Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-148
District Docket No. XIV-2018-0539E

In the Matter of

Michael David Lindner, Jr.

An Attorney at Law

Decision

Argued: October 21, 2021

Decided: December 21, 2021

Lauren Martinez 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 recommendation for a three-month suspension filed by the District IV Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.15(a) (four instances – negligent misappropriation of client funds); RPC 1.15(d) (failure to

comply with the recordkeeping provisions of R. 1:21-6); and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

For the reasons set forth below, we determine to impose a three-month suspension, with a condition.

Respondent earned admission to the New Jersey and Pennsylvania bars in 1995. During the relevant timeframe, he maintained a practice of law in Pitman, New Jersey.

On September 6, 2019, respondent received an admonition for his violation of RPC 5.5(a)(1) (unauthorized practice of law – failure to maintain liability insurance required to operate as an LLC). In re Lindner, 239 N.J. 528 (2019).

On September 15, 2020, the Court censured respondent for his violation of RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to communicate with client); RPC 1.5(c) (failure to prepare a written fee agreement in a contingent matter); RPC 5.5(a)(1); RPC 8.1(b); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). In re Lindner, 244 N.J. 197 (2020).

During the ethics hearing, the Office of Attorney Ethics (the OAE) presented documentary evidence and the testimony of the random auditor who remained assigned to the case after it was referred for disciplinary investigation.

Respondent proceeded pro se, incorporated his opening statement into his testimony, and testified on his own behalf. The key factual disputes in the trial centered around the sufficiency of respondent's cooperation and the application of the recordkeeping Rules embodied in R. 1:21-6.

Respondent maintained four bank accounts in connection with his law practice: an attorney trust account (ATA) at Newfield Bank (ATA1); an attorney business account (ABA) at Newfield Bank (ABA1); an ATA at Investors Bank (ATA2); and an ABA at Investors Bank (ABA2).[1]

On May 25, 2016, the OAE scheduled a random compliance audit of respondent's financial records, to take place on June 24, 2016. When the auditor arrived at respondent's office on June 24, 2016, he was surprised by her presence and denied having received the OAE's May 25, 2016 letter. Respondent also represented that he was in the process of winding down his practice of law. The auditor provided respondent with a copy of Outline of Record Keeping Requirements Under RPC 1.15 and R 1:21-6.

In a June 27, 2016 letter, the OAE auditor documented that it had been necessary to delay the random audit and required respondent to submit certain documents by mail. Particularly, respondent was given fifteen days to provide financial records for the prior year, which are typically reviewed during an audit,

[1] ATA2 and ABA2 were opened on July 18, 2018, after the inception of the random audit.

including: his ATA and ABA statements; ATA and ABA receipts and disbursement journals; and ATA reconciliations, including checkbook and "schedule of trust clients identifying total balance on deposit in trust account." Respondent failed to provide the records and, in a September 19, 2016 letter, the OAE informed respondent that, if he did not provide the records within ten days, the random auditor would appear at his office. Respondent did not provide the records as requested and offered no explanation for that failure.

On December 6, 2016, the OAE issued a subpoena for respondent's ATA1 and ABA1 records for the prior year. On January 4, 2017, Newfield Bank responded to the subpoena and produced the requested documents.

On February 14, 2017, the OAE scheduled a demand audit for March 9, 2017, at the OAE offices, and expanded the scope of the requested records to a three-year period. Respondent appeared and provided some, but not all, of the required documentation. However, ATA1 did not reconcile and was short by $1,924.90. In a January 3, 2018 letter, the OAE requested, by January 19, 2018, documentary proof that the ATA1 shortage had been cured. The January 19, 2018 deadline passed without the OAE receiving any records or explanation from respondent for his failure to provide the records.

"After several phone calls and emails back and forth," in March 2018, respondent provided additional, but still incomplete, records. In a May 3, 2018

letter, the OAE observed that five of the ten noted deficiencies had been corrected. The letter further required respondent to certify, within forty-five days, that the remaining five deficiencies had been corrected, and noted that the case may be forwarded to the Director for review and evaluation as a disciplinary matter.

Respondent failed to reply to the OAE's May 3, 2018 letter and offered no explanation. On June 21 and July 24, 2018, the OAE sent follow-up letters demanding proof of his corrective action by August 3, 2018. Respondent failed to reply to the letters.

In an August 10, 2018 letter, the random auditor demanded anew that respondent provide, by August 22, 2018, his deficiency response and the certification originally requested in the auditor's May 3, 2018 letter. The letter further indicated that, failing his compliance with that directive, he would be required to appear at an August 24, 2018 demand audit.

On August 22, 2018, respondent provided, by e-mail, a partial reply, with no certification. Respondent's e-mail explained that he had been in the process of closing Lindner Law, LLC, as well as ATA1 and ABA1 connected to the firm, and had since opened a new practice, the Law Office of Michael D. Lindner, Jr., to do "part-time legal work, maybe at most 5% of my time per month."[2] The e-

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[2] According to Supreme Court records, respondent has been a solo practitioner practicing

mail also noted that respondent had corrected the deficiencies; that he had hired an investigative service to track down a client he could not locate; that he transferred a client's outstanding balance from his prior ATA1 to his new ATA2; and that "there is nothing much left to do." After receiving respondent's e-mail correspondence, the OAE auditor informed respondent that the e-mail response was incomplete and that the audit response could not be submitted by e-mail.

