Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 23-064
District Docket No. XIV-2021-0318E

In the Matter of	:
Ellyn Michele Epstein	:
An Attorney at Law	:

Decision

Argued: April 20, 2023

Decided: September 5, 2023

Amanda W. Figland appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a March 7, 2023 disciplinary stipulation between the Office of Attorney Ethics (the OAE) and respondent. Respondent stipulated to having violated RPC 1.4(c) (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding

the representation); RPC 1.5(a) (charging an unreasonable fee); RPC 1.5(c) (failing to provide a written fee agreement in a contingent fee case and to specify the method for calculating the legal fee); RPC 1.15(a) (commingling personal and client funds); RPC 1.15(c) (two instances – failing to segregate property in which both the attorney and another party have an interest until there is an accounting, also violating R. 1:21-7(g);[1] failing to hold a disputed fee separate until resolution of the dispute); RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6); RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); RPC 8.1(b) (failing to cooperate with disciplinary authorities); and RPC 8.4(c) (two instances – engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine that a censure is the appropriate quantum of discipline for respondent's misconduct.

[1] Rule 1:21-7(g) requires that, in tort matters in which contingent fees are limited by subpart (c) of the same rule (as was the case here), "[u]pon conclusion of the matter resulting in a recovery, the attorney shall prepare and furnish the client with a signed closing statement."

Respondent earned admission to the New Jersey and Pennsylvania bars in 1984. She maintained a law practice in Cherry Hill, New Jersey, until August 2022, when she retired from the practice of law.

As detailed below, effective July 30, 2020, the Court temporarily suspended respondent for her failure to comply with a fee arbitration determination in the client matter underlying this case. In re Epstein, 242 N.J. 516 (2020). On August 12, 2020, respondent's license to practice law was reinstated after she satisfied the fee arbitration determination. In re Epstein, 243 N.J. 540 (2020).

We now turn to the facts of this matter.

Respondent's primary area of practice was real estate law and litigation. In November 2013, she met with Susan and Aviad Coppens (the Coppens) to discuss their claim that a neighboring commercial property owner had caused extensive damage to their property by allowing a water retention basin to overflow.

On November 12, 2013, respondent prepared a fee agreement for the Coppens and mailed it to them. That same date, she entered her appearance and filed a complaint on behalf of the Coppens against the neighboring property owner.

The fee agreement provided that the Coppens would pay respondent a $5,000 flat fee, in three installments, between November 2013 and January 2014. It further provided that, "if there [were] litigation or other complications not heretofore contemplated, which requires an abnormal amount of work, [the Coppens] agree to pay for additional services." The billing rate for respondent's provision of such services was set at $250 per hour. The agreement further stated that the Coppens would pay directly for "expert fees, court costs, deposition costs and any other necessary expense."[2] On December 5, 2013, the Coppens signed the fee agreement.

The Coppens paid respondent the $5,000 flat fee by January 2014. During the next two years, respondent periodically requested additional fees. The Coppens paid her additional fees of $1,500 in December 2014, $1,000 in January 2015, and $2,500 in September 2015.

In October 2016, respondent and Susan Coppens discussed modifying the fee agreement for the remainder of the litigation and, ultimately, agreed to enter into a contingent fee agreement. On October 3, 2016, following their discussion, respondent sent a text message to Susan Coppens stating: "Fyi it would be 20%

[2] In an apparent typographical error, the stipulation stated that the November 2013 flat-fee agreement stated that these costs and expenses were to be paid by respondent; however, the agreement itself stated that the clients were responsible for paying them.

of the first $250 (-$21k). Then 10% of any money over $250k."[3] Susan Coppens replied by text message stating, "that's fair."

In connection with the disciplinary proceedings, however, neither Susan Coppens nor respondent could explain what the $21,000 figure in respondent's text message represented. Respondent, who usually did not accept contingent fees for litigation matters, stipulated that the October 3, 2016 agreement "was not sufficiently clear."

After respondent reached the contingent fee agreement with the Coppens, she handwrote the following on a copy of the November 2013 fee agreement:

> Amended by Agreement
> October 3, 2016 – (If verdict/settlement add'l legal fee)
> 20% of 1st $250 K (after deduct clients' expenses)
> 10% of next $250 K

Respondent claimed that, in October 2016, she mailed the undated, handwritten fee agreement to the Coppens. However, the Coppens denied that they ever received a copy. In any event, the entire agreement was neither in writing nor signed by both respondent and the Coppens.

Notwithstanding the contingent fee agreement, starting in November 2016, respondent demanded from Susan Coppens additional payments of legal

[3] All typographical errors within the e-mail and text messages quoted herein are contained in the original communications.

fees. Respondent claimed that the October 2016 contingent fee agreement supplemented the November 2013 flat fee agreement, such that she was entitled to continue receiving additional interim payments, in addition to the twenty percent of any net settlement she would receive as her contingent fee. However, respondent never advised the Coppens whether payments made after October 2016 would be credited against the contingent fee or were for "additional services" under the flat fee agreement. Nor did respondent and the Coppens address this issue in e-mail and text exchanges regarding the payments. Susan Coppens later stated that, although she should have clarified why respondent continued to request additional payments after entering the contingent fee agreement, she failed to do so.

