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May 2, 2024

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

Re: **In the Matter of Dale S. Orlovsky**
Docket No. DRB 24-041
District Docket No. XIV-2022-0087E

Dear Ms. Baker:

The Disciplinary Review Board has reviewed the motion for discipline by consent (three-month suspension or such lesser discipline as the Board deems appropriate) filed by the Office of Attorney Ethics (the OAE) in the above matter, pursuant to R. 1:20-10(b). Following a review of the record, the Board granted the motion and determined to impose a three-month suspension, with conditions, for respondent's violation of RPC 1.7(a)(2) (engaging in a concurrent conflict of interest); RPC 1.15(b) (failing to promptly disburse funds); and RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6).

Specifically, as stipulated, on or about May 20, 2021, the OAE performed a random compliance audit of respondent's firm's financial records, revealing

numerous recordkeeping deficiencies.¹ Those deficiencies included: negative client balances; inactive balances in the firm's attorney trust account (ATA) for an extended period; unidentified funds held in the firm's ATA; improper attorney business account (ABA) designation; no ATA three-way reconciliations; and lack of required record maintenance for the firm's ATA and ABA. The audit also revealed a surplus of \$462,705.07 in the firm's ATA. The OAE directed respondent to correct the deficiencies within forty-five days and to explain how the corrections were made. Additionally, the OAE cautioned respondent that his file may be reviewed for appropriate disciplinary action.

On October 29, 2021, respondent sent a letter to the OAE, setting forth his plan to correct the firm's recordkeeping deficiencies. Additionally, as it related to the surplus funds, respondent represented that his firm was unable to determine the exact origin of those funds or the appropriate parties entitled to the funds, but believed the \$462,705.07 should be remitted to the Superior Court Trust Fund Unit. Specifically, respondent maintained that the \$462,705.07 in question was a surplus related to the 2012 transfer of funds from the attorney trust account of the respondent's former firm – Orlovsky, Grasso & Bolger – to his current firm's trust account.

On December 22, 2021, the OAE sent a letter to respondent, this time directing him to provide to the OAE weekly updates regarding his progress in bringing the firm's three-way reconciliations current.

On June 8 and 24, 2022, respondent submitted additional firm financial records; however, the very same deficiencies that the OAE had identified during the random audit persisted. Indeed, respondent had resolved only the negative client balances set forth on the firm's ledger cards.

Subsequently, the OAE conducted a demand audit of the firm's financial records, which revealed the following, additional recordkeeping deficiencies: electronic transfers were made from the firm's ATA without proper authorization, and old, outstanding ATA checks were not resolved. Thereafter,

¹ The Board considered this consent matter contemporaneously with the companion consent matter of John J. Mensching (DRB 24-025), which is being transmitted to the Court this same date. Mensching and Orlovsky, partners at the same firm, admitted that they were jointly responsible for their firm's recordkeeping obligations.

the OAE notified respondent of the continuing and newly-identified recordkeeping deficiencies and directed that he correct them.

On March 30, 2023, the OAE directed respondent to open a new ATA to facilitate compliant three-way reconciliations and proper accounting practices going forward. Respondent agreed, stating he would wind down the firm's ATA and remit all inactive balances and unidentified funds to the New Jersey Superior Court Trust Fund Unit, as R. 1:21-6(j) requires.

Subsequently, on April 11, 2023, respondent opened a new ATA at Wells Fargo Bank, in which he deposited all the firm's entrusted funds.

By the conclusion of the OAE's investigation, respondent had corrected some, but not all, of the identified recordkeeping deficiencies. Specifically, the following recordkeeping deficiencies remained with respect to the firm's ATA: unidentified funds; inactive trust ledger balances for an extended period; old and unresolved outstanding checks; and no monthly three-way reconciliations.

Additionally, during respondent's demand audit, he revealed that his wife, Carol Orlovsky, along with her business partners, had made mortgage loans to four of respondent's real estate clients: Kevin and Patricia Lighter, Michael Sassman, and Woolf Services LLC.

Respondent admitted that his firm received the loan proceeds from Carol and her partners and held those funds in trust, in his firm's ATA, for the respective real estate transactions. According to respondent, Carol entered into each loan transaction using her own funds and respondent made no monetary contribution toward them.

However, respondent admitted that he had concurrently represented (1) Carol and her business partners in the loan transactions, and (2) firm clients in the underlying real estate transactions. Respondent acknowledged that a conflict could arise in representing both his wife, as the lender, and his firm clients, as the borrowers, and conceded that conflict waivers were required for those representations. Indeed, conflict waivers were executed in four of the seven transactions; however, respondent admittedly failed to timely obtain even those waivers.

