Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-174
District Docket No. XIV-2017-0431E

In the Matter of

Daniel M. Replogle, III

An Attorney at Law

Decision

Argued: September 19, 2019

Decided: December 20, 2019

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite proper notice.

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 censure filed by the District IV Ethics Committee (DEC). The formal ethics complaint charged respondent with having violated RPC 1.15(a) (negligent misappropriation of client funds and commingling); RPC 1.15(d) and R. 1:21-6 (recordkeeping);

RPC 5.5(a)(1) (unauthorized practice of law for failure to maintain professional liability insurance); and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

For the reasons set forth below, we determine to reprimand respondent.

Respondent was admitted to the New Jersey bar in 1984 and to the Pennsylvania bar in 1983. He has no prior discipline, but, since June 4, 2018, has been ineligible to practice law due to nonpayment of the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection. During the relevant timeframe, respondent maintained a law office in Collingswood, New Jersey.

This matter came to the attention of the Office of Attorney Ethics (OAE) as the result of an overdraft notification from TD Bank, where respondent maintained his attorney trust account (ATA) and attorney business account (ABA). Because respondent failed to appear at the January 14, 2019 ethics hearing, at the inception of the hearing, the panel chair telephoned respondent and asked whether he was planning to attend. Respondent replied, "Guess what, I'm not coming. Goodbye." The hearing proceeded in respondent's absence.[1]

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[1] In an October 12, 2018 Pre-hearing Report, respondent represented, "I am no longer practicing law. I have separated all of my files and divided them to several different attorneys based on specialty. I have kept copies of all of my records."

OAE disciplinary investigator Yesenia Ortiz testified that, on July 21, 2017, TD Bank notified the OAE of a $797.87 overdraft in respondent's ATA that had occurred the previous day. On August 1, 2017, the OAE directed respondent to provide a written explanation of the overdraft. In his August 15, 2017 reply, respondent explained that, on March 22, 2017, he had issued a $999.87 ATA check to client Montique Benton, representing the balance of funds owed to Benton in connection with a litigation recovery. At the time he issued the check to Benton, his ATA held $9,085.32. However, Benton did not negotiate that check until July 21, 2017, when the balance in respondent's ATA was just $202, resulting in the overdraft and a $797.87 shortage in the ATA. On July 3, 2017, respondent had transferred $1,200 from his ATA to his ABA, reducing the balance in the ATA to $252. On August 5, 2017, respondent deposited funds in the ATA to partially cure the shortage. On August 8, 2017, he issued to Benton a replacement ATA check for $999.87.

The complaint, thus, alleged that respondent's transfer of the $1,200 from the ATA to the ABA caused the negligent misappropriation of $797.87 of Benton's funds, in violation of RPC 1.15(a). In his amended answer, respondent admitted that he had been required to safeguard $999.87 for Benton when, on July 3, 2017, he made the transfer of $1,200 from his ATA to his ABA. Moreover, during a September 12, 2017 audit interview with Ortiz, respondent

conceded that the ATA shortage was his fault.

The OAE's investigation of the ATA overdraft also revealed the following recordkeeping deficiencies: (a) improper trust account designation: must indicate "Attorney Trust Account" or "IOLTA Attorney Trust Account" on bank statements, checks, and deposit slips [R. 1:21-6(a)(2)]; (b) client ledger cards not fully descriptive [R. 1:21-6(a)(2)]; (c) client ledger cards with debit balances [R. 1:21-6(d)]; (d) inactive balances left in the ATA [R. 1:21-6(d)]; (e) no individual ledger card for each client [R. 1:21-6(c)(1)(B)]; (f) no monthly trust bank reconciliation with client ledgers, journals, and checkbook [R. 1:21-6(c)(1)(H)];; (g) no running checkbook balance [R. 1:21-6(c)(1)(G)]; (h) old outstanding checks left unresolved [R. 1:21-6(d)]; (i) deposit slips lack sufficient detail [R. 1:21-6(c)(1)(A)]; (j) trust funds on deposit exceed obligations [R. 1:21-6(d)]; (k) funds unrelated to the practice of law held in the ATA [R. 1:21-6(a)(1); RPC 1.15(a)]; (l) personal funds commingled in the ATA [RPC 1.15(a)]; (m) improper image processed trust checks [R. 1:21-6(b)]; (n) client identification not indicated on checks [R. 1:21-6(c)(G)]; (o) improper business account designation: must indicate "Attorney Business Account," "Attorney Professional Account," or "Attorney Office Account" on bank statements, checks, and deposit slips [R. 1:21-6(a)(2)]; (p) all earned legal fees must be deposited to the ABA [R. 1:21-6(a)(2)]; (q) improper image processed