Throughout her work on the Coppens' matter, respondent failed to record the time she spent on the case or to provide the Coppens with invoices identifying her services. Nevertheless, the Coppens paid her each time she requested an interim payment. Between October 2016, when respondent and the Coppens entered into a contingent fee agreement, and November 2017, when the case was settled through mediation, the Coppens paid respondent another $6,600 in legal fees, bringing to $16,600 their aggregate payments to respondent.

Additionally, on August 31, 2017, respondent sent a text message to Susan Coppens, requesting a $4,000 loan and stating she needed the funds that day.

Coppens replied that she did not have $4,000 to lend and it would be "impossible" to get the money to respondent.

On November 2, 2017, during the aforementioned mediation, the parties to the civil action settled the case for a payment of $50,000 to the Coppens. That same date, respondent claimed to the Coppens that, based upon the October 2016 contingent fee agreement, she was entitled to an additional $7,000 in legal fees from the settlement proceeds. As they were all leaving the mediation, respondent stated to the Coppens, "we agree on the money that you owe me, right?" Without answering, the Coppens turned away from her and left. Later, respondent contended that the Coppens had agreed to pay the additional $7,000; however, the Coppens denied agreeing to this payment. Respondent admitted that she did not provide the Coppens with a written document explaining how she calculated her claim for an additional $7,000 in legal fees.

In calculating the net settlement, respondent admittedly did not review any records. Instead, she estimated that the Coppens had spent $15,000 in litigation costs, based on knowing they had paid the expert witness about $14,000. She then subtracted $15,000 from the $50,000 settlement to reach a net figure of $35,000, calculated twenty percent of that amount, and concluded that the Coppens owed her $7,000 in contingent legal fees.

Following the mediation, Susan Coppens prepared a list of the litigation expenses that she and her husband had paid and determined that these expenses totaled $17,801.62. However, Coppens did not share this information with respondent at the time.

The day after the mediation, respondent e-mailed Coppens that "[y]ou will get a check for $50k within 30 days" of returning a signed release to defense counsel. In a November 6, 2017 text message to Coppens, respondent stated that defense counsel would provide the settlement check to respondent, who would give the check to the Coppens; the Coppens would then deposit it and pay respondent her contingency fee.[4] Alternatively, she stated, "[u]nless you prefer that I put [it] in my trust account and give you the balance [a]nd keep the contingency fee[.]" Coppens replied by text message, stating, "We will come and pick it up." Later in the same exchange, respondent stated that she would have defense counsel "over[]night it to me. We can meet at my office . . . soon as it arrives." She added, "if you could decide where you're going to put the money so you can bring a check to postdate it for me, I would really appreciate it."

[4] Although the stipulation refers to the date as "November 14, 2017," this appears to be a misinterpretation of a time stamp ("11:14") displayed on respondent's phone screen.

Defense counsel's office contacted respondent on November 15, 2017 to advise her that Susan Coppens had contacted the office directly, inquiring about when the settlement check would be ready for pick up. Respondent then sent Coppens a text message, asking why she had contacted defense counsel's office and querying whether she did so "to make things quicker or because you don't intend on paying me? I totally trust you[;] I know that you wouldn't do that to me." Coppens replied that she had called defense counsel's office because it would be easier for her to pick up the check.[5] She further stated that, after she received the check, she and respondent would "settle up." Neither then, nor in other November 2017 text message exchanges with respondent, did Coppens state that she objected to respondent receiving any additional legal fee.

On November 29, 2017, respondent learned that the settlement check had been sent to defense counsel and would soon arrive at his office. That same date, respondent sent an e-mail to Susan Coppens, stating:

> Before the check comes, I wanted to speak with you both. After careful consideration and much angst, I wanted to let you know that when I agreed to take 20% of the first $250,000 . . . I never in a million years would have believed that this case would settle for less than six figures, or I would not have taken the case.

[5] The Coppens resided in Egg Harbor Township, New Jersey, defense counsel maintained an office in Pleasantville, New Jersey, and respondent's primary office was in Cherry Hill, New Jersey. Thus, the Coppens lived significantly closer to defense counsel's office than respondent's place of business.

. . . .

> But I do not want to be forever bitter and have to be the one to take 20% of the net, rather than gross, of $50,000. when I am the one who did all that work on the least amount possible for four years. So I am asking that I be given 20% of the gross (or $10,000.) and I will agree to pay . . . [the mediator's] bill when split in half, is $750 (total was $1500).
>
> I will tell [defense counsel] that I want his office to give you the check and you will overnight me a check for $9,250. I will wait til you tell me the check for $50K has cleared. I will trust you and let you sign my name if it is on the check.
>
> If this agreement is okay, please advise asap and I will tell [defense counsel] to give his letter, plus the check to you for pick up when he tells me it has arrived. You can send me his letter later.

