matter; the attorney also failed to promptly deliver funds to a client, and violated the recordkeeping rules; 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 other compelling mitigation); 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); and 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; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years).

Here, respondent is guilty of negligent misappropriation of client funds, failure to promptly disburse settlement funds, and failure to promptly comply with the client's reasonable requests for information. Respondent's conduct involved one client matter. There is no evidence that any other client funds were impacted.

This case is somewhat similar to Arrechea, which proceeded as a default. Arrechea routinely commingled personal and client funds in his trust account. His issuance of trust account checks for personal use resulted in the negligent misappropriation of client funds. The attorney also failed to promptly deliver funds to a client, and violated the recordkeeping rules by writing trust account checks to himself, and making cash withdrawals from the trust account. The complaint recited some serious mitigating health factors, which prompted the attorney to close his practice and relocate to Florida. Because of his otherwise unblemished record of more than thirty-five years and his health issues, we determined that a reprimand was sufficient discipline. The mitigating factors here, however, are not as compelling as Arrechea's.


Based on the above precedent, typically a reprimand would be warranted. However, we find that respondent deprived an elderly client of his funds, which we deem to be a significant aggravating factor warranting greater discipline. We, therefore, determine to impose a censure.

We further determined to require respondent to submit proof to the OAE of completion of an OAE-approved trust and business accounting course within six months of the Court's Order; and, for a two-year period, to provide the OAE with monthly reconciliations of his attorney accounts, on a quarterly basis.

Member Zmirich voted to impose a six-month suspension, with the above conditions.

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 Jeffrey M. Benjamin
Docket No. DRB 17-426

Argued: March 15, 2018

Decided: June 18, 2018

Disposition: Censure

<i>Members</i>	Censure	Six-month Suspension
Frost	X	
Baugh	X	
Boyer	X	
Clark	X	
Gallipoli	X	
Hoberman	X	
Rivera	X	
Singer	X	
Zmirich		X
Total:	8	1


Ellen A. Brodsky
Chief Counsel