

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 19-071  
District Docket No. XIV-2016-0198E

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In the Matter of :  
:   
Walter Toto :  
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An Attorney at Law :  
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Decision

Argued: April 18, 2019  
Decided: October 22, 2019

Joseph A. Glyn appeared on behalf of the Office of Attorney Ethics.

Marc D. Garfinkle 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 disciplinary stipulation filed by the Office of Attorney Ethics (OAE), in which respondent admitted having violated RPC 1.15(a) (negligent misappropriation of client or escrow funds and commingling

personal and trust funds), RPC 1.15(d) and R. 1:21-6 (recordkeeping deficiencies), RPC 8.1(a) (false statement of material fact to ethics authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

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

Respondent was admitted to the New Jersey bar in 1996. He has no prior discipline.

The facts are contained in a February 11, 2019 stipulation between respondent and the OAE. At all relevant times herein, respondent maintained the following accounts in connection with his law practice: a TD Bank attorney trust account (TD ATA); a TD Bank attorney business account (TD ABA); a 1st Constitution Bank attorney trust account ending in 7212 (ATA7212); and a 1st Constitution Bank attorney trust account ending in 4412 (ATA4412).

On March 29, 2016, respondent's TD ATA was overdrawn by \$112,348.68. On April 18, 2016, the OAE sent respondent a letter requesting a written explanation of the cause of the overdraft. Although respondent satisfactorily explained the overdraft, the ensuing OAE investigation revealed numerous instances of recordkeeping deficiencies and negligent misappropriation of trust funds, as follows.

### The Schellak Matter

In May 2013, respondent represented Ben and Jessica Schellak in the purchase of real estate in Highland Park, New Jersey from the Wiegands. Respondent served as settlement agent for the May 10, 2013 closing.

According to respondent's HUD-1 settlement statement for the transaction, he was entitled to receive \$1,050 — legal fees of \$450 and costs of \$200. On the closing date, respondent transferred \$1,150, a \$100 overdisbursement, from his TD ATA, to his TD ABA for his fees and costs. Respondent's overdisbursement to himself created a \$100 shortage of client funds.

On July 23, 2013, when respondent completed all necessary disbursements in connection with the Shellaks' closing, he should have held \$286,924.41 in the TD ATA for clients and for outstanding checks. His TD ATA balance on that day was \$282,622.06, representing a total shortage of \$4,302.35 on account of all clients. Of that amount, \$100 was attributable to the overdisbursement of his fee in the Schellak matter.

Respondent stipulated that the overdisbursement invaded other clients' funds in the trust account, constituting negligent misappropriation, in violation of RPC 1.15(a).

### The Buck Litigation

On August 28, 2013, respondent deposited a \$25,000 check from another law firm into the TD ATA, which he attributed to a matter referred to as the Buck Litigation. The OAE's forensic reconstruction for the matter indicated that, in September and October 2013, he made withdrawals from that account for legal fees, leaving a balance on November 8, 2013 of \$615 for the matter. On that date, and again on November 13, 2013, respondent issued TD ATA checks to himself for \$1,000, and \$615, respectively, on account of the Buck matter. By issuing these checks totaling \$1,615, respondent created a shortage of \$1,000 on account of the Buck litigation.

On November 8, 2013, respondent should have held \$380,571.90 in the TD ATA. However, on that date, his TD ATA balance was \$376,784.55, representing a shortage of \$3,787.35 on account of all clients. The overdisbursement to himself invaded other client funds required to be held in the TD ATA, and constituted negligent misappropriation, in violation of RPC 1.15(a).

### The D'Albero Matter

On October 27, 2014, respondent received a \$200,000 wire transfer from his client, Toll Brothers, Inc. (Toll Brothers) involving a real estate transaction

referred to as the D'Albero matter. Respondent then issued to himself three TD ATA checks totaling \$4,000 related to the D'Albero matter: \$1,500 on October 30, 2014; \$500 on November 4, 2014; and \$2,000 on November 12, 2014. Thereafter, the Toll Brothers balance was \$196,000.