Respondent then sent an e-mail to defense counsel, informing him that he could give the settlement check to the Coppens. Later that day, respondent forwarded to Susan Coppens her e-mail to defense counsel, along with his acknowledgement of receipt.

On November 30, 2017, defense counsel's office called respondent to advise that the settlement check was ready. Thereafter, respondent called Susan Coppens and sent her a text message asking if she had received respondent's e-mail. Coppens did not reply to this text or to respondent's e-mails of the day

before but understood them to mean that she (not respondent) would pick up the check from defense counsel's office.

That same date, without having heard back from the Coppens, respondent picked up the check. Further, although the check was made payable to "Aviad and Susan Coppens" and respondent's name was not on it, respondent signed it as "Attorney for & on behalf of Aviad Coppens and Susan Coppens" and deposited it in her attorney business account (ABA). That evening, respondent sent an e-mail to the Coppens, stating that "the check went to [defense counsel] today and I tried to reach you but I didn't[.] I still haven't received a response so the check is now in my attorney trust account." In fact, respondent had deposited the check in her ABA – she had no attorney trust account (ATA) at the time. She further stated that "I will be sending you an attorney check when this check clears."

On December 1, 2017, Susan Coppens drafted a reply to respondent's November 29, 2017 e-mail. However, the copy of Coppens' e-mail in the record before us was sent not to respondent, but rather to a "Sue Coppens" e-mail address. In the self-addressed e-mail, Coppens stated that she disagreed with respondent receiving more fees, since she already had paid respondent more than "our agreed upon 20%;" she also stated she had not authorized respondent to

sign the settlement check. According to respondent, she never received this e-mail.

On December 3, 2017, respondent – after deducting $7,000 in fees from the settlement – wrote a check to the Coppens for $43,000 and sent Susan Coppens an e-mail stating that the check was on its way.

On December 4, 2017, respondent sent Coppens another e-mail, with photographs of both sides of the settlement check, and asked that the Coppens speak to her in person "if [they] have a problem." By the next day, she clearly knew the Coppens disputed her claim to additional fees, because she sent Susan Coppens a text message stating, "I will fight for every penny I earned," including those "you think I didn't earn." Notwithstanding the disagreement, respondent had spent the $7,000 in disputed fees by the end of December 2017.

In the interim, on December 8, 2017, the Coppens deposited the $43,000 check they had received from respondent. On December 26, 2017, they filed for fee arbitration against respondent.

On June 11, 2018, a panel of the District IV Fee Arbitration Committee heard the matter and issued a decision in favor of the Coppens.

Respondent appealed and, on November 7, 2018, we remanded the matter for a new hearing before a new panel (DRB 18-259).

On February 19, 2019, a second fee arbitration hearing took place. The hearing panel determined that respondent had received $23,600 in legal fees from the Coppens: $10,000 between November 2013 and October 1, 2016; another $6,600 between October 3, 2016 and November 2, 2017; and, finally, $7,000 from the settlement funds. The panel further concluded that, following the October 2016 contingent fee agreement, the Coppens owed respondent $5,800 for legal services. It calculated respondent's entitlement to a contingent fee using respondent's October 3, 2016 text message, which stated that $21,000 in expenses would be deducted prior to taking twenty percent as the fee. After applying a credit for an unpaid mediation fee, the panel determined that respondent owed $7,450 to the Coppens.

In addition to ordering respondent to pay this amount to the Coppens, the panel referred the matter to the ethics committee, due to respondent's "failure to notify [c]lients that she had obtained the settlement payment, to obtain their signatures and to obtain approval of an accounting reflecting a proposed distribution[.]" However, the panel did not find that respondent's fee had been "so excessive as to evidence an intent to overreach."

Respondent appealed the second fee arbitration determination to us. On September 23, 2019, we denied her appeal and upheld the determination (DRB 19-210). Respondent then failed to comply with the fee arbitration award of a

$7,450 refund to the Coppens. Consequently, effective July 30, 2020, the Court temporarily suspended her. Epstein, 242 N.J. at 516-17. On August 12, 2020, the Court reinstated respondent's license to practice law after she satisfied the fee arbitration determination. Epstein, 243 N.J. at 540.

During the OAE's investigation of this matter, respondent initially falsely represented that she had deposited the Coppens' $50,000 settlement check in her ATA. However, after reviewing her bank records, respondent conceded that she had, instead, deposited the check in her ABA.

Additionally, respondent falsely claimed that she maintained an ATA, but the account she listed as her ATA on her annual attorney registration was a personal savings account.

Subsequently, by letter dated September 25, 2019, the OAE directed respondent to explain why she believed she had deposited the Coppens' settlement check in an ATA and to clarify whether she maintained an ATA from January 1, 2017 through the date of the OAE's correspondence. By letter dated October 1, 2019, respondent claimed that her bank had failed to set up her ATA as she had requested, and instead created an ABA for her. Although she stated she would provide the OAE with proof that she had maintained an ATA, she failed to provide such proof.