Based on the above facts, the parties stipulated that respondent violated RPC 1.7(a)(2), RPC 1.15(b), and RPC 1.15(d).

Respondent violated RPC 1.7(a)(2), which prohibits lawyers from representing a client where, “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person . . . [.]” Here, respondent admitted that his wife, Carol, loaned money to existing real estate clients of his firm. He admittedly deposited the loan proceeds into his firm’s trust account. Moreover, respondent acknowledged that, by representing both his wife and current firm clients, a conflict could arise. He, thus, conceded that conflict waivers were required for these representations. Although respondent did execute conflict waivers in some of the matters, the waivers were executed after the mortgage agreements were signed and the money was loaned to the clients. Thus, he clearly violated RPC 1.7(a)(2).

Moreover, respondent admittedly held, in the firm’s ATA, a surplus of funds totaling \$462,705.07, for which he was unable to determine the origin or to whom the funds belonged. Respondent allowed this inactive balance to remain in the firm’s ATA, despite the OAE’s directive that he correct that deficiency. Further, as of the date of the stipulation, the funds remained in the firm’s possession. Respondent, thus, violated RPC 1.15(b) by failing to “promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.”

Further, RPC 1.15(d) requires all New Jersey attorneys to comply with the recordkeeping requirements of R. 1:21-6. Respondent violated this Rule in various aspects. Specifically, despite the OAE’s persistent notifications of the applicable recordkeeping deficiencies, respondent still had outstanding deficiencies, including unidentified funds in the firm’s ATA; inactive trust ledger balances in the ATA for an extended period; old outstanding checks not resolved in the ATA; and no three-way reconciliations for the ATA. Respondent resolved the other identified deficiencies by opening a new ATA and remediating the firm’s recordkeeping practices going forward.

Typically, cases involving attorneys who fail to promptly deliver funds to clients or third parties have resulted in admonitions or reprimands, depending on the existence of other ethics infractions and prior disciplinary history. See In the Matter of Raymond Armour, DRB 11- 451, DRB 11-452, and DRB 11-453

(March 19, 2012) (admonition imposed on an attorney who, in three personal injury matters, failed to promptly notify his clients of his receipt of settlement funds and to disburse the clients' share of the funds; the attorney also failed to communicate with clients; no prior disciplinary history), and In re Anderson, 2021 N.J. LEXIS 1327 (reprimand imposed on an attorney who failed to deliver \$24,575 in escrow funds promptly; attorney also failed to safeguard funds, negligently misappropriated client funds, and had numerous recordkeeping deficiencies; no prior disciplinary history).

Additionally, when attorneys have recordkeeping deficiencies accompanied by aggravating factors like additional ethical infractions, the existence of a disciplinary history, or a failure to remedy the recordkeeping deficiencies, a reprimand or censure has been imposed. See e.g., In re Leven, 245 N .J. 491 (2021) (reprimand for an attorney who was cited for numerous recordkeeping deficiencies, failed to resolve those deficiencies, and repeatedly provided incomplete records to the OAE; the attorney also violated RPC 3.4(c), RPC 8.1(b), and RPC 8.4(d); in mitigation, the attorney had no prior discipline in nearly forty-seven years at the bar; in addition to reprimanding the attorney, the Court required the attorney to disburse unidentified trust funds to the New Jersey Superior Court Trust Fund and to submit monthly reconciliations to the OAE for two years); In re Abdellah, 241 N.J. 98 (2020) (reprimand for an attorney who failed to resolve recordkeeping deficiencies despite being advised of these deficiencies in a prior random audit; in mitigation, the attorney had no prior discipline in twenty-four years at the bar); In re Lueddeke, 2022 NJ. LEXIS 456 (May 17, 2022) (censure for an attorney whose recordkeeping deficiencies included permitting \$414,278.24 of inactive client balances and outstanding checks to languish in his trust account for almost a decade; attorney failed to remedy his recordkeeping deficiencies despite being the subject of two random audits; prior admonition; in addition to censuring the attorney, the Court required the attorney to take two recordkeeping courses); In re Davis, 242 N.J. 141 (2020) (censure for an attorney whose recordkeeping deficiencies included holding inactive client balances totaling \$181,022.27 in connection with 116 client matters in his trust account, with the oldest balances dated back nearly fifteen years prior to the demand audit; attorney also failed to safeguard client funds and to cooperate with disciplinary authorities; prior discipline included two reprimands (in 2007 and 2012); in addition to censuring the attorney, the Court required the attorney to submit monthly reconciliations to the OAE for two years, resolve all inactive client balances in his trust account, and disburse any unidentified funds in his trust account to the Superior Court Trust Unit); In

re Esposito, 240 N.J. 174 (2019) (censure for an attorney whose recordkeeping deficiencies included holding \$169,043.03 of unidentified funds and numerous inactive balances in his ATA; the attorney also failed to disburse excess fees to entitled parties promptly in real estate matters; in mitigation, the attorney had no prior disciplinary history and remedied all of his recordkeeping deficiencies including the inactive balances; in addition to censuring the attorney, the Court required the attorney to submit monthly reconciliations to the OAE for two years).

Likewise, cases involving conflicts of interests coupled with other ethics infractions or a prior disciplinary history, have resulted in discipline greater than a reprimand. See e.g., In re Bagnara, __ N.J. __ (2022), 2022 N.J. LEXIS 1167 (censure imposed on an attorney who steered nineteen of his clients to a title company, without disclosing that he was a salaried employee of that company; attorney also negligently misappropriated client funds, commingled his personal funds in his trust account and had recordkeeping deficiencies, no prior disciplinary history); In re LaVan, 249 N.J. 5 (2021) (censure imposed on an attorney who concurrently represented a property owner, in need of remediation on her property, and an environmental remediation corporation; the attorney also failed to disclose she had a financial interest in the remediation corporation and to obtain a written conflict waiver of the involved parties; prior reprimand in 2019); In re LaRusso, 190 N.J. 335 (2007) (censure imposed on an attorney who engaged in the dual representation of forty-five clients composed of funeral homes and their patrons with directly adverse interests; no prior disciplinary history); In re Patel, 159 N.J. 527 (1999) (three-month suspension imposed on an attorney who engaged in a concurrent conflict of interest by representing a father and son in separate civil actions but arranging to obtain attorney fees owed by the son from the father's settlement proceeds; attorney also failed to provide a client a written statement on conclusion of contingent fee matter, entered into a prohibited business transaction with a client, and had recordkeeping deficiencies; no prior disciplinary history).

Here, respondent's misconduct bears great resemblance to the misconduct addressed in Lueddeke, Davis, Esposito, and Bagnara. Like the censured attorneys in Lueddeke, Davis, Esposito, respondent allowed more than \$400,000 in client funds to languish in his firm's trust account for an extended period. Additionally, similar to the attorneys in Lueddeke and Davis, respondent's books and records remained non-compliant with R. 1:21-6, despite the OAE's numerous directives to cure the deficiencies. Further, like the censured attorney

in Bagnara, respondent engaged in multiple instances of conflict of interests in addition to recordkeeping deficiencies. By contrast however, respondent's disciplinary history differs from the attorneys in Lueddeke, Davis, Esposito, and Bagnara, where the attorneys either had no prior disciplinary history or previously received discipline of a reprimand or an admonition for dissimilar misconduct.

In mitigation, respondent admitted his wrongdoing and entered into a disciplinary stipulation.

In aggravation, despite the OAE's requests, the firm's books and records still are not in compliance with the recordkeeping Rules. In re Silber, 100 N.J. 517 (1985) (the attorney's failure to remediate conduct despite opportunities to do so considered in aggravation). In further aggravation, respondent previously was suspended for two years, in 2012.

On balance, given the aggravating factors present, the Board determined that a three-month suspension is the appropriate quantum of discipline to protect the public and preserve confidence in the bar. Additionally, the Board determined that, as conditions, respondent: (1) within thirty days of any Order of final discipline in this matter, take a trust and business accounting class offered by the OAE; (2) provide proof, within thirty days of any Order of final discipline in this matter, that respondent has wound down his ATA, disbursing all funds, including inactive balances, old outstanding checks, and unidentified funds, to entitled parties and/or the New Jersey Superior Court's Trust Fund Unit; and (3) submit quarterly reconciliations to the OAE for two years.

Enclosed are the following documents:

1. Notice of motion for discipline by consent, dated February 26, 2024.
2. Stipulation of discipline by consent, dated February 26, 2024.
3. Affidavit of consent, dated February 26, 2024.
4. Ethics history, dated May 2, 2024.

Very truly yours,

/s/ Timothy M. Ellis

Timothy M. Ellis
Chief Counsel

TME/akg
Enclosures

c: (w/o enclosures)
Hon. Mary Catherine Cuff, P.J.A.D. (Ret.), Chair
Disciplinary Review Board (e-mail)
Johanna Barba Jones, Director
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