On August 30, 2018, respondent submitted a letter with attachments, purporting to explain certain shortages in his trust account and enclosing a certification, dated August 22, 2018, indicating that he had completely responded, addressed each audit deficiency, and provided all information requested. In the auditor's assessment, respondent had addressed the deficiencies but had not produced all the records requested during the audit.

In subsequent e-mail correspondence, the auditor reiterated to respondent that she still did not have his ATA2 statements. The random audit could not be closed absent those statements because the auditor was obligated to ensure that the client trust funds had properly been transferred. On September 21, 2018, respondent, via e-mail attachment, sent the OAE auditor his most recent ATA1 statement.

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under the firm name Michael D. Lindner, Jr., Esq., since 2014. From 2012 to 2014, he practiced as a solo firm by the name of Linder Law, LLC. From 2001 to 2012 he practiced with Blumberg and Lindner, LLC.

The auditor then undertook the complex process of reconstructing respondent's ATA1. While reconstructing ATA1, the auditor began to find evidence of additional shortages occurring earlier than the audit period.

In a December 5, 2018 letter, the OAE notified respondent that the random audit unit had referred his matter for a disciplinary investigation. The OAE directed respondent to provide, by January 4, 2019, certain records covering the period January 2013 through January 2019, and required him to attend a January 30, 2019 demand interview. The scope of the audit period had been expanded in response to the auditor's ongoing record reconstruction, so that she could determine how the earlier intrusions upon client funds had begun.

Respondent failed to provide the requested documents by January 4, 2019. The OAE followed up in a January 9, 2019 letter, in which it notified respondent that he had failed to provide the documents, directed him to produce them within five days, and also scheduled a January 30, 2019 demand audit. Respondent again failed to provide the documents.

On January 24, 2019, the OAE attempted to contact respondent by e-mail to confirm his attendance at the scheduled January 30, 2019 demand audit and observed that respondent had not yet provided the documents requested in prior letters. Respondent failed to reply or to produce the required documents.[3]

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[3] The random auditor testified that the OAE did not receive, nor did she personally receive,

However, on January 30, 2019, respondent appeared for the demand audit. The demand audit began with the random auditor and First Assistant Ethics Counsel providing respondent with a detailed explanation of the difference between the random audit, which had closed, and the investigation into his potential negligent misappropriation, which was underway. Respondent was unable to provide the OAE with the documents it had requested by way of letters dated December 5, 2018 and January 9, 2019.

During the demand audit, respondent exhibited a continuing lack of understanding of how to perform three-way reconciliations. The auditor then provided him with a second copy of Outline of Record Keeping Requirements Under RPC 1.15 and R 1:21-6 (rev. 2017). In the course of the demand audit, the auditor and the First Assistant:

> discussed exactly, you know, what it was that we were requesting and what had not been produced at this time. And I also spent some time going through with Mr. Lindner what he would need to do to go back and recreate these records since he had not been maintaining them, but he would have to go back and recreate a lot of these records from the earlier period in order to be able to prepare, you know, the records that we [sic] were being requested.

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the purported January 29, 2018 e-mails referenced in e-mails sent at 11:14 a.m. and 11:05 a.m. from respondent. The OAE took the position that those documents were never received by its offices. Respondent did not present a full copy of the attachments as a trial exhibit.

[T73.][4]

The auditor and the First Assistant explained to respondent how the apparent negligent misappropriation revealed by the reconstruction had occurred. They also explained exactly what financial records the OAE needed to receive from him to conclude its investigation, and that e-mail was not a permitted form of transmission. Respondent appeared to understand and agreed that thirty days would be sufficient time to provide the outstanding documents.

That same day, the OAE, by letter, directed respondent to provide all outstanding documents by February 28, 2019. Respondent failed to reply or to produce the documents.

In a March 7, 2019 letter, the OAE again directed respondent to "immediately" provide the outstanding documents, including, for January 2013 through January 2019: three-way reconciliations for all ATAs; all client ledger cards for all ATAs; all checkbook registers for all ATAs; trust and receipts journals for all ATAs; bank statements for all ATAs and ABAs; and ABA business receipts and disbursements journals.

In a March 8, 2019 e-mail, respondent asked the OAE auditor for verification of what the OAE needed, stating that he "want[ed] to get this all out to you today." The OAE auditor replied, within an hour of respondent's e-mail

[4] "T" refers to the March 8, 2021 hearing transcript.

message, listing the documents that she still needed. Similarly, on March 11, 2019, respondent transmitted an e-mail to the auditor indicating his belief that he had already provided all requested documentation. However, respondent had failed to provide monthly trust account reconciliations, receipts journals, or disbursements journals in response to those e-mails or thereafter.