The OAE confirmed that respondent had not maintained an ATA during the relevant period. The investigation also brought to light other recordkeeping deficiencies, including failing to maintain individual ledger cards for clients (including the Coppens); failing to maintain ATA and ABA receipts and disbursements journals; commingling of client and personal funds; and failing to maintain monthly three-way reconciliations.

Based on the foregoing facts, the parties stipulated that respondent violated the Court Rules and Rules of Professional Conduct, as follows:

- RPC 1.4(c) – by failing to adequately discuss with the Coppens how her contingent legal fees would be calculated, and how additional legal fee payments would be applied, so that the Coppens could make an informed decision about paying legal fees;

- RPC 1.5(a) and R. 1:21-7(d) – by improperly calculating her contingent legal fee without adding up all disbursements and deducting this total from the gross settlement;

- RPC 1.5(c) and R. 1:21-7(g) – by entering into a contingent fee agreement with the Coppens without specifying the method for calculating the legal fee, and by not having the Coppens execute a written contingent fee agreement;

- RPC 1.15(a) – by commingling client funds with personal funds when she deposited the settlement check in her ABA;

- RPC 1.15(c) and R. 1:21-7(g) – by failing to provide a final settlement statement or other accounting to the Coppens before disbursing to herself a contingent fee and releasing the remaining settlement proceeds to the Coppens;

- RPC 1.15(c) – by failing to segregate and hold the $7,000 she claimed as legal fees in her ATA, pending a resolution of the fee dispute with the Coppens;

- RPC 1.15(d) – by failing to comply with the recordkeeping requirements of R. 1:21-6;

- RPC 3.4(c) – by failing to comply with the fee arbitration decision after the Board denied her appeal;

- RPC 8.1(b) – by failing to respond to the OAE's request for information about her ATA; and

- RPC 8.4(c) (two instances) – by

    - signing a check that was payable to the Coppens and depositing that check in her ABA; and

    - advising the Coppens that they could pick up the settlement check at defense counsel's office, but then picking up the check herself, signing it, depositing it in her ABA, and advising the Coppens that she was holding the funds in her ATA.

In the stipulation, the OAE stated that it lacked clear and convincing evidence that respondent knowingly misappropriated client funds. Citing In re Kim, 222 N.J. 3 (2015), In re Frost, 156 N.J. 415 (1998), and In re Barbour, 147 N.J. 456 (1997), the OAE pointed out that "[a]ttorneys who reasonably believe that they are entitled to take legal fees from funds they are holding, have not typically been found to have knowingly misappropriated those funds." Here, the OAE maintained that, although respondent "knew that Susan Coppens had not specifically approved her taking of $7,000 from the settlement funds," she

nevertheless "had a colorable claim of entitlement to $7,000 as a legal fee" based on the October 2016 contingent fee agreement.

The OAE noted not only that respondent and the Coppens had entered into a contingent fee agreement, but that later – after the underlying matter settled in November 2017 – Susan Coppens had stated she would "settle up" with respondent once the settlement funds were received. In addition, the OAE claimed that respondent's taking of $7,000 was consistent with the terms of the contingent fee agreement, as it represented twenty percent of what respondent estimated to be the net settlement after deducting litigation expenses, and respondent's estimate that the Coppens had paid $15,000 in expenses was "reasonably similar" to their actual expenditure of $17,801.62.

According to the OAE, Susan Coppens was unhappy with the result of the mediation; uncertain about respondent's entitlement to legal fees; and of the view that it would be unfair for respondent to receive more in legal fees than the Coppens received via the net settlement. However, she did not successfully advise respondent that she objected to respondent taking any legal fees at all from the settlement funds, nor did she reply to most of the communications from respondent in which respondent clearly expressed her view that she was entitled to a contingent fee from the funds. Indeed, according to the OAE, while Coppens sought "control over the settlement check" and "had no intention of paying any

portion of the settlement funds" to respondent, she nevertheless "allowed [r]espondent to believe that she would receive some legal fees from the settlement funds." Further, the OAE observed that respondent "correctly understood that a contingent fee agreement could not be revoked by a client who was disappointed with the amount of the settlement."

In addition, the OAE expressed its understanding that the fee arbitration panel "did not consider $23,600 to be an 'excessive' fee since [r]espondent performed a 'considerable amount of work over an extended period of time.'"[6] The OAE further emphasized that, although the fee arbitration panel rejected respondent's "overall position" that she "could collect flat fees, interim hourly legal fees if the matter required 'an abnormal amount of work' and a 20% contingent legal fee on the settlement," it nevertheless "relied on and enforced" the contingent fee agreement.

Based on the above facts and reasoning, the OAE concluded that respondent reasonably believed she was entitled to additional legal fees under the contingent fee agreement. Thus, "the evidence [was] not clear and

[6] We note that the fee arbitration panel did not state that $23,600 was not "excessive" but that it was not "so excessive as to evidence an intent to overreach." Moreover, although the panel approved as "fair and reasonable" a fee of $15,800, in keeping with the text message regarding the contingent fee agreement and in light of respondent's considerable work on the matter, it rejected respondent's "unilateral decision to take additional unauthorized fees" and concluded "she took more than she was entitled to out of the settlement proceeds."

convincing that [she] knowingly misappropriated client funds when she kept $7,000 on November 30, 2017 as legal fees and wrote a check to her clients for $43,000 on December 3, 2017."