On November 20, 2014, respondent issued a TD ATA check for \$198,000, payable to the "D'Albero Family Living Trust," which caused an overdisbursement of \$2,000, as shown on the Toll Brothers client ledger card that the OAE reconstructed. On that date, respondent should have held \$407,937.38 in the TD ATA. The actual balance in the TD ATA on November 20, 2014 was only \$376,289.53, representing a shortage of \$31,647.85 on account of all clients. Of that shortage, \$2,000 was attributable to the overdisbursement in the D'Albero transaction.

Respondent stipulated that the \$2,000 overdisbursement constituted a negligent misappropriation, in violation of RPC 1.15(a).

#### The Abdelmalak Matter

In May 2015, Kamel Abdelmalak retained respondent for the purchase of real estate in East Brunswick, New Jersey from the Kopskos. Respondent served as settlement agent for the May 21, 2015 closing.

Respondent's HUD-1 settlement statement for the transaction indicated that Acquired Title Services, LLC (ATS) was to receive \$2,071.50. On May 21, 2015, respondent issued a TD ATA check to ATS for \$2,170, an overdisbursement of \$98.50 for the matter.

According to the OAE-prepared client ledger for the matter, on June 18, 2015, after respondent made other required disbursements, the Abdelmalak account was short \$98.50. On February 3, 2016, respondent deposited in the TD ATA a reimbursement check from ATS for \$98.50, thereby correcting the shortage.

On June 18, 2015, respondent was required to hold \$647,168.34 for all clients, but the TD ATA had a balance on that date of only \$618,311.08, representing a \$28,857.26 shortage on account of all clients.

Respondent stipulated that, by disbursing a check for \$2,170, instead of \$2,071.50, in the Abdelmalak matter, he overdisbursed \$98.50, which contributed to an existing shortage in the TD ATA, invaded other client funds, and constituted negligent misappropriation, in violation of RPC 1.15(a).

## The Dudak Matter

Margot Dudak retained respondent for her June 18, 2015 sale of real estate located in Monroe Township, New Jersey. Foundation Title, LLC (FT) served as settlement agent for the transaction.

On June 19, 2015, respondent erroneously deposited sales proceeds of \$123,372.57, that he had received from FT in the TD ABA, rather than the TD ATA. On June 30, 2015, respondent transferred those funds to the TD ATA.

Between June 19, 2015 and June 30, 2015, the balance in the TD ABA fluctuated, with its lowest balance of \$122,409.26 occurring on June 24, 2015, representing a \$963.71 invasion of Dudak's funds, which were required to have been held in an attorney trust account.

On June 19, 2015, respondent deposited \$850 from FT for his fee and costs, related to the real estate transaction. Respondent retained \$450 of those fees in the TD ATA for about eighteen months, until December 22, 2016, when he deposited \$450 in his TD ABA.

Respondent stipulated that his \$963.71 invasion of Dudak's funds constituted negligent misappropriation, in violation of RPC 1.15(a).

Respondent stipulated that he "commingled proceeds totaling \$123,372.97 in connection with the sale of the [Dudak property] when he

wrongfully deposited those proceeds into his TD Bank ABA instead of his TD Bank ATA." Moreover, by leaving \$450 in legal fees in the TD ATA from July 2015 to December 2016, he commingled those funds with client funds in the trust account, violations of RPC 1.15(a).

### The Hubacek Matter

In June 2015, Rainelle Hubacek retained respondent for her purchase of real estate. On June 26, 2015, respondent inadvertently credited Hubacek with \$2,000 more in funds than respondent had received for her transaction. He, thus, disbursed \$2,000 more to her than he should have. Respondent was unaware of the overdisbursement until the OAE investigation took place. On June 9, 2016, respondent obtained Hubacek's return of the \$2,000 overpayment, and deposited it in the TD ATA, thereby curing the shortage.

On June 26, 2015, respondent should have held \$803,252.91 in the TD ATA (\$594,775.46 of client funds and \$208,477.45 for outstanding checks). However, that account held just \$772,395.65, representing a shortage of \$30,857.26 for all clients. Respondent stipulated that he invaded \$2,000 of other clients' funds by an overdisbursement to Hubacek, which contributed to the



\$30,857.26 shortage in the TD ATA on account of all clients. Respondent's negligent misappropriation violated RPC 1.15(a).

### The O'Brien Matter

Respondent represented Karen E. O'Brien, and served as settlement agent, in her purchase of real estate in Monroe Township, New Jersey. On July 16, 2015, he erroneously deposited \$81,451.79, in connection with the real estate transaction, into his TD ABA instead of the TD ATA. He disbursed \$81,457.79 at the closing that day, although the TD ATA held no funds on account of the transaction. The next day, respondent realized his deposit error and transferred \$81,457.79 from the TD ABA to the TD ATA.

On July 16, 2015, respondent should have held \$356,236.10 in the TD ATA. On that date, the balance in the account was \$244,192.67, representing a shortage of \$112,043.43 for all clients.

As a result of respondent's mistaken deposit of funds for the O'Brien matter into his TD ABA, he negligently misappropriated other clients' funds when he disbursed \$81,457.79 from the TD ATA. The misappropriation in the O'Brien matter contributed to the overall shortage of \$112,043.43 in the TD ATA at the time, in violation of RPC 1.15(a).

Respondent also stipulated that "he commingled trust account escrow deposits [sic] money with his business account by wrongfully depositing \$81,457.79 of client escrow money into his TD Bank ABA instead of his TD Bank ATA."

### The Triplet Square Matter

In August 2015, Triplet Square, LLC (TS) retained respondent for the purchase of real estate in Union Beach, New Jersey. Respondent served as settlement agent for the transaction. At the August 27, 2015 closing, respondent disbursed funds, including check number 3191 for \$9,750 to "Brothers Commercial Brokerage" (BCB). However, on August 28, 2015, after receipts and disbursements, a \$7,074.32 shortage existed because TS had not provided sufficient funds for the real estate transaction.

During a January 19, 2017 demand audit, respondent explained that, despite the shortage of funds, he proceeded with the closing because BCB had agreed not to deposit its \$9,750 check until respondent received the additional \$7,074.32 from TS to cure the shortage. Despite that promise, BCB's check number 3191 cleared on August 28, 2015.

On August 27, 2015, respondent should have held \$646,317.26 in the TD ATA. On that date, the account held \$631,220.21, a shortage of \$15,097.05 on account of all clients.

On September 14, 2015, TS remitted funds to respondent to cure the shortage.

Respondent stipulated that, even though he had not received funds sufficient to cover disbursements for the TS transaction, he proceeded with the closing, overdisbursing the TS account by \$7,074.32 at settlement. Respondent admitted that he negligently misappropriated other clients' funds of \$7,074.32, which contributed to the \$15,097.05 shortage in the TD ATA at the time, in violation of RPC 1.15(a).

#### The Estate of Carolina Toto

Carolina Toto, respondent's grandmother, died in 1987, leaving an estate for which respondent's father served as the executor. Respondent's father's siblings were heirs to the estate. Although respondent's father had obtained a tax identification number for the estate, he never opened a separate estate account. Rather, beginning in 1999, he asked respondent to manage the estate's funds from the TD ATA.

Respondent's father authorized respondent to bill the estate and to pay himself for legal services, which respondent did at a flat rate of \$300 per month from January 1, 1999 through February 2009, after which he prepared more detailed billing for the estate. Those bills are not a part of the record.

Respondent's records and the OAE-prepared client ledger card for the estate showed that respondent overdisbursed funds from the estate multiple times during 2014 and 2015. Specifically, on March 17, 2014, respondent transferred \$1,000 from the TD ATA to the TD ABA. At the time, the balance in the estate was only \$300, causing a shortage of \$700. On that date, respondent should have held \$1,321,302.78 in the TD ATA, but the actual balance was \$1,316,154.93, representing a shortage of \$5,147.85 on account of all clients.

According to the OAE-prepared ledger for the estate, from March 27, 2014 to February 2, 2015, respondent made numerous online transfers of estate funds from the TD ATA to the TD ABA, and disbursements to two heirs, which caused a negative balance of \$28,700. On February 2, 2015, respondent received a wire transfer of \$50,000 on behalf of the estate, which brought the estate balance to \$21,300.

The estate balance went negative again on February 5, 2015, when respondent disbursed a series of TD ATA checks totaling \$33,169.48, which

caused a shortage of \$11,869.48 on behalf of the estate. On April 29, 2015, the estate received a wire transfer for \$50,000, which cured the shortage and brought the estate's balance to \$25,787.37.