On April 16, 2019, respondent sent an e-mail to the OAE, attaching a previous e-mail from March 20, 2019, and stating, “Here was one that I don’t know if it went through.” The March 20, 2019 e-mail listed out documents that he indicated had already been provided by e-mail, indicated that he had not been able to reconstruct his ATA1, and represented that he did not understand what the OAE intended by requesting a list of client funds in the trust account. There were no attachments to the April 16, 2019 e-mail which the random auditor could access.

Following the reconstruction and the reassignment of the investigation to a new Deputy Ethics Counsel, the OAE notified respondent, on August 28, 2019, that a demand audit would occur at his law office on September 26, 2019. The OAE enumerated twelve particular client files that respondent must produce for inspection. The letter noted that seven categories of documents remained outstanding and noted respondent’s failure to cooperate with the investigation.

On September 26, 2019, the OAE conducted the demand audit at respondent's office. Respondent provided the requested client files and was able to identify several previously unidentifiable transactions, which enabled the auditor to fully reconstruct his ATA1. Respondent also was able to provide a full reconciliation of his new ATA2 during the on-site visit.

At the conclusion of the September 26, 2019 on-site audit, respondent still had not provided the following for the period 2013 to 2019: monthly reconciliations for ATA1 with listing of client balances, an ATA1 receipts journal, and/or an ATA1 disbursements journal. During the lengthy on-site visit, the auditor showed respondent how to use his computer program to generate three-way reconciliations.

The auditor's full reconstruction exposed respondent's routine online transfers from his ATA1 to his ABA1.

Additionally, respondent's client, Jeanette Schiraldi, first came to the attention of the auditor during her reconstruction, late in the random audit. On October 2, 2013, respondent deposited a $5,500 settlement check from Geico Insurance in his ATA1 on behalf of Schiraldi. The check was dishonored five days after deposit, on October 7, 2013.

On October 7, 2013, respondent electronically transferred his costs and fees, totaling $4,836.81, to his ABA1, and then transferred $4,000 from his

ABA1 to his personal account. That same date, Newfield Bank dishonored the Geico Insurance check and withdrew $5,500 from respondent's ATA1, creating a debit balance of ($4,836.81) on Schiraldi's reconstructed client ledger card. Respondent became aware of the dishonored check in November 2013. Geico reissued the check on June 4, 2014, which respondent deposited on December 3, 2014, fourteen months after his October 7, 2013 negligent invasion of twenty-four clients' trust funds.

As of October 7, 2013, respondent was required to be holding $44,054.60 for twenty-four other clients. Respondent invaded those clients' funds as a result of the cumulative effect of his failure to promptly deposit the Geico check, coupled with the impact of his impermissible electronic transfer to his ABA1, which together reduced his ATA1 balance to $39,217.79.

At the January 30, 2019 demand audit, respondent admitted that he had become aware that the bank had dishonored the Geico Insurance check within approximately thirty days but failed to timely replenish his ATA1 until he deposited the reissued check, in December 2014. Over that same period, he transferred a total of $48,714.64 of earned fees from his ATA1 to his ABA1. Despite his awareness of the transfer, respondent did not use those earned fees to cover the $4,836.81 shortage in the ATA1 for the Schiraldi matter.

The random audit also brought to light recordkeeping irregularities affecting respondent's personal injury client, Geraldine Yurgin. On November 30, 2012 and January 7, 2013, he deposited in his ATA1 $6,500 and $35,000 in settlement funds on behalf of Yurgin, totaling $41,500.

On June 12, 2015, respondent disbursed $1,000 of settlement funds to Yurgin but failed to record that transaction in his client ledger. The ATA1 check issued to disburse those funds was signed by respondent's secretary, whom he had impermissibly authorized to sign trust account checks. As a result of the omission of the disbursement on the ledger card, that card incorrectly reflected $1,000 more than respondent was actually holding for Yurgin.

As of July 14, 2014, respondent was obligated to hold, inviolate, a total of $4,924.58 in settlement funds for Yurgin, pending the satisfaction of outstanding medical liens. On August 20, 2015, respondent disbursed a final settlement check to Yurgin in the amount of $4,924.58.

As of the March 9, 2017 random audit, the Yurgin client ledger card incorrectly showed that all funds had been disbursed and that Yurgin's ledger had a zero balance, as of August 20, 2015. However, the auditor's reconstruction showed that at the time that check was issued, respondent was actually holding only $3,924.58 on behalf of Yurgin.

As of August 20, 2015, respondent was obligated to hold $52,107.42 in trust for sixteen clients. As a result of respondent's excessive disbursement of $1,000 to Yurgin, he invaded those clients' funds.

After the shortage was discovered in the course of the random audit, and two-and-a-half years after the shortage occurred, respondent replaced the $1,000 in his ATA1.

In 2014, respondent was hired to administer the estate of Frank H. Sweeney. Respondent opened a fiduciary account with TD Bank on behalf of the estate.