The OAE recommended the imposition of a censure or lesser discipline. It surveyed relevant disciplinary precedent and asserted that violations of most of the Rules of Professional Conduct at issue are typically met with reprimands; violations of the other Rules, standing alone, typically result in admonitions. The OAE found no aggravating factors. In mitigation, it noted that respondent had no disciplinary history; entered into the disciplinary stipulation with the OAE; and, during the initial demand interview, admitted she had violated RPC 1.5(a) and RPC 1.15(c). The OAE also considered that the matter arose out of a single legal representation and respondent's "failure to pay the arbitration award resulted from a lack of funds." Based on "the totality of the charges" and respondent's violations of "numerous RPCs," the OAE urged that respondent should receive a censure or such lesser discipline as we deem appropriate.

Respondent did not submit a brief for our consideration and waived her appearance at oral argument.

Following a review of the record, we determine that the stipulated facts in this matter clearly and convincingly support all but one of respondent's admitted ethics violations.

Specifically, respondent violated RPC 1.4(c) by failing to clearly explain to the Coppens how she would calculate her contingent fee once the case settled, and how the fee payments they made during the course of the representation would factor into the contingent fee calculation. Respondent's utter failure to explain the contingent fee arrangement deprived the Coppens of the ability to make an informed decision about paying legal fees toward respondent's representation.

Likewise, respondent violated RPC 1.5(a) and R. 1:21-7(d) by taking a contingent fee greater than that to which she was entitled. See In re Weston-Rivera, 194 N.J. 511 (2008) (in eighteen cases, the attorney computed the contingent fee based on the gross sum recovered, and deducted charges from her client's share of the proceeds, a violation of RPC 1.5(a)). Here, respondent unreasonably withheld for herself $7,000 in additional fees from the settlement funds, even though by then, during the thirteen months that had elapsed since she and the Coppens agreed to a contingent fee arrangement, the Coppens had paid her an additional $6,600 in fees. Moreover, she failed to calculate the net settlement in a reasonably accurate manner. Specifically, without reviewing records or asking the Coppens how much they had paid in litigation expenses, she simply estimated that the expenses totaled $15,000, based on her knowledge that the Coppens had paid about $14,000 to an expert.

In addition, respondent violated RPC 1.5(c) and R. 1:21-7(g) by failing to reduce the contingent fee agreement to a writing signed by her and the Coppens. Her vague text message to Susan Coppens regarding the agreement did not clearly specify the method by which the contingent fee would be determined. Respondent also failed to provide the Coppens with a written settlement statement.

Typically, commingling occurs when an attorney improperly deposits personal funds in an ATA, not when an attorney deposits client funds in an ABA. See, e.g., In the Matter of Ihab Awad Ibrahim, DRB 20-135 (April 26, 2021); In the Matter of David G. Esposito, DRB 19-206 (September 23, 2019) at 9-10, so ordered, 240 N.J. 174 (2019); see also In re Toto, 241 N.J. 359 (2020). However, because respondent expressly admitted using her ABA as the functional equivalent of an ATA (because she did not have an ATA), we find that she violated RPC 1.15(a) by commingling her personal funds with her clients' funds. See In re Petti, 36 N.J. 146, 156-57 (1961) (finding the attorney violated Canon 11 of the Canons of Professional Ethics, which prohibited commingling, where the attorney had no "trustee account" but rather a single bank account in which he deposited clients' moneys and fees, and from which he both distributed monies belonging to his clients and paid office expenses).

Similarly, when respondent paid herself and spent the $7,000 that she believed she was owed in legal fees, she violated RPC 1.15(c), which required that these funds "be kept separate . . . until the dispute [was] resolved." As early as November 15, 2017, respondent wrote a text message in which she acknowledged and expressed concern that the Coppens did not concur with her plan to collect additional fees out of the settlement funds. Moreover, by December 5, 2017 (if not sooner), she clearly knew the Coppens disputed her claim to the $7,000. She nevertheless proceeded to spend that amount. Additionally, respondent's failure to provide the Coppens with a settlement statement, or, indeed, any accounting at all of the work and expenses in the case, prior to paying herself a legal fee, constituted a violation of RPC 1.15(c), as well as Rule 1:21-7(g).

Respondent's failure to maintain an ATA, individual client ledger cards, and ATA and ABA receipts and disbursements journals; failure to perform monthly reconciliations; and failure to deposit client funds in her ATA, constituted recordkeeping violations, contrary to Rule 1:21-6 and RPC 1.15(d).

