DISCIPLINARY REVIEW BOARD

OF THE

SUPREME COURT OF NEW JERSEY

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September 21, 2020

Heather Joy Baker, Clerk
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625-0962

Re: **In the Matter of Yanky Brenner**
Docket No. DRB 20-170
District Docket No. XIV-2017-0420E

Dear Ms. Baker:

The Disciplinary Review Board has reviewed the motion for discipline by consent (censure or such lesser discipline as the Board deems appropriate) filed by the Office of Attorney Ethics (OAE) in the above matter, pursuant to R. 1:20-10(b). Following a review of the record, the Board determined to grant the motion and to impose a censure for respondent's violation of RPC 1.15(b) (failure to promptly notify clients or third parties of receipt of funds in which they have an interest and to promptly disburse those funds) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Specifically, following his admission to the New Jersey bar in 2006, respondent was the sole associate at the law firm of Norman D. Smith, Esq., in Lakewood (the Smith firm), and, from 2011 to 2016, served as the closing agent in the majority of real estate transactions that the Smith firm handled. On October 14, 2016, respondent left the Smith firm and opened a solo practice and his own attorney trust and business accounts. By letter dated October 12, 2016, two days prior to respondent's departure from the Smith firm, the OAE notified Smith that his firm had been selected for a random audit. The audit, conducted on November 16, 2016, revealed that the Smith firm had engaged in the practice of overestimating recording fees prior to real estate closings. Thereafter, the Smith firm failed to refund the difference between the estimated and actual fees. While at the Smith firm, respondent participated in the firm's practice of inflating estimated recording costs, which affected both clients and third parties.

The OAE's investigation further revealed that, at his solo practice, respondent had engaged in the same systematic misconduct in connection with estimated recording fees. However, in January 2017, after learning that the OAE was investigating the Smith firm for that improper practice, respondent immediately ceased and took remedial action.

The OAE audited respondent's solo practice financial records, cognizant of the Court's requirements in In re Fortunato, 225 N.J. 3 (2016). The investigation revealed that respondent's transactional activity after January 2017 conformed with Fortunato. From December 12, 2016 through January 9, 2017, however, respondent overestimated recording fees and retained the excess funds, resulting in $1,580 in overpayments involving seventeen real estate clients. Between January 18 and February 7, 2017, respondent refunded the excess recording fees to each of the seventeen clients. These refunds occurred within thirty-seven days after the clients' respective closings. Of note, respondent's cessation of the unethical practice and his refunds to the affected clients and third parties occurred prior to September 13, 2017, the date of his first investigative contact with the OAE.

The stipulated violations in this matter include only the time period of 2011 through October 2016, when respondent was associated with the Smith firm. Respondent stipulated that, by failing to promptly return to his clients and third parties the difference between estimated and actual recording fees, and by retaining those escrow funds as a "service fee" while serving as a closing agent for the Smith firm, he violated RPC 1.15(b). Finally, respondent stipulated that, by retaining the excess recording fees as an undisclosed service fee, without his clients' knowledge or consent, and by executing inaccurate HUD-1 forms in these transactions, he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, a violation of RPC 8.4(c).

The discipline imposed for misrepresentations on closing documents based on the improper retention of excess recording fees typically has been a reprimand or a censure. See, e.g., In re Rush, 225 N.J. 15 (2016) (reprimand for attorney who, in two real estate matters, improperly retained more than $700 in excess recording fees, and falsely attested that the HUD-1 forms he had signed were complete and accurate accounts of the funds received and disbursed in connection with those transactions; the attorney also was guilty of lack of diligence, commingling, and recordkeeping violations; in mitigation, he stipulated to his misconduct and had no prior discipline); In re Masessa, 239 N.J. 85 (2019) (censure for attorney who engaged in a systematic practice of overcharging real estate clients for recording fees totaling $76,254 and then retained those excess funds when he served as settlement agent in the transactions; the attorney admitted signing hundreds of HUD-1 settlement statements that were inaccurate accounts of the disbursements for the transactions); In re Li, 239 N.J. 141 (2019) (censure for attorney who, over a seven-year period, systematically collected inflated, "flat" recording fees totaling $119,660, from 738 real estate clients; without the clients' consent, he retained the difference between the estimated and actual recording fees; the attorney was aware that the HUD-1 settlement statements prepared and executed by the settlement agents in those matters contained inaccurate accounts of the actual disbursements for recording fees; the attorney also charged improper fees of $100 and $50, described as "title binder review fees," and as "legal documentation and notary fees," respectively, admitting that those costs were excessive and had been included in the flat legal fee he charged for the transactions; recordkeeping violations also found; the attorney was required to refund