On November 20, 2015, respondent issued two checks, each for $969.12, from his ATA1, instead of from the estate account, to two beneficiaries of the Sweeney estate, Gary Hagerman and Kimberly Doak. On November 20, 2015, respondent was not holding any money in ATA1 on behalf of the Sweeney estate.

The auditor's reconstruction demonstrated that, as of November 20, 2015, respondent was obligated to hold, inviolate, $51,195.17 for twenty-four clients in ATA1. Respondent's erroneous disbursement of $1,938.24 from ATA1, rather than the estate account, reduced the balance of ATA1 to $48,296.94, and thereby invaded the funds of those twenty-four other clients.

Similarly, on December 7, 2015, respondent issued an ATA1 check, improperly signed by his secretary, in the amount of $2,907.36, to a third Sweeney beneficiary, Eileen Foster. On December 7, 2015, respondent was required to hold $51,235.18,[5] inviolate, on behalf of twenty-four clients. Respondent's December 7, 2015 disbursement to Foster increased the shortage caused by the disbursements to Hagerman and Doak to a total ATA1 shortage of ($4,845.60). Respondent cured the shortage two days later, on December 9, 2015, by depositing in ATA1 a $4,845.60 check issued from the estate account.

On May 6, 2016, respondent deposited a $40,000 check from Liberty Mutual in his ATA1 on behalf of his friends and clients, Chris and Jill Leach. That same day, respondent transferred $6,500 of his attorney fees and costs to his ABA1, without allowing sufficient time for the Liberty Mutual funds to clear.

Respondent admitted that, on May 6, 2016, he was holding funds for clients in ATA1.[6] As a result, respondent's May 6, 2016 transfer to his ABA1

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[5] The complaint identified the total funds required to be held inviolate as $51,195.17. However, the attached trust accounting evidence, admitted into evidence as P52, lists the total as $51,235.18. The discrepancy is immaterial, given that all the ATA1 funds were required to be held inviolate, and none of the funds in ATA1 related to the Sweeney estate.

[6] Unlike in the other client matters, the record does not contain the number of clients whose funds respondent was holding as of May 6, 2016, nor the total balance of those trust funds over the three-day invasion.

caused a ($6,500) shortfall in ATA1, invading those unrelated clients' funds. The shortfall was cured when the Liberty Mutual funds cleared on May 9, 2016.

The OAE offered proof of respondent's recordkeeping deficiencies throughout its presentation. Particularly, it demonstrated, through the auditor's testimony, that the client ledger cards that respondent initially and belatedly provided were not sufficiently descriptive to allow for a reconstruction of his accounts, in violation of R. 1:21-6(c)(1)(B).

The OAE also presented testimonial and documentary proof that client ledger cards were maintained with debit balances, in violation of R. 1:21-6(d). Particularly, the auditor testified that respondent maintained Yurgin's and Schiraldi's ledger cards with debit balances. The reconstructed ledger cards associated with clients Sydney Bill and the Leaches also reflected debit balances.

In his verified answer, respondent admitted that inactive trust ledger balances remained in his ATA for an extended period, in violation of R. 1:21-6(d), and that each had been resolved, with the exception of $1,165.51 owed to client Derrick Simmons.

Although not discussed explicitly in testimony, the DEC received authenticated documentary evidence showing that ABA1 and ATA1 bore improper designations, namely "Lindner Law, LLC, Attorney Trust Account"

and "Lindner Law LLC, General Account," in violation of R. 1:21-6(a)(2). Respondent rectified those designations when he moved his law firm accounts to ABA2 and ATA2.[7]

The auditor testified that respondent did not produce monthly trust account reconciliations for review as directed, and continued to fail to do so even after having received two copies of the random audit guide instructing him how to do so, plus detailed instructions from the auditor and First Assistant Ethics Counsel, in violation of R. 1:21-6(c)(1)(H).

The OAE did not elicit auditor testimony specific to the allegation that respondent's deposit slips lacked sufficient detail, in violation of R. 1:21-6(c)(1)(A). Respondent admitted that particular deficiency and indicated in his August 30, 2018 response that it had been resolved prior to the completion of the audit.

The auditor testified that respondent had not maintained all his trust and business account records for seven years, in violation of R. 1:21-6(c)(1). Particularly, respondent was not maintaining canceled checks, deposit slips, or monthly three-way reconciliations.

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[7] Although rectified as to form of caption, it does appear that respondent's name is misspelled in the caption of ATA2.

The DEC also received into evidence exhibits showing that ABA1 checks were not properly imaged with two per page, and instead appeared with eight check images per page, in violation of R. 1:21-6(b).

The auditor testified that, from 2013-2018, respondent's electronic transfers from ATA1 to ABA2 were made from ATA1 without proper written authorization, in violation of R. 1:21-6(c)(1)(A). The auditor recited that she had explained the impermissible character of those ATA transfers to respondent during the January 30, 2019 demand interview.

The OAE presented both testimonial and documentary proof that the non-attorney secretary had been permitted by respondent to sign ATA1 checks, in violation of R. 1:21-6(c)(1)(A).