The Court's June 29, 2020 Order temporarily suspending respondent for her failure to comply with the fee arbitration determination in the Coppens case is evidence that she violated RPC 3.4(c). See In the Matter of Russell T. Kivler, DRB 08-155, 08-156, 08-159, 08-167, 08-244, 08-245, 08-246, 08-247 (October

21, 2008) at 29 (observing that "[t]he Court has found that an attorney who fails to abide by a fee arbitration award violates RPC 3.4(c) and RPC 8.4(d)"), so ordered, 197 N.J. 255 (2009).[7]

Respondent violated RPC 8.4(c) in multiple ways. First, respondent led the Coppens to believe that they would be the ones to pick up the settlement check from defense counsel's office, but then picked up the check herself; executed and deposited the check without first informing them that she had the check or receiving their authorization to sign it; and then falsely told them she was holding the settlement funds in her ATA, when she did not have an ATA. Second, respondent engaged in dishonest conduct by signing her name to a check made payable only to the Coppens and then depositing the check.

However, the RPC 8.1(b) charge cannot be sustained. Respondent's failure to produce documentation that an ATA existed, when it did not, is not a failure to cooperate with the OAE's investigation.

Moreover, we find that the evidence does not demonstrate that respondent knowingly misappropriated the clients' funds, in violation of RPC 1.15(a) and the principles of Wilson. As we have observed in the past, "no attorney has ever been disbarred for taking client funds when the attorney has a reasonable belief

[7] RPC 8.4(d) was not charged in the instant matter.

of entitlement to the monies." In the Matter of Daniel Donk-Min Kim, DRB 14-171 (December 11, 2014) at 60-61, so ordered, 222 N.J. 3 (2015); see also In re Frost, 156 N.J. 416 (1998) (two-year suspension for attorney who, among other serious improprieties, took his fee from the proceeds of his client's refinance, based on the erroneous belief that he had reached an agreement with one of the client's creditors to settle an outstanding judgment).

In contrast, attorneys who purposely miscalculate their fee, with no reasonable belief to entitlement, have been subject to a claim of knowing misappropriation. See In re Noonan, 102 N.J. 157, 159-160 (1986) (stating that, under Wilson, knowing misappropriation of client funds "is the mere act of taking your client's money knowing that you have no authority to do so").

Here, we conclude that the disciplinary stipulation provided sufficient grounds to conclude that respondent reasonably believed she was entitled to a portion of the settlement proceeds. Susan Coppens' text message to respondent, stating that after Coppens picked up the check, "then we can settle up," supported respondent's belief that she was entitled to and would receive an additional fee. Furthermore, Coppens did not refute respondent's multiple statements indicating that she expected to receive additional fees after the settlement check arrived – an expectation that respondent reiterated in text messages to Coppens on November 6 and 15, 2017, and in several e-mails to

Coppens on November 29, 2017. Because respondent reasonably expected to receive an additional fee after the settlement check was deposited and applied one plausible (albeit not the only plausible) interpretation of her fee agreements with the Coppens when she estimated the amount to which she was entitled, her taking of $7,000 from the settlement monies did not constitute knowing misappropriation.

In sum, we find that respondent violated RPC 1.4(c); RPC 1.5(a); RPC 1.5(c); RPC 1.15(a); RPC 1.15(c) (two instances); RPC 1.15(d); RPC 3.4(c); and RPC 8.4(c) (two instances). However, we determine to dismiss the RPC 8.1(b) charge.

Respondent's misconduct falls into three distinct categories: RPC violations directly related to the Coppens matter and affecting these clients; noncompliance with the fee arbitration committee determination; and failure to comply with recordkeeping requirements.

First, respondent engaged in multiple unethical acts involving the Coppens, starting with her failure to provide them with a proper contingent fee agreement, and proliferating when she picked up, signed, and deposited the settlement check without informing the Coppens in advance or obtaining their consent. Then, rather than keeping the funds separate until she and the Coppens resolved their disagreement regarding the amount of her total legal fee, she

unilaterally determined, paid to herself, and spent $7,000 of the settlement monies, an amount she admittedly had estimated, and for which she failed to provide any written accounting when she disbursed the remaining $43,000 to the clients.

Respondent's failure to hold the $7,000 pending resolution of the fee dispute and to provide the clients with a final settlement statement or accounting would typically result in an admonition. See In the Matter of Gary T. Steele, DRB 10-433 (March 29, 2011) (following a real estate closing, the attorney paid himself a $49,500 fee from the closing proceeds, knowing that the client had not authorized that disbursement, and did not promptly turn over the balance of the funds to the client; the attorney also did not return the file to the client, as requested), and In the Matter of Ronald S. Kaplan, DRB 01-031 (May 22, 2001) (the attorney, who came into possession of settlement funds in which he and a prior attorney had an interest, did not keep the funds separately until there was an accounting and severance of their interests, a violation of RPC 1.15(c)); cf. In the Matter of Michael S. Kimm, DRB 09-351 (January 28, 2010) (admonition where the attorney improperly calculated his contingent fee on the gross recovery, rather than on the net recovery, a violation of RPC 1.5(c) (the corollary of R. 1:21-7(g), charged here); the attorney also improperly advanced more than

$17,000 to his client, prior to the conclusion of her case, a violation of RPC 1.8(e)).