On May 7, and December 17, 2015, TD ATA checks for \$7,967.31 and \$16,264.41 caused estate shortages of \$3,957.79 and \$15,826.12, respectively. Two deposits of \$50,000 each on August 11, 2015 and May 6, 2016 cured these negative balances.

Respondent stipulated that he overdisbursed funds from the estate on multiple occasions in 2014 and 2015, which caused negative balances ranging from \$700 to \$28,700. By doing so, he invaded other client funds required to be held in the TD ATA. Respondent stipulated that these invasions constituted negligent misappropriations, in violation of RPC 1.15(a).

The OAE interviewed respondent's father about respondent's handling of the estate funds, in light of disbursements of estate funds payable to respondent, and the possibility that he had not been entitled to all of those funds. Respondent's father confirmed that respondent was entitled to the funds as legal fees. In light of that statement, and respondent's "utterly deficient financial records," the OAE determined that the estate misappropriations had been negligent, not knowing, in nature.

## The Toll Brothers Matter

Respondent used a 1<sup>st</sup> Constitution Bank trust account ATA7212 exclusively for matters involving client Toll Brothers' housing development, Regency at Monroe. Respondent held deposits that Toll Brothers received from buyers, and disbursed the funds to Toll Brothers upon settlement.

On June 17, 2015, respondent erroneously deposited two Toll Brothers down payments of \$51,257 and \$143,302 into another trust account at 1<sup>st</sup> Constitution Bank (ATA4412). On July 15, 2015, respondent erroneously deposited a third down payment for Toll Brothers for \$72,592, into ATA4412, for a total of \$267,151 in that account. On July 7, 2015, respondent issued an ATA7212 check to Toll Brothers for \$242,647. When the check was presented to the bank for payment, insufficient funds were in the account to fund the check, which caused an overdraft of \$93,386.69. The overdraft did not impact other clients' funds, as only Toll Brothers' funds were maintained therein.

On July 16, 2015, respondent transferred \$267,051 from ATA4412 to ATA7212, and issued a replacement check to Toll Brothers. The \$267,051 returned was \$100 short of the \$267,151 erroneously deposited into ATA4412. That shortage, combined with several small unreimbursed bank charges, accounted for an overall negative balance in respondent's Toll Brothers account.

On July 31, 2015, the shortage was \$257.69 and, on January 1, 2016, amounted to \$311.54. On December 5, 2016, respondent deposited a \$311.54 check from the TD ABA to cure the shortage.

Respondent stipulated that, as a result of his deposit error, he "negligently misappropriated client funds when he created a negative balance in [ATA7212] dedicated for Toll Brothers escrow money when he disbursed checks that were not covered by adequate deposits as a result of his error of making deposits into the wrong account," in violation of RPC 1.15(a).

#### The Recordkeeping Deficiencies

An unrelated audit of respondent's attorney books and records, completed on November 10, 2010, had exposed a number of recordkeeping deficiencies including \$36,900 of unidentified funds in ATA4412. At the time, respondent certified to the OAE that he would turn over those unidentified funds to the Superior Court Trust Fund Unit (SCTFU). At the July 14, 2016 audit interview in this matter, respondent admitted that he had never done so. He also told investigators that, in 2012, he stopped preparing reconciliations and maintaining proper attorney records.

The July 14, 2016 audit revealed the following deficiencies in respect of respondent's three trust accounts and the TD ABA: (1) failure to prepare three-way reconciliations; (2) failure to maintain client ledger cards; and (3) failure to maintain receipts and disbursements journals, in violation of RPC 1.15(d) and R. 1:21-6.

Respondent stipulated that the following statement contained in an attachment to his November 10, 2010 certification was untrue:

My office has reduced the excess funds amount through diligent searches and inquiries and with the balance we intend to submit a check to the Clerk of the Superior Court for deposit with the Superior Court Trust fund [sic]. Additionally, we will support that application with a detailed affidavit setting forth specifically the facts and all reasonable efforts in search, inquiry and notice.

[Ex.70.]

Respondent stipulated that the assertion that he would turn over the \$36,900 in unidentified funds to the SCTFU constituted a false statement to disciplinary authorities and a misrepresentation, in violation of RPC 8.1(a) and RPC 8.4(c).

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In respect of discipline, respondent has agreed to the following conditions. In addition to the continuing legal education required of all New Jersey



attorneys, he will attend the course "New Jersey Trust and Business Accounting," or an equivalent course approved by the OAE. He also agreed to furnish to the OAE monthly reconciliations, on a quarterly basis for two years.

In aggravation, the parties cited the existence of respondent's prior diversion "for recordkeeping."<sup>1</sup>

In mitigation, respondent has no prior discipline since his admission to the bar in 1996.

The stipulation cited admonition cases for the recordkeeping violations and reprimand to suspension cases for misrepresentations to disciplinary authorities. The parties did not liken this matter to any of the cited cases. However, on the basis that the aggravating factor (prior diversion) outweighs the mitigating factor (no prior discipline), the OAE recommended the imposition of a censure. Respondent's counsel urged us to impose a reprimand.

Following a review of the record, we are satisfied that the facts contained in the stipulation clearly and convincingly support the finding that respondent violated RPC 1.15(a), RPC 1.15(d) and R. 1:21-6, RPC 8.1(a), and RPC 8.4(c).

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<sup>1</sup> Ordinarily, agreements in lieu of discipline are confidential. In this instance, however, respondent stipulated to the existence of a prior diversion.

In March 2016, due to poor recordkeeping practices, respondent created an overdraft in one of his trust accounts, which prompted an OAE investigation and a demand audit of his attorney books and records. That audit revealed negligent misappropriations in eleven matters, mostly real estate matters, as well as recordkeeping deficiencies, as follows.

In the Schellak matter, at the May 10, 2013 real estate closing, respondent erroneously disbursed from the TD ATA \$1,150 for his legal fee and costs. The correct figure was \$1,050. That \$100 error caused an invasion of other clients' funds when, on July 23, 2013, he disbursed the funds remaining on account of the matter to the Schellaks. At the time, the TD ATA had an overall shortage for all clients of \$4,302.35, of which \$100 was attributable to the Schellak error. Respondent stipulated that he negligently misappropriated client funds, a violation of RPC 1.15(a).

In the Buck litigation, on August 28, 2013, respondent deposited \$25,000 from another law firm. Over the next few months, he drew against those funds incrementally until they were exhausted. By issuing checks on November 8 and November 13, 2013 for his fees, respondent created a \$1,000 shortage. At the time, the TD ATA had a shortage of \$3,787.35 on account of all clients, \$1,000 of which was attributable to this matter.

Respondent stipulated that the shortage caused an invasion of other clients' funds held in the TD ATA, constituting negligent misappropriation, in violation of RPC 1.15(a).

In the D'Albero matter, on October 27, 2014, respondent received a \$200,000 wire transfer into the TD ATA from his client, Toll Brothers. After respondent disbursed \$4,000 to himself, the balance decreased to \$196,000. Yet, on November 20, 2014, respondent disbursed \$198,000 to the D'Albero Family Living Trust, which represented a \$2,000 overdisbursement.

On November 20, 2014, a shortage of \$31,647.85 existed in the TD ATA on account of respondent's clients, \$2,000 of which was attributable to the D'Albero matter. Respondent, thus, negligently misappropriated \$2,000 of other client funds, a violation of RPC 1.15(a).

In the Abdelmalak matter, respondent disbursed \$2,170 to the title company for its involvement in the real estate transaction, which represented a \$98.50 overdisbursement of the \$2,071.50 ATS was entitled to receive. On June 18, 2015, when respondent issued TD ATA checks in connection with the transaction, he caused a \$98.50 shortage. At the time, a shortage existed in the TDA ATA of \$28,857.26 on account of all clients, \$98.50 of which was attributable to the Abdelmalak matter.

Respondent's \$98.50 shortage invaded other clients' funds in the TD ATA and constituted negligent misappropriation, a violation of RPC 1.15(a).

In the Dudak matter, while representing the seller in a real estate transaction, respondent erroneously deposited real estate proceeds of \$123,372.97 into his TD ATA instead of his TD ABA. For the next twelve days, until June 30, 2015, the balance in the TD ABA fluctuated, periodically creating a shortage in the \$123,372.97 that respondent was required to hold in escrow for Dudak. The largest shortage was \$963.71 on June 24, 2015.

On June 30, 2015, respondent realized his mistake and transferred the full \$123,372.97 into the TD ATA, which he later properly disbursed.

In the meantime, on June 19, 2015, respondent received \$850 from the title company for his legal fee and costs and deposited these funds in the TD ATA. Thereafter, \$450 of his fee languished in the TD ATA for eighteen months, until respondent removed the fee on December 22, 2016.

Respondent was required to hold Dudak's \$123,372.97 inviolate in the trust account. Having deposited the funds into a business account in error, respondent still was required to safeguard them. Nevertheless, the balance in the TD ABA fell below the required amount by as much as \$963.71, which

constituted the negligent misappropriation of Dudak's funds, a violation of RPC 1.15(a).

Respondent also commingled personal funds in the TD ATA, leaving \$450 of his legal fee in the trust account for eighteen months. Under RPC 1.15(a), the only funds of the lawyer permitted to be held in the trust account are those reasonably sufficient to pay bank charges. By commingling fees in the TD ATA for eighteen months, respondent violated RPC 1.15(a).

Respondent also stipulated that, by depositing \$123,372.97 of his client's funds in his TD ABA, he commingled them with his own funds held in that account. Commingling, however, involves an attorney's improper use of the trust account to house personal funds. It does not implicate an attorney's mistaken placement of client funds with attorney funds in the business account. Respondent's stipulation notwithstanding, we dismiss this particular commingling charge as inapplicable.

In the Hubacek matter, as a result of a bookkeeping error at the June 26, 2015 closing, respondent disbursed \$2,000 more to his client than he should have. That error went unnoticed until June 9, 2016, when respondent corrected the deficiency with Hubacek's return of the extra \$2,000.

In the interim, on June 26, 2015, respondent's TD ATA had a shortage of \$30,857.26 on account of all clients, \$2,000 of which was attributable to the Hubacek matter. This \$2,000 shortage invaded other clients' funds required to be held in the TD ATA, and constituted a negligent misappropriation, in violation of RPC 1.15(a).

In the O'Brien matter, respondent erroneously deposited \$81,457.79 in the TD ABA, instead of the TD ATA. Those escrow funds were to finance O'Brien's purchase of property in Monroe Township. When respondent disbursed \$81,457.79 from the TD ATA for the O'Brien transaction with no concomitant funds in the account to do so, he negligently misappropriated other clients' funds, and contributed to an overall shortage of \$112,043.43 in the TD ATA at the time, constituting negligent misappropriation, in violation of RPC 1.15(a).

Although respondent also stipulated that he commingled the escrow funds with his own funds held in the TD ABA, once again, commingling involves an attorney's improper use of the trust account to hold personal funds. It does not apply to a mistaken deposit of client funds in the business account. Respondent's stipulation notwithstanding, we dismiss this RPC 1.15(a) charge as well.

In the Triplet Square matter, respondent proceeded with the real estate closing, despite a funding shortage of \$7,074.32. The real estate broker, BCB,

had promised not to deposit its commission check, which was sufficient to cover the shortage, until after respondent received additional funds from TS. Unfortunately for respondent, BCB's \$9,750 commission check cleared the next day.

Respondent's decision to close the TS transaction with a shortage of \$7,074.32 in the trust account caused an invasion of other clients' funds held in the TD ATA. On the closing date, the account had a shortage of \$15,097.05 on account of all clients, \$7,074.32 of which was attributable to the TS transaction.

On September 14, 2015, TS wired \$7,074.42 to cure the shortage. Nevertheless, between August 27, 2015 and September 14, 2015, the shortage remained. Respondent's invasion of other clients' funds held in the TD ATA constituted a negligent misappropriation, in violation of RPC 1.15(a).

In respect of the Estate of Carolina Toto matter, respondent's father, who was Carolina's son and the executor of her estate, asked respondent to manage the estate's affairs through his trust account. Respondent's father had authorized respondent to charge the estate a flat fee of \$300 per month from January 1999 until February 2009, when respondent began to prepare more detailed billing for the estate.

The OAE reconstruction of the estate matter revealed numerous overdisbursements from the estate between March 17, 2014, and December 17, 2015. All shortages ultimately were cured via subsequent deposits of estate funds in the TD ATA.

Respondent stipulated that his overdisbursements in 2014 and 2015 had caused negative balances ranging from \$700 to \$28,700 on account of the estate matter. Respondent's stipulated invasions of other client funds constituted negligent misappropriations, in violation of RPC 1.15(a).

The OAE allayed its concerns about respondent's potential self-dealing, by confirming with respondent's father, the executor of the estate, that respondent had been entitled to the sums that he disbursed to himself, as legal fees.

In respect of the Toll Brothers matter, respondent maintained two trust accounts at 1<sup>st</sup> Constitution Bank. One of them, ATA7212, was used exclusively for matters involving Toll Brothers Regency at Monroe development. On June 17 and July 15, 2015, respondent deposited \$267,151 of Toll Brothers funds into the wrong trust account (ATA4412) at that bank. The funds remained in the wrong account until July 16, 2015.



On July 7, 2015, respondent issued an ATA7212 check to Toll Brothers for the release of \$242,647 in escrow funds. At the time, however, insufficient funds were in the account, which caused a \$93,386.69 shortage in ATA7212.

On July 16, 2015, after respondent realized his deposit error, he transferred \$267,051 from ATA4412 to ATA7212. That sum was \$100 short of the amount needed to make the account whole. When the OAE added accrued and unreimbursed bank charges, the total shortage in the account increased to \$311.54 from January 1, 2016 until December 5, 2016, when respondent cured the shortage with a \$311.54 check.

As a result of a deposit error, respondent disbursed checks to Toll Brothers for which no corresponding funds existed in the ATA7212, thereby creating a shortage of \$93,386.69 and invading other escrow funds that respondent held for Toll Brothers matters. Respondent's actions in this regard constituted a negligent misappropriation, in violation of RPC 1.15(a).

The OAE audit revealed numerous recordkeeping deficiencies in respondent's law practice. In an unrelated 2010 audit of respondent's books and records, the OAE discovered \$36,900 of unidentified funds in respondent's trust account. At the time, respondent certified that he would turn those funds over to the SCTFU. At the July 14, 2016 audit in this matter, respondent admitted that

he had not done so. Respondent further admitted that in 2012, he ceased preparing reconciliations and proper records.

In the present matter, the audit uncovered the following deficiencies in all three trust accounts and the TD ABA: failure to: (1) prepare three-way reconciliations; (2) maintain client ledger cards; and (3) maintain receipts and disbursements journals. Respondent's actions in this regard violated RPC 1.15(d) and R. 1:21-6.

Finally, respondent was untruthful when he certified that he would turn over the \$36,900 of unidentified funds to the SCTFU, as evidenced by his failure to do so for the six years from 2010 to 2016. Typically, a respondent's representation of future action is not found to be unethical, because the attorney might have had the intent to perform that action at the time of the statement. Here, however, because respondent has agreed that he made a misrepresentation to disciplinary authorities, we find a violation of RPC 8.1(a) and RPC 8.4(c).

In summary, respondent is guilty of negligent misappropriation in eleven matters and commingling in one matter (RPC 1.15(a)), recordkeeping violations (RPC 1.15(d) and R. 1:21-6) and making a misrepresentation to the OAE (RPC 8.1(a) and RPC 8.4(c)).

Generally, a reprimand is imposed for recordkeeping deficiencies that result in the negligent misappropriation of client funds. See, e.g., In re Cameron, 221 N.J. 238 (2015) (after the attorney had deposited \$8,000 into his trust account for the payoff 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 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 transaction 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 uncovered various recordkeeping deficiencies, in violation of RPC 1.15(d)); In re Wecht, 217 N.J. 619 (2014) (attorney's inadequate records caused him to negligently misappropriate trust account 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).

Here, respondent's numerous negligent misappropriations were occasioned by seemingly nonexistent recordkeeping. By respondent's own admission, he ceased keeping proper records in 2012, just a year after he benefited from a diversion for recordkeeping deficiencies. Indeed, at oral argument before us, respondent's counsel characterized respondent's recordkeeping as "horrendous." At least a reprimand is warranted for this misconduct alone.

Respondent also commingled a \$450 legal fee in the trust account for eighteen months, as a direct result of his failure to keep proper records. Admonitions have been imposed on attorneys who commingled personal funds in the trust account, even when found alongside recordkeeping deficiencies. See, e.g., In the Matter of Richard Mario DeLuca, DRB 14-402 (March 9, 2015) (attorney commingled personal funds in the trust account and engaged in recordkeeping violations, including failure to perform proper three-way reconciliations of the trust account) and In the Matter of Dan A. Druz, DRB 10-404 (March 3, 2011) (attorney commingled personal and client funds in his trust

account, and routinely used the account for business and personal transactions; numerous recordkeeping deficiencies also found).