In response to questioning by the panel, the auditor indicated that the investigation had not revealed any proof that respondent had intentionally invaded client funds. The auditor likewise responded to panel questions describing the potential harm caused by negligent misappropriation, agreeing that no client had ultimately been deprived of funds through respondent's negligent misappropriation. When asked whether he knowingly failed to cooperate or to respond, the auditor indicated that she did not think that respondent was trying to avoid the OAE.

Respondent incorporated his opening remarks by reference into his sworn testimony and both are summarized here.

Respondent attributed his failure to prepare for the original random audit to the fact that he was engaged in responding to a concurrent disciplinary investigation.

Respondent emphasized that his recordkeeping errors were due to his ignorance, although he acknowledged that ignorance was not a defense.[8] He blamed deficiencies regarding the captioning of his accounts and check imaging on bank staff. He admitted performing electronic transfers without written instruction but indicated that he disagreed with the Rule and believed that what he was doing was normal. He emphasized the duration of his relationship with the secretary whom he permitted as a signatory.

Respondent denied ever receiving notice from the auditor that his audit production was incomplete. He emphasized that he provided all the records that he possessed, noting that his three-way reconciliations "didn't exist" and, therefore, could not be provided. He characterized himself as having "fully complied with the investigation," including the September 26, 2019 demand audit at his office. He also stated "although my compliance could have been a

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[8] In re Berkowitz, 136 N.J. 134, 147 (1994) ("Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct")

little better, ultimately they got everything they needed," and conceded that he "did not timely respond to the requests for information." However, he took the position that his cooperation had been sufficient.

Respondent characterized his negligent misappropriations as "honest mistakes." He emphasized his absence of intent to harm any client, the absence of actual harm to any client, and the fact that one of his recordkeeping errors occurred in Yurgin's favor.

Respondent attributed the underlying cause for the Schiraldi misappropriation to the client's failure to timely sign the Geico check or, alternatively, confusion on the part of his former law firm.

Respondent underscored that he corrected shortfalls once they were identified by the auditor. He emphasized his generosity in "fronting" Yurgin $1,000 before the Medicare liens were fully resolved.

Regarding the Estate of Sweeney, respondent testified that the Sweeney matter "was an estate account where I was an administrator. In my 20 plus years of being an attorney, I had never handled a case as administrator." He testified that the clients got the money to which they were entitled, and the use of the wrong account was rectified "literally within a minute of [respondent] recognizing, we just wrote a check and deposited it and that was resolved."

With regard to the Leach matter, respondent indicated that he had halved his fee. He described his transfer of the fees to ABA1 before the deposit had cleared as having "apparently jumped the gun by maybe a few hours."

On a personal level, respondent described the pressures of his family obligations during a period in which his mother-in-law was experiencing a health crisis. He noted that he never gave in to the temptation to intentionally invade client funds, despite financial difficulties. He described how he had earned funds "critical to [his] financial survival" through his work as a financial advisor and an insurance agent.

> You know, I'm hoping at some point, as much as I enjoyed being a lawyer for as long as I did, I don't have to do this anymore because it's just too much time. I probably was working anywhere from 70 to 80 hours a week from three different jobs trying to keep my house from disappearing, keeping food on the table. And in the process of that, yes, there were some delays in getting some documents to the OAE. It shouldn't happen, you should get it timely, but I was barely keeping my head above water, and those delays happened in what is a voluminous process of gathering all these documents from files that are closed, that are in storage, that are on the computer somewhere with no staff, no nothing.
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> [T168-T169.]

During cross-examination, respondent acknowledged his duty to adhere to the recordkeeping Rules. He expressed recognition that his "failure to have a three-way reconciliation contributed to every one of these problems," and an

awareness of the negative impact of negligent misappropriation upon client funds.

The parties submitted written summations consistent with their arguments at the ethics hearing. The OAE argued that it had satisfied its burden of proof and recommended imposition of a censure, citing, in aggravation, respondent's disciplinary history, lack of remorse, and failure to promptly remediate all of his recordkeeping deficiencies, despite multiple opportunities to do so. In turn, respondent argued that he had committed no misconduct.

On April 29, 2021, the DEC issued its Hearing Panel Report (HPR) with attached exhibits.

The DEC found that respondent had violated RPC 1.15(a), in four instances, by failing to safeguard client funds when he disbursed funds from his ATA1, from October 7, 2013 through December 3, 2014 in connection with the Schiraldi matter; from August 20, 2015 through March 5, 2018 in connection with the Yurgin matter; from May 6, 2016 through May 9, 2016 in connection with the Leach matter; and from December 7, 2015 through December 9, 2015 in connection with the Sweeney matter.

Regarding the charged violation of RPC 1.15(d), the DEC found that respondent failed to perform and maintain monthly three-way reconciliations of his ATAs; that he authorized a nonlawyer to sign checks drawn on his ATA1;

and that his ATA1 and ABA1 failed to contain the proper designations. The DEC did not find that respondent had failed to retain canceled checks and deposit slips for seven years, stating, "[t]he Panel does not believe that Respondent can fairly be separately cited for failure to comply with the seven-year retention requirement with respect to records Respondent never generated in the first place."