Standing alone, an intentional misrepresentation to a client requires the imposition of a reprimand. See In re Kasdan, 115 N.J. 472, 488 (1989) (noting that "[t]he Court has consistently held that intentionally misrepresenting the status of lawsuits warrants public reprimand."). A reprimand may still be imposed even if the misrepresentation is accompanied by other, non-serious ethics infractions. See, e.g., In re Morrissey, 240 N.J. 182 (2019) (reprimand for attorney who made multiple misrepresentations to the client regarding the status of tax appeals for a number of years; the attorney also failed to provide a written contingent fee agreement and did not adequately explain the matter to the client, violations of RPC 1.4(c) and RPC 1.5(c)); In re Ruffolo, 220 N.J. 353 (2015) (reprimand for attorney who falsely assured the client that his matter was proceeding apace and he should expect a monetary award in the near future, as the attorney knew that the complaint had been dismissed, violations of RPC 8.4(c); the attorney also exhibited gross neglect and a lack of diligence by allowing his client's case to be dismissed, not working on it after filing the initial claim, and failing to take any steps to prevent its dismissal or ensure its reinstatement thereafter, violations of RPC 1.1(a) and RPC 1.3; the attorney also violated RPC 1.4(b) by failing to promptly reply to the client's requests for

status updates); In re Falkenstein, 220 N.J. 110 (2014) (reprimand for attorney who violated RPC 8.4(c) when he failed to inform the client that he had not complied with the client's request to seek post-judgment relief, led the client to believe that he had filed an appeal, and concocted false stories to support his lies; the attorney grossly neglected and lacked diligence in the case, violations of RPC 1.1(a) and RPC 1.3; because the attorney did not believe the appeal had merit, his failure to withdraw from the case was a violation of RPC 1.16(b)(4); finally, the attorney practiced law while ineligible, although not knowingly, a violation of RPC 5.5(a)); In re Braverman, 220 N.J. 25 (2014) (reprimand for attorney who failed to tell his client that the complaints filed on her behalf in two personal injury actions had been dismissed, thereby misleading her, by his silence, into believing that both cases remained pending, a violation of RPC 8.4(c); the attorney also violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 3.2, and RPC 8.1(b); we found that the attorney's unblemished thirty-four years at the bar was outweighed by his inaction, which left the client with no legal recourse).

The discipline warranted by respondent's second RPC 8.4(c) violation, based on signing and depositing the settlement check herself, would be an admonition or a reprimand. Here, the circumstances are most analogous to cases in which attorneys have been charged with other violations, not under RPC

8.4(c), for failing to obtain a client's signature before depositing a check made out to the client. In these cases, we have imposed an admonition. See In the Matter of Louis N. Cacmiano, Jr., DRB 02-094 (May 22, 2002) (imposing an admonition where the attorney deposited into his trust account a settlement check payable to him and his client without his client's endorsement or permission to deposit the check, a charged violation of RPC 1.15(c); the attorney paid the client her share of the settlement after the check cleared), and In the Matter of Charles Stephen Bartolett, DRB 09-228 (December 16, 2009) (determining that an admonition likely would be imposed solely for the attorney's signing and depositing, in his firm's business account, a check made payable to the firm, the client, and the client's father, without obtaining the signatures of the client and her father; when the attorney, upon receiving the check, called the client and father to arrange for them to endorse it, the client requested instead that the attorney "just deposit it so it could clear as soon as possible;" because the client asked the attorney to deposit the check and she received her funds, we found the attorney had not violated RPC 8.4(c) but violated In re Advisory Committee on Professional Ethics Opinion 635, 125 N.J. 181 (1991); in aggregate, the attorney's additional misconduct, including negligent misappropriation and a misrepresentation to Social Services, coupled with two prior suspensions, warranted imposition of a three-month suspension),

so ordered, 202 N.J. 7 (2010).

However, misrepresentations to third parties typically are met by reprimands. See, e.g., In re Walcott, 217 N.J. 367 (2014) (the attorney misrepresented to a third party, in writing, that he was holding $2,000 in escrow from his client as collateral for a settlement agreement; violations of RPC 4.4(a)(1) and RPC 8.4(c)); In re Chatterjee, 217 N.J. 55 (2014) (the attorney misrepresented to her employer, for five years, that she had taken steps to pass the Pennsylvania bar examination, a condition of her employment; compelling mitigation present); In re Liptak, 217 N.J. 18 (2014) (the attorney misrepresented to a mortgage broker the source of the funds she was holding in her trust account; the attorney also committed recordkeeping violations; compelling mitigation present).

Respondent's remaining violations of the Rules of Professional Conduct in her handling of the Coppens matter ordinarily are met with admonitions. Specifically, attorneys who fail to adequately communicate with their clients are typically admonished. See In the Matter of Kourtney Anna Borchers, DRB 21-237 (February 22, 2022) (the attorney violated RPC 1.4(b) by repeatedly failing, for weeks, to reply to a client's reasonable requests for information; the attorney also violated RPC 1.3 (lack of diligence); prior admonition), and In the Matter of Cynthia A. Matheke, DRB 13-353 (July 17, 2014) (the attorney violated RPC

1.4(b) and (c) by failing to advise her client about "virtually every important event" in the client's malpractice case for more than three years, including the dismissal of her complaint).