business checks [R. 1:21-6(b)]; (r) professional corporation without malpractice insurance [R. 1:21-6(a)(2)]; and (s) electronic transfers made without proper authorization [R. 1:21-6(c)(1)(A)].

Respondent admitted the violations identified in subparagraphs (a), (f), (g), (l), (o), (p), (q), (r), and (s) above. Specifically, in respect of the commingling allegation, listed in subparagraph (l), at the September 12, 2017 audit interview, the following colloquy took place between OAE Assistant Chief Investigator Joseph Strieffler and respondent:

> MR. STRIEFFLER: Okay. So, you're saying that the deposits into your trust account are for retainers and legal bills?
>
> THE WITNESS: Yes.
>
> MR. STRIEFFLER: So, you put it in trust and then move them to business?
>
> THE WITNESS: Yes.
>
> MR. STRIEFFLER: Why not just put them directly into the business account if they're for outstanding invoices?
>
> THE WITNESS: The reason is because I've always thought that, and I may be wrong, and if I am wrong, I apologize, but I don't think there's anything illegal about it.
>
> MR. STRIEFFLER: There's nothing illegal about being wrong, if you are wrong.

THE WITNESS: My thought was it was always better to deposit every dime into the trust account.

MR. STRIEFFLER: That's a fair assumption.

. . . .

MR. STRIEFFLER: Right. There's also another way that our office could view this. I'm not going to pursue this, but by depositing these fees for outstanding invoices into your trust account, it could be if it were -- if it rose to the level where you were depositing all of those fees into there, and weren't taking them out, it would get you commingling. I don't want to do that. That's an ethics violation and we don't want to go down that path. It would appear that they're going in and coming out with relative quickness between the two transactions.

THE WITNESS: Yes.

MR. STRIEFFLER: You're doing everything on a Friday, so assuming you're receiving funds throughout the week, and at the end of the week, you're taking them and putting them into the business account, okay.

[Ex.P-2,64-4 to 68-6.]

The complaint, thus, alleged that respondent's various recordkeeping deficiencies violated RPC 1.15(d) and R. 1:21-6.

Although respondent admitted that his letterhead bore a limited liability company (LLC) designation for a period of time when it should not have, that his LLC was in good standing, and that he did not maintain malpractice insurance, he denied that he committed misconduct by practicing law as an LLC

while failing to maintain at least $100,000 of required malpractice insurance, as R. 1:21-1B(a)(4) requires. He told investigators that, after opening his ATA and ABA in 2008, he determined that practicing as a sole-attorney LLC offered him little added protection from personal liability. He claimed, without offering dates or evidence, that he ceased functioning as an LLC, ultimately removed the designation from his letterhead, and practiced as a sole proprietorship thereafter. However, respondent conceded that his ATA and ABA checks, as well as his bank statements for those accounts, still contained the LLC designation. When asked whether his LLC certificate remained in good standing, he answered, "Yes," without further elaboration.[2] A self-described "cheapskate," respondent continued to use the preprinted checks with his LLC designation, rather than order new checks.

The complaint, thus, charged respondent with having engaged in the unauthorized practice of law for failing to maintain professional liability insurance as an LLC, a violation of RPC 5.5(a)(1).

The complaint further alleged that, toward the end of the OAE's investigation, respondent ceased cooperating with ethics authorities.

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[2] In order to remain in good standing, New Jersey corporations, including LLCs, are required to file annual reports with the Division of Revenue, in the absence of which the State may dissolve or cancel the entity. The record does not address the filing of annual reports for respondent's LLC or why respondent concluded that his certificate was still in good standing.

Specifically, following the September 12, 2017 demand audit, the OAE requested certain attorney records, some of which respondent produced on October 11, 2017. Between November 14, 2017 and January 19, 2018, respondent continued to send the OAE reports, and other documents, which the OAE contended were replete with errors. As a result, on February 23, 2018, the OAE issued a deficiency letter for the above nineteen recordkeeping deficiencies and noted respondent's "wholesale disregard" for the recordkeeping rules. The OAE set a deadline of April 9, 2018 for respondent to provide corrected monthly reconciliations, client ledger cards, receipts and disbursements journals, and data from a Microsoft Money program that he had used for his attorney accounts. Respondent, however, never replied and failed to provide that information. As previously noted, he also refused to appear at the DEC hearing, all of which led to the charge of failure to cooperate with disciplinary authorities, in violation of RPC 8.1(b).

In its summation brief, the OAE sought the imposition of a three-month suspension, based largely on respondent's alleged failure to cooperate: specifically, failure to file a conforming answer, despite repeated requests that he do so, failure to file a pre-hearing memorandum, and failure to appear at the disciplinary hearing. Citing In re Silber, 100 N.J. 517 (1985), the OAE brief stated, "In aggravation, the OAE notes that Respondent failed to correct his

misconduct despite numerous opportunities to do so." The OAE also requested that the hearing panel find that respondent lacked remorse for his actions, and that it consider his "hostile tone" when he stated that he would not attend the ethics hearing.

The hearing panel concluded that respondent's $1,200 transfer of funds from the ATA caused the negligent misappropriation of $797.87 of Benton's funds, a violation of RPC 1.15(a) that respondent essentially admitted during the ethics investigation. The DEC further found that respondent had committed the various recordkeeping deficiencies detailed above, in violation of RPC 1.15(d) and R. 1:21-6. The DEC additionally concluded that respondent had failed to cooperate with disciplinary authorities by not complying with the OAE's final, February 2018 request for documents, in violation of RPC 8.1(b).

Finally, the DEC found a lack of clear and convincing evidence that respondent engaged in the unauthorized practice of law – that he had continued to practice law as an LLC, for which professional liability insurance is required, as no evidence was presented that any clients were misled about his status as a sole practitioner. Therefore, the DEC dismissed the RPC 5.5(a) charge.

As the OAE had urged in its summation brief, the panel cited, in aggravation, respondent's failure to file a conforming answer, despite repeated requests that he do so; failure to file a pre-hearing memorandum; and failure to

appear at the ethics hearing. The panel report, however, makes no mention of a lack of remorse or hostile tone on respondent's part.

In mitigation, the panel considered that respondent has no prior discipline and that the negligent misappropriation, which respondent corrected promptly, amounted to less than $1,000.

The hearing panel majority recommended a censure. The public member voted for a three-month suspension because of respondent's "woefully inadequate" recordkeeping, and because the Benton misappropriation "was the only one the Respondent was caught on and [he] disregarded all reasonable requests to properly rectify" his recordkeeping.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

On July 3, 2017, respondent transferred $1,200 from his ATA to his ABA. As a result of poor recordkeeping, he was unaware that his client, Benton, had failed to negotiate a $999.87 ATA check respondent had issued to him three months prior, in March 2017. On July 3, 2017, following respondent's $1,200 transfer, the balance in his ATA was just $252, well short of the $999.87 required to be held, inviolate, for Benton.

On July 20, 2017, Benton negotiated respondent's check. By then,

respondent's ATA balance had been further reduced to $202, representing a shortage of $797.87 in behalf of Benton. Respondent conceded that the July 21, 2017 overdraft invaded Benton's trust funds. Respondent, thus, is guilty of negligent misappropriation, a violation of RPC 1.15(a).

Respondent also was charged with having commingled personal and client funds in the trust account. He admittedly thought it was better to deposit his legal fees in the trust account, from which he transferred them to the ABA. In the only illuminating discourse on that subject, which took place during respondent's audit interview, the investigator established that respondent routinely had removed his personal funds from the ATA within a week, for which the OAE was not pursuing a commingling charge. Although the OAE changed its position and charged respondent with commingling, the record contains no clear and convincing evidence that respondent left personal funds in the ATA alongside client funds for an inordinate period of time. Consequently, we dismiss the commingling charge under RPC 1.15(a).

Respondent is guilty of numerous recordkeeping deficiencies. Indeed, the OAE listed nineteen deficiencies in its February 23, 2018 letter to respondent. He conceded that he had assigned improper designations to his trust and business accounts, made electronic transfers from the ATA without proper authorization to do so, and had not prepared three-way reconciliations of the ATA. In respect

of the remaining allegations, respondent presented no evidence to refute the OAE findings and Ortiz's testimony about respondent's faulty recordkeeping. Respondent, thus, is guilty of numerous violations of RPC 1.15(d) and R. 1:21-6.

Although respondent initially cooperated with disciplinary authorities by providing documents, attending the September 12, 2017 demand audit, and replying to numerous requests for information, his replies apparently were error-laden. Thereafter, he failed to comply with the OAE's final, February 23, 2018 demand that he provide corrected monthly reconciliations, client ledger cards, receipts and disbursements journals, and readable data from his Microsoft Money program. Respondent then refused to attend the January 14, 2019 DEC hearing. In so doing, he failed to cooperate with disciplinary authorities, a violation of RPC 8.1(b).

Finally, the DEC was correct to dismiss the charge that respondent engaged in the unauthorized practice of law by practicing as an LLC without malpractice insurance. At a point in time not established in the record, respondent created an LLC and, in 2008, opened the ATA and ABA for that entity. On another date not in the record, respondent decided to cease practicing as an LLC and to become a sole practitioner. Although he removed the LLC designation from his attorney letterhead, his ATA and ABA checks retained the

LLC designation. Based on the record before us, it appears that respondent was simply avoiding incurring the expense of obtaining new ATA and ABA checks.

During the audit interview, respondent replied in the affirmative when asked whether his LLC certificate still was in good standing. That would suggest that, at a minimum, he had been filing annual reports with the State of New Jersey. It would have been disingenuous of respondent to claim, on the one hand, that he was a sole practitioner, while on the other hand, continuing to take steps to keep the LLC active. Because, however, respondent was asked no further questions about any actions he might have taken in that regard, it is possible that respondent had not actively maintained the LLC and just assumed that it was in good standing. Additionally, no evidence was adduced below that respondent's clients were misled by his actions. For lack of clear and convincing evidence, we dismiss the RPC 5.5(a) charge.

In sum, respondent violated RPC 1.15(a), RPC 1.15(d) and R. 1:21-6, and RPC 8.1(b). We determine to dismiss the allegations that respondent commingled funds, in violation of RPC 1.15(a), and violated RPC 5.5(a) by practicing as an LLC without maintaining required malpractice insurance. The sole issue left for our determination is the appropriate quantum of discipline to be imposed for respondent's misconduct.

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).

Standing alone, failure to cooperate with disciplinary authorities will ordinarily warrant an admonition. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to the district ethics committee investigator's repeated requests for information regarding his representation of a client in three criminal defense matters, a violation of RPC 8.1(b)) and In the Matter of Jeffrey M. Adams, DRB 14-243 (November 25, 2014) (attorney failed to cooperate with the district ethics committee's attempts to obtain information from him about his representation of a client in connection with the sale of a house, a violation of RPC 8.1(b)).

There are, however, mitigating and aggravating factors to consider. Following our review of the record, we find no aggravation. In mitigation, respondent has no prior discipline in thirty-five years at the bar, he promptly replenished the missing funds, and there is no evidence that clients were harmed by his misconduct. Moreover, he claims to have ceased practicing law and closed his law office.

On balance, we determine that a reprimand is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Vice-Chair Gallipoli voted for a three-month suspension. Member Zmirich voted for a censure. Member Boyer 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, Chair

By: _____
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel M. Replogle, III
Docket No. DRB 19-174

Argued: September 19, 2019

Decided: December 20, 2019

Disposition: Reprimand

Members	Reprimand	Three-Month Suspension	Censure	Recused	Did Not Participate
Clark	X				
Gallipoli		X			
Boyer					X
Hoberman	X				
Joseph	X				
Petrou	X				
Rivera	X				
Singer	X				
Zmirich			X		
Total:	6	1	1	0	1

Ellen A. Brodsky
Chief Counsel