Moreover, the DEC found that the OAE failed to establish, by clear and convincing evidence, that respondent violated R. 1:21-6(c)(1)(A) regarding transfers without proper authorization. The DEC found that:

> . . . authorization would require the lawyer to physically deliver a paper authorization to the transferor bank, bearing the lawyer's "wet signature" (i.e. a handwritten, original signature). The Panel discerns no such requirement, which would be at odds with modern banking practices, the language of the Rule, and the definitions of "writing," "written" and "signed" in RPC 1.0(o), and the Panel otherwise finds that there is insufficient evidence to establish that transfers were made without proper authorization.
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> [HPR¶69.]

Additionally, the DEC found no support for various other violations of R. 1:21-6 asserted in the complaint, specifically: that client trust ledger sheets were not fully descriptive; that client trust ledger sheets were found with debit balances; that inactive trust ledger balances remained in the trust account for an

extended period; that deposit slips lacked sufficient detail; and that ABA1 checks were not properly image-processed.

Finally, the DEC found that the OAE had failed to establish, by clear and convincing evidence, that respondent violated RPC 8.1(b). The DEC explained that respondent produced all records requested by the OAE, except for monthly three-way reconciliations and receipts and disbursements journals for his ATA1 and ABA1. The DEC reasoned that respondent failed to prepare monthly three-way reconciliations and was charged as such under RPC 1.15(d) and, therefore, "the Panel does not believe Respondent can be found to have violated RPC 8.1(b) for failing to produce documentation he does not have, or for failing to generate such documentation for the first time in response to the OAE's demand." Regarding the receipts and disbursements journals, the DEC noted that respondent offered to supply the records, but that the OAE failed to take him up on his offer.

The DEC cited In the Matter of Marc Z. Palfy, DRB 15-193 (March 30, 2016), and In the Matter of James H. Wolfe, III, DRB 18-107 (September 6, 2018), and questioned whether failure to provide documentation with deadlines established by the OAE "can alone afford a basis [for] finding a[n] RPC 8.1(b) violation, when all of the available information is ultimately provided, or offered to be provided." Although the DEC acknowledged that "egregious delays in

providing requested information could give rise to a[n] RPC 8.1(b) violation that would not be 'cured' by the lawyer eventually providing the requested information," the DEC concluded that, in this case, respondent attempted to be cooperative, was not attempting to deceive the OAE or hide anything, and the OAE was eventually able to conduct the audit.

Based on its finding that respondent had violated RPC 1.15(a) (four instances) and RPC 1.15(d), the DEC noted that, if respondent had no prior history, it would recommend a reprimand. However, due to respondent's disciplinary history, which the DEC found as an aggravating factor, the DEC recommended a three-month suspension.[9]

In its submission to us, the OAE agreed with the DEC's findings that respondent had violated RPC 1.15(a) and RPC 1.15(d), but disagreed with the DEC's dismissal of the RPC 8.1(b) charge and certain recordkeeping violations which also formed the basis of the RPC 1.15(d) charge. The OAE argued that the recordkeeping violations, as charged, adhered to the language of R. 1:21-6(c)(I)(A) and abided with New Jersey disciplinary precedent, such as In the Matter of Joseph A. Gembala, III, DRB 13-139 (December 10, 2013), so ordered

[9] Although the DEC did not explicitly set forth aggravating and mitigating factors, it stated that, although "none of Respondent's previous discipline involves the same violations involved in this matter, in view of the recency and seriousness of the previous violations, especially those for which Respondent was censured, the Panel believes more severe discipline than a reprimand is appropriate."

217 N.J. 148 (2014), in which we reaffirmed that attorneys must comply with electronic-transfer requirements of R. 1:21-6(c)(I)(A).

The OAE, which previously had recommended a censure, agreed with the DEC's recommendation of a three-month suspension, and asked that a condition be imposed that respondent be obligated to submit monthly reconciliations of his attorney accounts, on a quarterly basis, to the OAE for a period of two years.

At oral argument before us, respondent appeared pro se. He reiterated that he had "attempted the best [he] can to do everything that's been required of [him] throughout this process." He argued that every time cooperation was required, he cooperated, and that he was "working together amicably" with the OAE, "trying to get to the bottom of this." In respondent's view, the "number one key thing here is that at no time did [he] ever take any money that was not [his]." He argued that he made "four honest mistakes" over the course of a six-year process, and that he "struggled" to find that he had committed ethics violations for four mistakes after handling hundreds of cases during that time. Finally, respondent argued that he learned his lesson, is "winding down" his practice, and does not take any matters except "small, in-office matters, like a real estate contract review, maybe writing a will here or there, just enough to continue to put food on the table…." Respondent requested that we impose an admonition or reprimand for his violations.

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. However, we determine that respondent is guilty of all the charged misconduct, having violated RPC 1.15(a) (four instances), RPC 1.15(d), and RPC 8.1(b).

Specifically, respondent's mishandling of the Schiraldi, Yurgin, Sweeney, and Leach matters resulted in the invasion of other clients' funds which he was duty-bound to safeguard in his ATA1. In the Schiraldi matter, respondent allowed a $4,836.41 shortage to persist in ATA1 for one year and blamed the shortage on his client and Geico. Respondent failed to cure the deficit with attorney fees or other funds and, thus, invaded the trust funds of twenty-four other clients over a prolonged period.

In the Yurgin matter, respondent failed to record the issuance of a $1,000 ATA check, created a $1,000 shortage in ATA1, and thereby invaded other clients' funds. Respondent only became aware of the shortage due to the OAE investigation.

In the Sweeney matter, respondent negligently disbursed funds for estate beneficiaries from his ATA1, instead of from the estate account that he had opened to administer the estate. Respondent's conduct caused the invasion of other clients' trust funds.

Finally, in the Leach matter, respondent, in his words, "jumped the gun" by depositing the settlement check and disbursing his attorney fee, before the funds had cleared. A three-day, $6,500 shortage resulted, which invaded the funds of respondent's other clients. The above misconduct constituted four instances of the negligent misappropriation of client funds, in violation of RPC 1.15(a).

Additionally, notwithstanding respondent's legal arguments that he should not be held responsible, we agree with the DEC that respondent violated RPC 1.15(d). Particularly, we agree with the DEC that respondent failed to perform monthly reconciliations of ATA1; authorized a nonlawyer to sign checks drawn on ATA1; and bore responsibility for the improper designation of both ATA1 and ABA1.

In contrast, we respectfully part company with the DEC to find that respondent also violated his R. 1:21-6(c)(1) duty to maintain deposit slips and canceled checks for a period of seven years. We decline to view as determinative the DEC's finding that respondent's canceled checks and deposit slips had been lost as a result of a server crash. At the random audit, a transcript of which was admitted into evidence, respondent conceded the availability of those records from the bank. Further, the admitted record evinces respondent's agreement that he could produce the requested records within thirty days of January 30, 2019.

The DEC was not inclined to weigh the admitted exhibits which had not been directly connected to the recordkeeping Rules for its benefit until closing argument. Although the record would have benefitted from a more explicit treatment of the evidence, we ultimately have no reservation in finding from the documentary evidence that each of the identified subsections of the recordkeeping Rule was violated.

One additional recordkeeping Rule deserves further comment. The DEC interpreted R. 1:21-6(c)(1)(A) to permit electronic fund transfers (EFTs) from an ATA. That Rule provides in relevant part:

> All trust account withdrawals shall be made only by [an] attorney authorized financial institution transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out of an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee, and the amount.

The DEC expressed its belief that EFTs constitute sufficient written instructions according to R. 1.0(o), which provides:

> "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, electronic communication, and embedded information (metadata) in an electronic document. A "signed" writing includes an electronic sound, symbol or process attached to or

> logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

We do not need to rely exclusively upon those passages because of the clarity of disciplinary precedent forbidding the practice. See In the Matter of Joseph Gembala, III, DRB 13-139 (December 10, 2013) at 3 (reprimanding respondent where on "multiple occasions, almost daily, electronic bank transfers were made to various companies"), so ordered, 217 N.J. 148 (2014).

The auditor explained that, absent written instructions identifying a particular client, it is challenging – if not impossible – for auditors and investigators to ascertain which clients' money is being moved out of trust. Given the essential protective purpose served by R. 1:21-6(c)(1)(A), that requirement is essential. Otherwise, every investigation touching an attorney trust account might become the arduous reconstruction necessitated by the facts of this case.

Finally, respondent failed to comply with the OAE's investigation. Although the DEC did not find clear and convincing evidence of this charge, it is clear from the record that the OAE auditor repeatedly requested documentation from respondent, and respondent provided neither the documents nor an explanation for his omission. When the OAE auditor's letters repeatedly went unanswered, the OAE auditor had no choice but to refer the matter for further investigation and a demand audit.

Moreover, respondent's failure to timely provide the complete documents requested by the OAE auditor, or to explain that he did not have the documents, contributed to delay in the investigation and the scheduling of three demand audits, and cemented his violation of RPC 8.1(b). We explicitly accept respondent's admission that he did not timely comply with records requests and reject respondent's claim that he provided every document requested by the OAE. That fact was rendered particularly clear by the auditor's testimony that, at the conclusion of the September 26, 2019 on-site audit, respondent still had not provided monthly reconciliations for ATA1 listing of client balances, an ATA1 receipts journal, and/or an ATA1 disbursements journal, the last two of which the auditor had shown him how to run on his own recordkeeping software.

In sum, we find that respondent violated RPC 1.15(a) (four instances), RPC 1.15(d), and RPC 8.1(b). The sole issue left for our determination is the appropriate quantum of discipline 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 Mitnick, 231 N.J. 133 (2017) (as the result of poor recordkeeping practices, the attorney negligently misappropriated more than $40,000 in client funds held in his trust account; violations of RPC 1.15(a), and RPC 1.15(d); significant mitigation included the attorney's lack of prior discipline in a thirty-five-year legal career);

In re Rihacek, 230 N.J. 458 (2017) (attorney was guilty of negligent misappropriation of client funds held in his trust account, various recordkeeping violations, and charging mildly excessive fees in two matters; no prior discipline in thirty-five years); and In re Cameron, 221 N.J. 238 (2015) (after the attorney had deposited in his trust account $8,000 for the pay-off 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 deal 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, a violation of RPC 1.15(d)).

Like the attorneys in Mitnick, Rihacek, and Cameron, respondent's utter inattention to his recordkeeping obligations led to his repeated, negligent misappropriation of significant amounts of client trust funds. Given his failure to properly reconcile his ATA, the shortages he created via his misappropriation persisted. In the Schiraldi matter, for example, respondent created a $4,836.41

shortage in ATA1 and allowed it to persist for one year. That conduct alone warrants a reprimand.

Respondent also repeatedly failed to cooperate with the OAE's concerted efforts to investigate his misconduct and to complete a demand audit of his financial records. What began as a random audit was elevated to a disciplinary investigation as a direct result of respondent's non-compliance, despite his heightened awareness, given his disciplinary history, of his obligation to cooperate with the OAE. That additional misconduct warrants the enhancement of the appropriate quantum of discipline to a censure.

In crafting the appropriate discipline, we also consider mitigating and aggravating factors. Here, in mitigation, respondent corrected his recordkeeping deficiencies and, ultimately, no clients suffered financial harm due to his prolonged misconduct.

As to aggravation, the Court has signaled an inclination toward progressive discipline and stern treatment of repeat offenders. In such situations, enhanced discipline is appropriate. See In re Kantor, 180 N.J. 226 (2004) (disbarment for abandonment of clients and repeated failure to cooperate with the disciplinary system).

This is respondent's third disciplinary matter before us. Hence, a review of the timeline and nature of respondent's disciplinary history is appropriate.

The 2019 admonition for respondent's violation of RPC 5.5(a)(1) addressed his failure to maintain professional liability insurance from 2016 through 2017. In the Matter of Michael D. Lindner, DRB 18-254 (January 30, 2019). The Court agreed with our imposition of discipline. In re Lindner, 239 N.J. 528 (2019).

The 2020 censure was imposed for respondent's violations of RPC 1.1(a); RPC 1.3; RPC 1.4(b); RPC 1.5(c); RPC 5.5(a)(1); and RPC 8.4(c). The misconduct in the two client matters underlying that case occurred from August 2012 through September 2016 (the Kelly matter), and from August 2014 through September 2015 (the Mulvihill matter). We found respondent grossly negligent, lacking in diligence, and non-communicative with his clients. Moreover, in the Mulvihill matter, respondent practiced law during a period when he was administratively ineligible to do so for failure to comply with the Interest on Lawyers Trust Accounts requirements.

In this matter, respondent's failure to cooperate with disciplinary authorities, resulting in the RPC 8.1(b) charge, occurred from 2016, when the OAE initially attempted to conduct the random audit, through 2019. Given the pending status of respondent's other disciplinary matters, he had a heightened awareness of his obligation to cooperate with disciplinary authorities, knowing that he was under scrutiny for other misconduct.

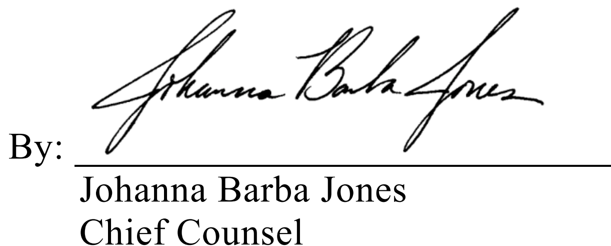
We, thus, conclude that, based on the timeline and varied nature of respondent's misconduct in his prior disciplinary matters versus the instant case, enhanced discipline is warranted.

In further aggravation, respondent has failed to exhibit remorse or an understanding of the gravity of his misconduct, referring to his misconduct in the instant matter as "mistakes" that do not warrant discipline.

On balance, we find that the aggravation significantly outweighs the mitigation. Consequently, we determine that a three-month suspension is necessary to protect the public and preserve the integrity of the bar. Moreover, upon reinstatement, we require respondent to submit to the OAE monthly reconciliations of his attorney accounts, on a quarterly basis, for a period of 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
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair



By: ______________________________
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael David Lindner, Jr.
Docket No. DRB 21-148

Argued: October 21, 2021

Decided: December 21, 2021

Disposition: Three-Month Suspension

Members	Three-Month Suspension
Gallipoli	X
Singer	X
Boyer	X
Campelo	X
Hoberman	X
Joseph	X
Menaker	X
Petrou	X
Rivera	X
Total:	9

Johanna Barba Jones
Chief Counsel