A reprimand or censure is typically imposed for a false statement or misrepresentation to disciplinary authorities, so long as the lie is not compounded by the fabrication of documents to conceal the misconduct. See, e.g., In re Maziarz, 238 N.J. 476 (2019) (reprimand for attorney who, in a 2017 demand audit, misrepresented in a letter to disciplinary authorities that he had corrected recordkeeping deficiencies found in an earlier, 2016 random audit; commingling, negligent misappropriation, recordkeeping violations, and failure to cooperate with disciplinary authorities also found); In re Mehta, 227 N.J. 53 (2016) (reprimand for attorney who fabricated a document and presented it to disciplinary authorities in defense of an ethics grievance filed by a former client); In re DeSeno, 205 N.J. 91 (2011) (reprimand for attorney who misrepresented to the district ethics committee the filing date of a complaint on the client's behalf; the attorney also failed to adequately communicate with the client and failed to cooperate with the investigation of the grievance; prior reprimand); In re Otlowski, 220 N.J. 217 (2015) (censure for attorney who misrepresented to an individual lender of his client and to the OAE that funds belonging to the lender and his co-lenders, which had been deposited into the

attorney's trust account, were frozen by a court order when, to the contrary, they had been disbursed to various parties, and who made misrepresentations on an application for professional liability insurance; violations of RPC 8.1(a) and RPC 8.4(c); mitigating factors included the passage of time, the absence of a disciplinary history in the attorney's lengthy career, and his public service and charitable activities); In re Schroll, 213 N.J. 391 (2013) (censure for attorney who misrepresented to a district ethics committee secretary that the personal injury matter in which he was representing the plaintiff was pending, when he knew that the complaint had been dismissed over a year earlier; for the next three years, the attorney continued to mislead the committee secretary that the case was still active; in addition, the attorney misrepresented to the client's former lawyer that he had obtained a judgment of default against the defendants; the attorney also was guilty of gross neglect, lack of diligence, and failure to reply to the client's numerous attempts to obtain information about her case; no prior discipline); and In re Falzone, 209 N.J. 420 (2012) (attorney censured for lying to the OAE during its investigation; the attorney also failed to comply with the recordkeeping rules and to supervise his wife/secretary, thereby enabling her to steal \$279,000 from his trust account).

Other than respondent's false statement to the OAE, the remainder of his stipulated misconduct appears to be dilatory, as opposed to nefarious, in nature. He did not appear to be attempting to enrich himself at the expense of his clients. Rather, he was neglectful of the financial aspects of his law practice.

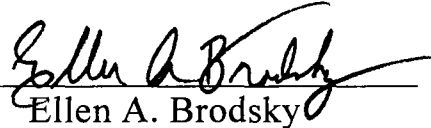
In aggravation, respondent has a prior diversion for negligent misappropriation. In mitigation, he has no prior discipline in twenty-two years at the bar and he stipulated his misconduct, thereby saving disciplinary resources.

A reprimand would be warranted for either of respondent's primary infractions – the negligent misappropriations and the lie to the OAE. Moreover, in light of respondent's diversion and the prior audit in 2010, which revealed recordkeeping infractions, respondent should have exercised careful review of his financial records. Therefore, we determine to impose a censure.

As respondent agreed in the stipulation, we require him to satisfy the following conditions. In addition to the continuing legal education credits required of all New Jersey attorneys, respondent shall attend the course "New Jersey Trust and Business Accounting," or an equivalent course approved by the OAE, and provide the OAE with monthly reconciliations, on a quarterly basis, for two years.

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, Chair

By:   
Ellen A. Brodsky  
Chief Counsel



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SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Walter Toto  
Docket No. DRB 19-071

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Argued: April 18, 2019

Decided: October 22, 2019

Disposition: Censure

<i>Members</i>	Censure	Recused	Did Not Participate
Clark	X		
Boyer	X		
Gallipoli	X		
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0

  
Ellen A. Brodsky  
Chief Counsel