identified excess costs of $186,050 to the former clients); and In re Fortunato, 225 N.J. 3 (censure for attorney who violated RPC 8.4(c) in four real estate matters by retaining excess recording fees totaling $1,608, couched as "services fees," in addition to his legal fee; the attorney also prepared and executed inaccurate HUD-1 settlement statements; in mitigation, the attorney asserted that "I have seen many other attorneys do this, and I believe it may be the rule among [transactional real estate] attorneys rather than the exception").

In Fortunato, the Board and the Court required the attorney to review all his real estate transactions for the previous seven years and to report to the OAE in respect of any improper retention of recording fees in those matters. Since Fortunato, the OAE has required similarly situated attorneys to review their past seven years' transactions and to report to the OAE any matters involving the retention of excess recording fees. In the Matter of Alfonso Fortunato, DRB 15-199 (February 2, 2016) (slip op. at 18).

Here, neither the OAE nor respondent were able to conduct a review of the Smith firm's real estate transactions for the requisite seven-year period. However, the sampling of Smith firm real estate matters, when respondent was the closing agent, identified ten matters involving improper charges for recording fees, totaling $1,405 for buyers and $195 for sellers, in transactions occurring in 2014 and 2015. By comparison, the attorney in Fortunato received a censure for four such matters, with excess fees totaling $1,608. However, Fortunato had not yet been required to review his previous seven years of transactions for other excess fees when the censure was imposed.

In Li and Masessa, the Board concluded that, as a matter of stare decisis, a censure was the appropriate sanction for attorneys who improperly retain excess recording fees, in violation of RPC 1.15(b) and RPC 8.4(c). The Board asked the Court, going forward, to consider harsher discipline for such conduct. The Court agreed, cautioning that, in the future, attorneys who engage in the purposeful, systematic, and unauthorized charging and retention of excess recording fees, or the implementation of other deceptive, income-generating practices, may be subject to a greater level of discipline. Here, respondent's misconduct predated the Court's Orders in Li and Masessa, which were issued on July 25, 2019.

Respondent's admitted misconduct echoes the overcharging schemes confronted in the above cases. Although respondent systematically inflated recording costs and knowingly executed inaccurate HUD-1 statements, misrepresenting the accounting and disbursements for the transactions, the stipulation asserts that he did not, as an associate at the Smith firm, personally reap the monetary benefits. In his own solo practice, respondent identified and reimbursed his clients and third parties who had been affected by the unethical practice. Further, in mitigation, the Board considered respondent's lack of disciplinary history.

Accordingly, the Board determined to grant the motion for discipline by consent and to impose a censure, with a warning to respondent that, if he resumes his unethical practice in respect of real estate transactions, more severe discipline will follow.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated July 9, 2020.

2. Stipulation of discipline by consent, dated April 27, 2020.

3. Affidavit of consent, dated March 4, 2020.

4. Ethics history, dated September 21, 2020.

Very truly yours,

/s/ Ellen A. Brodsky

Ellen A. Brodsky
Chief Counsel

EAB/jm
Enclosures

c: (w/o enclosures)
Bruce W. Clark, Chair
Disciplinary Review Board (e-mail)
Charles Centinaro, Director
Office of Attorney Ethics (e-mail and interoffice mail)
Johanna B. Jones, Assistant Ethics Counsel, Presenter
Office of Attorney Ethics (e-mail)
Shalom D. Stone, Esq., Respondent's Counsel (e-mail and regular mail)