Further, charging an unreasonable fee ordinarily warrants an admonition, if it is limited to one incident and if the attorney's fees are not so excessive as to evidence intent to overreach the client.[8] See, e.g., In the Matter of S. Michael Musa-Obregon, DRB 18-063 (April 25, 2018) (the attorney violated RPC 1.5(a) by signing a retainer agreement, in a family court action, which provided that twenty-five percent of the fee was non-refundable); In the Matter of Raymond L. Hamlin, DRB 09-051 (June 11, 2009) (the attorney attempted to collect a $50,000 fee in an unsuccessful contingent fee matter, pursuant to an agreement providing for payment of a $50,000 fee even without a recovery, a violation of RPC 1.5(a); the attorney also violated RPC 1.5(b) by failing to reduce to writing the terms of his fee agreement with the client); Weston-Rivera, 194 N.J. at 511 (in eighteen matters, the attorney computed the contingent fee based on the gross recovery and improperly deducted charges from her client's share of the proceeds); In the Matter of Angelo R. Bisceglie, Jr., DRB 98-129 (September 24, 1998) (the attorney billed a Board of Education for work not authorized by

[8] As noted above, the second fee arbitration hearing panel determined that respondent's fee was not "so excessive as to evidence an intent to overreach."

that Board, although it was authorized by the Board's president; the fee was unreasonable but did not rise to the level of overreaching).

Conduct involving failure to provide a written contingent fee agreement, even if accompanied by other, non-serious ethics offenses, also typically results in an admonition. See, e.g., In the Matter of Martin G. Margolis, DRB 02-166 (July 22, 2002); In the Matter of Alan D. Krauss, DRB 02-041 (May 23, 2002); In the Matter of John S. Giava, DRB 01-455 (March 15, 2002).

Based upon the above precedent, a reprimand is the baseline quantum of discipline for respondent's misconduct in her interactions with the Coppens and her handling of their case.

Respondent's second, distinct course of misconduct involved her knowing failure to comply with the fee arbitration committee's determination, which she resolved only after the Court temporarily suspended her. A reprimand ordinarily is imposed on an attorney who fails to obey court orders, even if the infraction is accompanied by other, non-serious violations. See, e.g., In re Ali, 231 N.J. 165 (2017); In re Cerza, 220 N.J. 215 (2015); In re Gellene, 203 N.J. 443 (2010).

Respondent's third category of misconduct involved violating the Rule 1:21-6 recordkeeping requirements and commingling funds. Recordkeeping irregularities and commingling, in combination, ordinarily are met with an admonition, if the misconduct does not negatively impact or invade a client's

funds. See, e.g., In the Matter of Richard P. Rinaldo, DRB 18-189 (October 1, 2018) (the attorney engaged in recordkeeping violations and commingled personal loan proceeds in his ATA, violations of RPC 1.15(a) and (d); the commingling did not impact client funds in the ATA); In the Matter of Richard Mario DeLuca, DRB 14-402 (March 9, 2015) (the attorney commingled personal and trust funds and failed to comply with recordkeeping requirements; although the attorney had an ATA shortage of $1,801.67, no client or escrow funds were invaded by virtue of the shortage, because the attorney maintained more than $10,000 of earned legal fees in the ATA); In the Matter of Dan A. Druz, DRB 10-404 (March 3, 2011) (an OAE audit revealed that, during a two-year period, the attorney had commingled personal and client funds in his ATA by routinely using the account for business and personal transactions; recordkeeping deficiencies also found).

Accordingly, respondent's client-related misconduct alone would warrant a reprimand; her failure to comply with the fee arbitration determination would also, standing alone, warrant a reprimand; and, in addition, she committed recordkeeping violations. Based on disciplinary, a short term of suspension would be warranted for respondent's misconduct.

To craft the appropriate discipline in this matter, we also consider aggravating and mitigating factors.

We find no aggravating factors.

In mitigation, we accord respondent's unblemished disciplinary record, since her 1984 admission to the bar, compelling weight. Moreover, she entered into a disciplinary stipulation and, during the initial interview with the OAE, admitted that she had violated RPC 1.5(a) and RPC 1.15(c).

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

Were respondent currently practicing law, it would be prudent to impose conditions to address her admitted noncompliance with recordkeeping Rules. However, because respondent's law license is in retired status, such conditions are not necessary to protect the public.

Members Petrou and Rivera were absent.

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: */s/ Timothy M. Ellis*
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Ellyn Michele Epstein
Docket No. DRB 23-064

Argued: April 20, 2023

Decided: September 5, 2023

Disposition: Censure

Members	Censure	Absent
Gallipoli	X	
Boyer	X	
Campelo	X	
Hoberman	X	
Joseph	X	
Menaker	X	
Petrou		X
Rivera		X
Rodriguez	X	
Total:	7	2

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel