Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-234
District Docket Nos. XIV-2015-0032E
and XIV-2015-0224E

In the Matter of	:
Jay J. Friedrich	:
An Attorney at Law	:

Decision

Argued: January 21, 2021

Decided: May 27, 2021

Timothy J. McNamara 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 disbarment filed by a special master. The formal ethics complaint charged respondent with having violated RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979) (multiple instances) (knowingly misappropriating client funds); RPC 1.4(b)

(failing to communicate with a client); RPC 1.5(b) (failing to set forth in writing the basis or rate of the fee); RPC 1.15(a) (negligently misappropriating client funds); RPC 1.15(d) (committing recordkeeping violations); RPC 8.1(a) (making a false statement in connection with a disciplinary matter); RPC 8.1(b) (failing to cooperate with disciplinary authorities); RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer); and RPC 8.4(c) (two instances) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

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

Respondent earned admission to the New Jersey and Florida bars in 1971 and to the New York bar in 1986. During the relevant timeframe, he maintained a practice of law in Ridgewood, New Jersey.

Respondent has no prior discipline.

The De La Rosa Matter

Distilled to their essence, the most serious charges in this case turn on whether respondent and his client, Angela De La Rosa, entered into a September 2013 advance, general retainer agreement proposed and drafted by respondent and, if so, whether respondent abided by the terms of such a retainer agreement. Specifically, did De La Rosa agree to provide a more than $200,000 advance,

general retainer to respondent and, under the terms of the retainer agreement, was responded authorized to immediately disburse and use the entirety of the retainer, or was he required to safeguard it in his trust account and bill against it, monthly, as he provided legal services to De La Rosa?

The relevant facts of this portion of the matter are as follows. On January 12, 2015, TD Bank notified the Office of Attorney Ethics (the OAE) of an overdraft in respondent's attorney trust account; respondent asserted that TD Bank's notification was in error, that his account contained sufficient funds at the time of the alleged overdraft, and that TD Bank ultimately reversed all overdraft charges. The OAE disagreed that the notification was in error, regardless of any such reversal, maintaining that subpoenaed records proved that respondent caused an overdraft of the account via a January 9, 2015 check to De La Rosa, which respondent issued against uncleared funds.

Moreover, on March 25, 2015, De La Rosa filed an ethics grievance against respondent, in which she asserted that respondent (1) withheld funds due to her for more than fifteen months; (2) failed to hold those funds in his trust account, inviolate, as required; and (3) was negligent in handling De La Rosa's legal matters. In his June 8, 2015 reply to the ethics grievance, respondent initially asserted that the OAE had no jurisdiction over the case, claiming that respondent's entire representation of De La Rosa had occurred in New York;

claimed that the client funds De La Rosa referenced were actually an advance, general retainer for legal services; and cited letters of engagement setting forth the structure of his legal fee and the purported retainer agreement.

During the ethics hearings, respondent testified that, in 2007, he had begun representing De La Rosa and her former husband, Alex Rodriguez, in their roles as owners and operators of two Manhattan restaurants. De La Rosa agreed that she first retained respondent, in 2007, to handle a landlord dispute involving the leased premises from which she operated one of the restaurants. The record reflects that, in 2007, respondent began sending to De La Rosa and Rodriguez periodic invoices for legal services rendered.

In defense of the charges against him, respondent claimed that an initial, February 1, 2007 letter of engagement, the copy of which he produced was neither on law firm letterhead nor signed by respondent or De La Rosa, constituted a retainer agreement with De La Rosa, for "various matters," and adequately set forth the basis and rate of his fee, as RPC 1.5(b) requires.

The February 1, 2007 letter stated, in relevant part

> This shall confirm that you have retained the services of FRIEDRICH & FRIEDRICH, LLC. From time to time we shall be representing you on various matters. This office shall be billing you on a monthly basis for all services rendered.
>
> The monthly billings which you shall receive shall specifically set forth the matter which we are

> representing you on and the attorney who has completed the services for you . . . . The expenses and costs shall be itemized . . . .
>
> We have not requested a retainer . . . . It, therefore, is our expectation that when billings are received from our office that the billings are paid promptly . . . .
>
> [Ex.R-1.][1]

Respondent also claimed that subsequent, September 18 and September 25, 2013 letters of engagement set forth his continuing agreement with De La Rosa for legal representation, including a new, $200,000 advance, general retainer agreement, and that he, in essence, had acted as "outside general counsel" to Rodriguez and De La Rosa. The September 18, 2013 letter stated, in relevant part

> The last billings I submitted were not entirely paid as a result of the dispute between you and Alex.
>
> My hourly billing rate has been reduced to $400.00 per hour . . . .
>
> In our discussions you have indicated to me that your business is not flourishing and you do not have availability of funds to pay me. Therefore it is understood and agreed that when you sell your residence you shall submit to me a Retainer of $200,000.00. The purpose of the Retainer is to insure my office shall be paid for all services rendered in all matters that we may represent you thereon. At any time you can request that I disburse to you the balance of the

[1] "Ex.R" refers to respondent's exhibits admitted during the ethics hearing. "OAEEx." refers to the presenter's exhibits admitted during the ethics hearing.

> Retainer, with the understanding that if you ever request the balance of the Retainer then in that event I can withdraw as your attorney. Upon the conclusion of the litigation I shall submit to you within thirty (30) days of the conclusion of the case whatever sums have not been used by you for your representation. These sums may also be used for any settlement that may result from either of these two litigations or any future litigations that may occur and that you have selected me to represent [you] thereon.
>
> As I indicated to you these litigations could result in legal fees of $200,000 if not more. That is why I suggested to you that you direct me to try to settle these matters.
>
> [OAEEx.16;Ex.R-2.]

A subsequent, September 25, 2013 letter stated, in relevant part

> . . . I have agreed to reduce the hourly billing rate from $400.00 to $300.00 per hour.
>
> This will confirm that the remaining sections of the Letter of Engagement dated September 18, 2013 shall remain in full force and effect.
>
> [OAEEx.17;Ex.R-3.]

De La Rosa confirmed that, initially, respondent was charging her $500 per hour, but that, at her request, he ultimately reduced his rate to $300 per hour. In her response to respondent's reply to her ethics grievance, during an OAE interview, and during the ethics hearing, however, De La Rosa asserted that she had received neither the February 2007 nor September 2013 letters of engagement that respondent claimed he had sent to her.

In November 2013, contemporaneous to De La Rosa's divorce from Rodriguez, respondent agreed to render legal services to her in connection with the $650,000 sale of her primary residence in Yonkers, New York. According to respondent, De La Rosa also retained respondent's son, David B. Friedrich, Esq., who was of counsel to the law firm Lester Schwab Katz & Dwyer, LLP (Lester Schwab), to complete the closing of that transaction. David Friedrich confirmed that he represented De La Rosa at the closing. De La Rosa testified that she had never agreed to allow David Friedrich to assume the representation for the real estate transaction, but acknowledged that he had, in fact, represented her at the closing.

According to the HUD-1 prepared for the closing, which was signed by De La Rosa, the buyer, and the settlement agent, De La Rosa was to receive net sale proceeds of $204,701.34, after Lester Schwab was paid a $1,400 legal fee. According to David Friedrich, from that $204,701.34, Lester Schwab kept approximately $20,000 in escrow, in connection with a use and occupancy agreement between De La Rosa and the buyer, which allowed De La Rosa to remain in the residence until some date in 2014.

On December 11, 2013, respondent deposited in his Atlantic Stewardship Bank attorney trust account a $185,767.67 check, made payable to De La Rosa, which represented her sales proceeds, as reduced by the use and occupancy

escrow (the Yonkers Funds). Respondent claimed that De La Rosa willingly provided to him the Yonkers Funds as an advance, general retainer, for "past, present[,] and pending legal services." De La Rosa had endorsed the back of the check with "for deposit only Friedrich & Friedrich Trust Acct." De La Rosa testified that she had endorsed the check to respondent because he had warned her that, if she deposited it in her personal account, the government, including the New York Department of Labor, may take the money; she further claimed that respondent promised to keep the Yonkers Funds in his trust account, "for [her] protection," and would return the money upon request. Respondent admitted that he had instructed De La Rosa to endorse the check to his attorney trust account.

On December 20, 2013, respondent used the entirety of the $185,767.67 in Yonkers Funds, which he described as his funds, pursuant to his claimed retainer agreement with De La Rosa, to open a new attorney business account at Wells Fargo Bank; the Yonkers Funds constituted the only funds in that attorney business account until January 17, 2014.

Based on his past representation of De La Rosa, respondent testified that the Yonkers Funds retainer was to ensure he did not get "stiffed," because De La Rosa owed him "a substantial amount of money at that time;" respondent maintained that the retainer agreement was "fair and equitable," and emphasized

that De La Rosa had the right to request the return of the unearned portion of the retainer at any time, but that respondent, in turn, could then provide her an accounting and cease representing her. A January 8, 2014 invoice sent by respondent to De La Rosa, however, reflected an outstanding balance of only $1,825.

Respondent acknowledged that the 2013 engagement letter also stated that the Yonkers Funds could be used to settle cases, which he testified contemplated a potential settlement of the then pending Santana labor case, in which De La Rosa was a defendant. De La Rosa told the OAE and subsequently testified that she neither authorized respondent to disburse any of the more than $204,000 in Yonkers Funds from his trust account nor consented to his use of those funds. De La Rosa further claimed that respondent failed to adequately handle the Santana case, resulting in a more than $800,000 default judgment against her.

During the ethics hearing, respondent further testified that, pursuant to New York law and regulations, an attorney is allowed to assist a client's efforts to "shield money from creditors." He claimed that he had given De La Rosa "totally appropriate" advice regarding asset protection, such as the ability to protect her primary residence from the claims of litigants. Respondent conceded, however, that, at the time De La Rosa provided him the Yonkers Funds, she had no creditors.

Between December 2013 and January 2014, respondent admittedly disbursed $34,500 of the Yonkers Funds from his Wells Fargo business account to pay personal and business expenses, including toward his mortgage and tax obligations, but denied that his conduct constituted the knowing misappropriation of those funds or, for that matter, any ethics violation. During the ethics hearing, respondent testified that his 2007 and 2013 letters of engagement with De La Rosa, which she had not signed, proved that the Yonkers Funds were an advance, general retainer and, thus, were his to use, and that he promptly deposited them in his business account in accordance with New Jersey regulations against commingling. Respondent conceded that he did not possess a specific, signed authorization from De La Rosa via which she consented to his use of the Yonkers Funds.

On March 10, 2014, respondent deposited in his Wells Fargo attorney business account an $18,600 Lester Schwab trust account check. Those funds represented additional Yonkers Funds – specifically, the $20,000 use and occupancy agreement escrow, as reduced by Lester Schwab's $1,400 legal fee. As with the initial Yonkers Funds, respondent claimed that these additional funds represented a retainer paid by De La Rosa toward past, present, and pending legal services. According to respondent's accounting of De La Rosa's sale of her Yonkers residence, he had received a total of $204,369.69 in Yonkers

Funds. Despite his claim of a retainer agreement, subsequent to the sale of De La Rosa's Yonkers residence, respondent continued to submit to De La Rosa invoices for legal services rendered and, he conceded, De La Rosa paid some of those invoices with funds independent of the Yonkers Funds. Thus, respondent was not systematically drawing down against the Yonkers Funds for his ongoing, accrued legal fees.

On January 9, 2015, respondent deposited in his TD Bank attorney trust account a $20,000 check, with the notation "Angela D," issued from a personal Wells Fargo checking account shared by respondent and his spouse. That same date, he issued a $20,000 trust account check to De La Rosa, with the notation "Yonkers."

During a May 13, 2015 OAE interview, respondent initially made a misrepresentation regarding that $20,000 disbursement by stating that those "monies came in and they were given to [De La Rosa] and they were for her rent for her restaurant business." A short time later, during the same interview, he then claimed that the $20,000 he paid to Angela had come from "one of her friends," but that he could not tell the OAE who those friends were, and that he knew where De La Rosa had money "squirreled away." Finally, during the same interview, respondent disclosed that the $20,000 had come from his own Wells Fargo account, and that they were his funds, via the 2013 retainer for legal

services. Respondent then apologized for being deceitful minutes earlier, stating he had not wanted to "go down this road" and admit his mistakes. During the ethics hearing, respondent testified that, by "friends," he actually had meant him and his wife, but that the OAE had simply failed to make further inquiry into his response.

As to their purported friendship, respondent testified that he and his wife would go out to eat with De La Rosa, and that De La Rosa had come to their homes in Ridgewood and in the Hamptons several times. He further testified that, during her divorce from Rodriguez, De La Rosa sought the friendship and advice of respondent, respondent's wife, and respondent's mother. De La Rosa claimed that she visited respondent's house in the Hamptons only once, prior to her divorce from Rodriguez, and, likewise, had met and spoken to respondent's mother on one occasion.

During a December 10, 2015 OAE interview, respondent again claimed that the approximately $204,000 in Yonkers Funds were his advance, general retainer, pursuant to the 2013 letter of engagement, and were not client trust funds. He conceded, however, that the September 2013 letters of engagement were his only proof of such a retainer agreement. He admitted that De La Rosa had requested the return of the Yonkers Funds "two or three times," but that he had warned her that the funds may become subject to a levy, due to the ongoing

labor issues, and "suggested to her that she take the money and send it to the Dominican Republic where she has family members." He stated that if he had been wrong to disburse the Yonkers Funds, out of trust, to his business account, then "he was wrong" and "can't change it." He stated that he considered the Yonkers Funds "earned at that time, mine," despite admitting that, prior to De La Rosa's termination of his representation, she did not owe him $204,000 in fees. He reiterated that he had no writing to prove that De La Rosa had explicitly accepted the terms of the purported retainer agreement.

During a February 11, 2016 OAE interview, David Friedrich stated a belief that the Yonkers Funds were part of an advance retainer agreement negotiated between respondent and De La Rosa, and that his father had held the funds in an attorney trust account. He claimed that De La Rosa had not been historically prompt in paying legal fees to respondent, but that his dad was "old school," and not fond of requiring clients to advance retainers of more than $5,000.

During a January 6, 2016 OAE interview, De La Rosa claimed that, at the time she received the Yonkers Funds in connection with the sale of her residence, she had no outstanding bills or arrearages for respondent's fees. To the contrary, she claimed she provided the Yonkers Funds to respondent, to hold in trust, after he warned her that, should she deposit the Yonkers Funds in her

own account, they would likely be levied upon by the New York Department of Labor, but that he could protect her. She further asserted that she and respondent had never discussed, let alone agreed to, a $204,000 retainer, and that she had never received the purported letters of engagement that respondent relied upon. De La Rosa emphasized that respondent billed her monthly, and that she paid him monthly, even after the purported retainer agreement was in place and respondent had possession of the Yonkers Funds.

De La Rosa claimed that, in 2015, she began requesting that respondent release the Yonkers Funds to her, given financial difficulties she was having, and that he eventually disbursed the first $20,000 to her, in January 2016, to pay her rent for her restaurant, which was $17,000 per month. She claimed that all of her communications with respondent regarding the release of the Yonkers Funds were verbal – either in person or telephonic. She also claimed that respondent became verbally abusive towards her, at one point saying he was not going to give her "s@%t." According to De La Rosa, the final straw was when she instructed respondent to issue a $17,000 check, from the Yonkers Funds, toward her purchase of a bank-owned property. Although respondent claimed he had issued the check, De La Rosa asserted that she later found out that he had lied, and she lost the house. She maintained that she began to believe that respondent was going to "steal" the Yonkers Funds.

By e-mail dated February 13, 2015, De La Rosa's new attorney, Martin E. Restituyo, Esq., informed David Friedrich, who was De La Rosa's attorney of record in the pending Santana matter, that he was assuming the representation of De La Rosa. Restituyo also requested that respondent and David execute a consent to change counsel form and demanded that respondent immediately disburse the entirety of the Yonkers Funds to De La Rosa. By letter to respondent dated February 20, 2015, Restituyo again demanded the disbursement of the entirety of the Yonkers Funds to De La Rosa and claimed that respondent had "absconded with them." Restituyo asserted that respondent had orally "proclaimed" to both De La Rosa and Restituyo that respondent was maintaining the Yonkers Funds, in escrow, for De La Rosa's protection. By February 26, 2015, however, respondent had reduced the balance of his Wells Fargo attorney business account and, thus, the Yonkers Funds, to $27,573.83.

In a February 27, 2015 letter to Restituyo, respondent claimed that the 2013 letters of engagement had created an advance, general retainer agreement with De La Rosa; noted that he had previously disbursed to Angela $20,000 of the Yonkers Funds; claimed that he never had an obligation to hold the Yonkers Funds in trust; and asserted that De La Rosa had "not objected" to any of his invoices for legal fees.

By March 5, 2015, respondent had increased the balance of his Wells Fargo attorney business account to $167,365.63. On March 4, 2015, respondent issued a $160,456.69 business account check to De La Rosa; on March 19, 2015, the check posted to his attorney business account. Respondent claimed that he disbursed these funds to De La Rosa to "compromise any fee dispute." In connection with his disbursement to De La Rosa, respondent kept an additional, $23,911 fee from the Yonkers Funds, purportedly toward payment for legal services provided in the Santana and other matters. Specifically, on his own client ledger card for the purported De La Rosa retainer, respondent listed only $23,911 in fees against the more than $204,000 retainer. In correspondence to the OAE dated January 15, 2016, respondent asserted that, in March 2015, De La Rosa owed him more than $60,000 in fees, but that he had "accepted the sum of $23,911."

During the ethics hearing, Restituyo testified that, in the beginning of 2015, he began representing De La Rosa in the Santana matter, a New York Department of Labor case in federal court, in which an $830,000 default judgment had been entered against De La Rosa and Rodriguez. Restituyo asserted that he was able to vacate the judgment, claiming ineffective assistance of counsel by respondent, and, ultimately, settled the matter for a $50,000 payment by De La Rosa to the plaintiffs. Restituyo testified that he then

attempted to discuss the Yonkers Funds with respondent but characterized respondent's interaction with him as non-cooperative. Restituyo then began communicating with respondent solely in writing, via e-mail and letter, because he found respondent to be "evasive."

Restituyo claimed that, as to the Yonkers Funds, respondent led him to believe that he was keeping that money safe for De La Rosa, in his attorney trust account, and that respondent never made a claim of right to the money, as a retainer or otherwise. Restituyo cited the check that respondent eventually disbursed to De La Rosa as proof that he had no claim to the funds and contended that respondent had never cited the letters of engagement as supporting any retainer agreement. Restituyo testified that he agreed to assist De La Rosa in filing an ethics grievance against respondent, because Restituyo concluded that respondent's conduct was "criminal," and also had suggested that De La Rosa report respondent's conduct to the West Chester County District Attorney's Office.

Restituyo also recounted that De La Rosa had requested that respondent disburse $17,000 of the Yonkers Funds as a down payment for her to buy a house in foreclosure and that, although respondent represented to De La Rosa that he had issued that check, Restituyo's investigation, which included speaking to a real estate agent and other interested parties, revealed that respondent had not

done so. Restituyo asserted that, in his belief, respondent had "blatantly" lied to De La Rosa about having issued such a check.

During the ethics hearing, respondent conceded that the legal services he provided to De La Rosa following his receipt of the Yonkers Funds had not reached the more than $204,000 constituting the Yonkers Funds. Respondent testified regarding two federal court actions he had defended De La Rosa against – the Disla and Santana matters – and claimed that she owed him legal fees for the substantial services he had rendered in settling those cases. Respondent testified that, after their divorce, De La Rosa and Rodriguez were disputing each other's respective responsibilities to pay the settlement amounts, which were in the hundreds of thousands of dollars. Respondent asserted that, after De La Rosa had demanded that the Yonkers Funds retainer be returned to her, their relationship had been terminated and, rather than seek fee arbitration, respondent wrote off more than $23,000 in legal fees she still owed to him.

The Squiccarini Matter

On April 26, 2013, respondent deposited $15,000 in his Atlantic Stewardship attorney trust account on account of his clients, David and Amy Squiccarini. Thereafter, in May 2013, respondent made a series of disbursements on behalf of the Squiccarinis, totaling $15,500, from his Atlantic Stewardship

attorney trust account, thereby invading other client and trust funds held in the account. The $500 shortage in his Atlantic Stewardship attorney trust account remained until December 31, 2013, when, according to the OAE, respondent simply adjusted the balance, without depositing $500 or otherwise rectifying the shortfall. Respondent claimed that, upon recognizing the shortfall, he "transferred fees due and owing to him in another matter" to cure it.

The Boyd Matter

On August 14, 2013, respondent issued a $5,000 Atlantic Stewardship attorney trust account check to East End Realty on account of an individual named Boyd.[2] As of December 31, 2013, respondent's financial records recognized a $5,000 shortfall in his Atlantic Stewardship attorney trust account for the Boyd subaccount. Subsequently, according to the OAE, respondent simply adjusted the shortfall, without depositing $5,000 or otherwise rectifying the shortfall. Respondent claimed that, upon recognizing the shortfall, he "transferred fees due and owing to him in another matter" to cure it.

[2] Boyd's first name is not contained within the record.

Alleged Failure to Cooperate and Recordkeeping Violations

By letter dated February 2, 2015, the OAE directed respondent to provide an explanation for the January 12, 2015 overdraft of his TD Bank attorney trust account. On February 17, 2015, respondent claimed to the OAE that the overdraft had been caused by a $20,000 deposit that had failed to post to the account for three days. By letters dated March 4 and 30, 2015, the OAE directed respondent to produce certain financial records and three-way reconciliations for the TD Bank attorney trust account.

On April 14, 2015, the OAE scheduled a May 13, 2015 demand audit of all of respondent's attorney trust and business accounts, from May 2014 forward. On May 14, 2015, following the demand audit, the OAE directed respondent to produce specific financial records by May 29, 2015; the OAE's request for the same records continued through August 2015.

Respondent was again interviewed by the OAE, on December 10, 2015; respondent failed to produce the financial records demanded by the OAE. In a March 18, 2016 letter to respondent, the OAE claimed that respondent had failed to cooperate with its investigation, and again directed respondent to produce specific financial records, by April 1, 2016. The OAE's efforts to secure financial records from respondent continued through May 2016, yet, according

to the OAE, respondent failed to fully comply with the OAE's demands for financial records and explanations.

Based on the foregoing facts, the OAE alleged, in count one of the complaint, that respondent knowingly misappropriated De La Rosa's Yonkers Funds, in violation of RPC 1.15(a), RPC 8.4(b), and the principles of Wilson; that respondent failed to adequately communicate with De La Rosa despite her repeated inquiries regarding the Yonkers Funds, in violation of RPC 1.4(b); that respondent, in connection with the commencement of his representation of De La Rosa; failed to set forth in writing the basis or rate of his fee, in violation of RPC 1.5(b); that respondent made a misrepresentation to the OAE by claiming that he was authorized to use the Yonkers Funds in connection with an advance, general retainer agreement, in violation of RPC 8.1(a); and that respondent initially made a misrepresentation to the OAE regarding the source of his initial, $20,000 return of Yonkers Funds to De La Rosa, in violation of RPC 8.4(c).

In count two of the complaint, the OAE alleged that, in the Squiccarini and Boyd matters, respondent negligently misappropriated client funds, in violation of RPC 1.15(a); and that in connection with the OAE's audit and investigation, respondent engaged in dishonest conduct by submitting an inaccurate trust receipts and disbursements journal, in violation of RPC 8.4(c).

In count three of the complaint, the OAE alleged that respondent failed to fully comply with the OAE's demands for financial records, in violation of RPC 8.1(b); and that respondent failed to comply with the recordkeeping obligations set forth in R. 1:21-6, in violation of RPC 1.15(d).

The Parties' Post-Hearing Submissions

In respondent's November 6, 2019 post-hearing submission to the special master, he denied having committed unethical conduct and asserted that the OAE had failed to prove any of the charged RPCs by clear and convincing evidence.

Respondent further asserted that the testimony provided by De La Rosa and Restituyo was conflicting and incredible, citing instances where De La Rosa had rejected as true statements that were contained in her own ethics grievance against respondent. Respondent maintained that Restituyo had no firsthand knowledge of any facts pertinent to the charges. Respondent urged the special master to dismiss as incredible De La Rosa's claims that she had not received from respondent the February 2007 and September 2013 engagement letters, and to reject the OAE's suggestion that respondent may have fabricated those engagement letters to conceal his misconduct.

Respondent maintained that his and David Friedrich's testimony was consistent and credible and that, from the beginning of the OAE's investigation, respondent had asserted that the Yonkers Funds were an advance, general retainer from De La Rosa, which position was supported by the evidence – specifically, the 2013 letter of engagement.

As to the knowing misappropriation charge, respondent asserted that his 2013 letter of engagement was sent to De La Rosa, and that her conduct following receipt of that letter established that she had agreed to advance the Yonkers Funds to respondent as a general retainer, which he was authorized to treat, immediately, as an earned fee, under both New Jersey and New York authority governing the use of retainer funds. Respondent maintained that, pursuant to New Jersey and New York disciplinary precedent, "a retainer need not be deposited into an attorney's trust account unless there is an explicit agreement between the lawyer and the client requiring deposit into the trust account," and noted that the 2013 letter of engagement contained no such explicit agreement. Thus, respondent maintained that he had every right to treat the Yonkers Funds as his funds and that, once De La Rosa requested the return of the Yonkers Funds, respondent acted appropriately, under advance retainer regulations, by providing her with both an accounting and a return of the unearned portion of the retainer. In any event, respondent claimed that the OAE

could not prove a knowing misappropriation of the Yonkers Funds, given respondent's reasonable belief of entitlement to the funds.

In conclusion, respondent argued that, if he was found to have acted unethically, a reprimand, at most, would be warranted, in light of his unblemished, nearly fifty years at the bar. Respondent cited his unblemished disciplinary record in New Jersey, New York, and Florida.

In respondent's January 4, 2021 brief to us, he argued that New York law controlled his representation of De La Rosa, including the retainer agreements between them, and that he had committed none of the charged misconduct. Respondent argued that the advance, general retainer agreement between the parties was effective and proper, that De La Rosa understood and accepted the retainer agreement, and that he was authorized to deposit such a retainer in his attorney business account. He claimed that De La Rosa did not object to his final accounting and return of the Yonkers Funds, and that he wrote off more than $60,000 in legal fees owed to him to resolve the parties' issues.

In its December 12, 2019 post-hearing submission to the special master, the OAE asserted that it had proven every charge against respondent by clear and convincing evidence. As to the knowing misappropriation charges, the OAE cited In re Stern, 92 N.J. 611, 617 (1983), acknowledging that the Court has "never held that the expenditure of a retainer is a conversion of trust funds," and

that, unless a client instructs otherwise, an attorney is permitted to place legal fees in a business account. The OAE argued that respondent's case was distinguishable, however, and constituted knowing misappropriation, because "respondent specifically directed [De La Rosa] to endorse the entirety of [the $204,367.67 in Yonkers Funds] over to his trust account," and respondent proceeded to invade those client trust funds, without the client's permission. In support of its position, the OAE noted that Stern further stated that, "[a]bsent an explicit understanding that the retainer fee be separately maintained, a general retainer fee may not be deposited in an attorney's trust account." The OAE emphasized that respondent initially deposited the Yonkers Funds in his attorney trust account and, thus, was not entitled to use those funds as an advance, general retainer.

The OAE asserted that the special master should reject respondent's contention that a retainer agreement had been formed, via the September 2013 letters of engagement, because, as respondent had admitted, De La Rosa never signed the letters of engagement, and respondent failed to produce any other written authorization from De La Rosa, whereby she consented to his use of the Yonkers Funds. Assuming, arguendo, that De La Rosa agreed to the terms of the 2013 letter of engagement, the OAE argued that respondent's conduct still constituted the knowing misappropriation of client funds, because respondent

had directed De La Rosa to endorse the Yonkers Funds check to his attorney trust account, and, thus, that arrangement – that the Yonkers Funds would be held in trust, and respondent could draw down against them as he performed legal services – became the parties' agreement. Stated differently, the OAE asserted that once De La Rosa, at respondent's direction, endorsed the Yonkers Funds check to respondent's attorney trust account, he needed her explicit authorization to modify the agreement, move the Yonkers Funds to his attorney business account, and treat them like an advance, general retainer. The OAE, thus, argued that respondent knowingly misappropriated De La Rosa's Yonkers Funds by failing to draw down from them, out of his attorney trust account, as he earned fees, and by taking more client funds out of trust that he had ever earned; the OAE emphasized that respondent conceded that he had never earned the full amount of fees he had taken out of his trust account in the form of the Yonkers Funds. Finally, the OAE asserted that "if an attorney and client expressly agree that a retainer will be held in trust, the attorney has no choice but to comply."

The OAE further argued that the special master should reject respondent's alternate defense to knowing misappropriation – that he held a reasonable belief of entitlement to the funds. Citing applicable New Jersey disciplinary precedent, the OAE asserted that respondent held no such reasonable belief, proven by his

treatment of the entirety of the Yonkers Funds as his own, despite admittedly having not performed more than $200,000 in legal serves for De La Rosa following the purported 2013 advance, general retainer agreement.

In furtherance of its position that respondent knew the Yonkers funds were required to be held, inviolate, in his attorney trust account, the OAE noted that respondent, subsequent to the commencement of the purported retainer agreement, continued to bill De La Rosa for legal services rendered, and admitted that she continued to remit payments, independent of the Yonkers Funds respondent held; that the evidence demonstrated that respondent had promised De La Rosa that he would protect the Yonkers Funds from potential creditors; that De La Rosa had endorsed the initial Yonkers Fund check, at respondent's direction, "[f]or Deposit Only, Friedrich and Friedrich Trust account;" and that respondent initially lied to the OAE regarding his transfer of $20,000 in personal funds back into his attorney business account, just prior to disbursing $20,000 in Yonkers Funds to De La Rosa.

In aggravation, the OAE asserted that respondent lacked candor with disciplinary authorities and had shown no remorse for his wrongdoing.

* * *

The special master concluded that the OAE had proven, by clear and convincing evidence, that respondent knowingly misappropriated De La Rosa's

client funds, in violation of Wilson, and, thus, he must be disbarred. Specifically, the special master rejected respondent's asserted defense that the more than $204,000 in Yonkers Funds constituted an advance, general retainer, concluding that there was no evidence in the record that De La Rosa understood or agreed to such a retainer agreement. The special master further found that De La Rosa had not given respondent permission to disburse any portion of the Yonkers Funds from his attorney trust account to his attorney business account, or to draw down upon them, as evidenced by her continued payment of monthly invoices respondent issued to her, which continued payments respondent acknowledged.

The special master emphasized that the only written agreement that both respondent and De La Rosa had reached was that she endorsed her initial Yonkers Fund check, for $185,767.67, with the notation "for deposit only Friedrich & Friedrich Trust Acct." The special master emphasized that respondent had conceded, during the ethics hearing, that he had no express, written authorization from De La Rosa to use the Yonkers Funds. The special master further emphasized that respondent initially lied to the OAE regarding the source of funds for the first $20,000 disbursement of Yonkers Funds to De La Rosa.

In conclusion, the special master determined that, even if respondent had sent the 2007 and 2013 letters of engagement to De La Rosa, those letters did not create an advance, general retainer agreement whereby respondent could disburse the Yonkers Funds from his attorney trust account and spend them, especially given his admission that he had spent more of the Yonkers Funds – on personal and business expenses – than he had ever earned as legal fees, and, thus, had to deposit personal funds back in his attorney business account to disburse the approximately $180,000 in Yonkers funds that he eventually returned to De La Rosa.

The special master further found that respondent's knowing misappropriation of De La Rosa's client funds constituted a criminal act, in violation of RPC 8.4(b); that respondent's failure to communicate with De La Rosa in connection with her repeated requests that he return to her the Yonkers Funds violated RPC 1.4(b); that respondent's failure, at the February 2007 commencement of his representation of De La Rosa, to set forth the basis or rate of his legal fee violated RPC 1.5(b); and that respondent's misrepresentation to the OAE, regarding the source of the initial, $20,000 disbursement of Yonkers Funds to De La Rosa, violated RPC 8.1(a).

In the Squiccarini and Boyd matters, the special master found that respondent had committed the negligent misappropriation of entrusted funds by

overdisbursing the funds he had on deposit for those parties and, thus, violated RPC 1.15(a).

Finally, the special master found that respondent had failed to maintain his financial records in accordance with R. 1:21-6 and had failed to cooperate with the OAE's audit and investigation by failing to produce all of the financial and other records demanded by the OAE in the De La Rosa, Squiccarini, and Boyd matters, and that respondent, thus, violated RPC 1.15(d) and RPC 8.1(b).

Based on his determination that respondent knowingly misappropriated client funds, the special master recommended his disbarment.

* * *

Following our de novo review of the record, we determine that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. We do not, however, adopt all the special master's findings.

As a threshold issue, we reject respondent's jurisdictional arguments. RPC 8.5, entitled "Disciplinary Authority; Choice of Law" states

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this

> jurisdiction and another jurisdiction for the same conduct.

Moreover, much of respondent's alleged misconduct in this case – particularly his interaction with the OAE and his disbursement and use of the Yonkers Funds – took place in New Jersey, where he maintained both his primary office and his attorney accounts. Finally, regardless of the site of respondent's misconduct, New Jersey and New York view and treat advance, general retainers the same way.

As set forth above, the crux of this case is whether respondent and De La Rosa entered into a September 2013 retainer agreement and, if so, whether respondent abided by the terms of that retainer agreement, which respondent drafted and which he, admittedly, never asked De La Rosa to sign. To resolve that issue, we examined whether De La Rosa agreed to provide a more than $200,000 advance, general retainer to respondent and, whether, under the terms of the claimed retainer agreement, respondent was authorized to immediately disburse and use the retainer, or was instead required to safeguard it in his attorney trust account and bill against it, monthly, as he provided legal services to De La Rosa.

Based on the record before us, it is unclear whether respondent and De La Rosa had a meeting of the minds regarding the advanced, general retainer agreement. Specifically, it is an open question as to whether De La Rosa agreed

that the Yonkers Funds would be available for respondent's immediate use, in light of his admitted instruction that she endorse it to his attorney trust account, the fact the Yonkers Funds were expressly available for potential settlements, and respondent's alleged statement that he would "protect" the Yonkers Funds for De La Rosa.

In Wilson, the Court described knowing misappropriation of client trust funds as follows:

> Unless the context indicates otherwise, 'misappropriation' as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
>
> [In re Wilson, 81 N.J. 455 n.1.]

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under In re Wilson, 81 N.J. 451 (1979), disbarment that is 'almost invariable' . . . consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act,

> measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the presenter must produce clear and convincing evidence that the attorney used trust funds, knowing that they belonged to the client and knowing that the client had not authorized him or her to do so.

Following our review of the record, we determine that the OAE failed to prove, by clear and convincing evidence, that respondent knowingly misappropriated client funds, in violation of Wilson. Because of the grave consequences that befall attorneys found guilty of knowing misappropriation, the standard of proof – clear and convincing evidence – must be fully satisfied. In re Johnson, 105 N.J. 249, 260 (1987).

In In re Konopka, 126 N.J. 225, 234 (1991), the Court further elaborated, on this standard, stating:

> [w]e insist, in every *Wilson* case, on clear and convincing proof that the attorney knew he or she was misappropriating. Obviously, we consider the attorney's records, if relevant, along with testimony, but if all we have is proof from the records or elsewhere that trust funds were invaded without proof that the

> lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [citations omitted.]

In this case, we are not persuaded, to a clear and convincing standard, that respondent's treatment of the Yonkers Funds constituted knowing misappropriation of client funds. New Jersey disciplinary precedent examining advance, general retainers is scarce, and the Court has not recently encountered the issues presented in this case. Moreover, in Stern, the Court noted "we have never held that the expenditure of a retainer is a conversion of trust funds." In re Stern, 92 N.J. at 617. Further, the Court held that "absent an explicit understanding that the retainer fee be separately maintained, a general retainer fee need not be deposited in an attorney's trust account." Id. at 619.

Stated differently, unless the client instructs otherwise, an attorney is permitted to place legal fees in a business or operating account, rather than a trust account. Id. at 619. Where the attorney initially deposits such legal fees in the trust account, before transferring them to the business account, at most, a brief commingling has occurred. Moreover, in the case of a proper advance retainer agreement, failing to return an unearned legal fee is not the same as stealing or borrowing client funds. Instead, RPC 1.16(d) (attorney shall take

steps to protect a client's interests upon termination of representation, including refunding advance payment of unearned fees) is the applicable Rule.

RPC 1.15(a) requires an attorney to hold "property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." In New Jersey, a general retainer may be deposited into the lawyer's business account unless the client requires that it be separately maintained, in which case the retainer must be deposited into the trust account. In re Stern, 92 N.J. at 619.

In 2003, the Court's Pollack Commission rejected modifying New Jersey's retainer rules to model the ABA/Pennsylvania rule, which states "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance to be withdrawn by the lawyer only as fees are earned or expenses incurred."

New York law mirrors New Jersey's jurisprudence on this issue. There are at least two opinions issued by the New York State Bar Association's Committee on Professional Ethics which address the issue of advance general retainer payments. Opinion 570 specifically concludes:

> . . . [A]dvance payments of legal fees need not be considered client funds and need not be deposited in a client trust account, and that any interest earned on fee advances may therefore be retained by the lawyer. Of course, the lawyer is obliged promptly to return any portion of the fee advance that is not earned in

> rendering legal services. DR 2-110(A)(3). If the lawyer treats advance payments of fees as the lawyer's own (and therefore retains any interest earned on them), it follows that the lawyer may not deposit the fee advances in a client trust account, as this would constitute impermissible commingling. On the other hand, the lawyer may agree to treat advance payments of legal fees as client funds and deposit them in a client trust account; in that event any interest earned on the funds while in the client trust account must be remitted to the client.

That conclusion – issued in 1985 - was further buttressed in 2007 by Opinion 816 of the New York Committee on Professional Ethics, which stated that "[a]n advance payment retainer is a sum provided by the client to the lawyer to cover payment of legal fees expected to be earned during the representation. To the extent the fees advanced are not earned during the representation, the lawyer agrees to return them to the client." New York Committee on Professional Ethics, Opinion 816, "Advance Payment Retainer; Client Trust Account" (October 26, 2017). The opinion goes on to conclude that a "lawyer may ethically accept an advance payment retainer and need not place such funds in a client trust account." Id.

Here, the quality of evidence presented by the OAE is not sufficient to meet its burden regarding the knowing misappropriation charges. Respondent claimed that, in 2013, due to a history of non-payment of bills, he sent to De La Rosa the advance, general retainer letters. Despite acknowledging her consistent

receipt of invoices and other correspondence that respondent sent to her, De La Rosa denied receiving those operative letters. Yet, she provided the first check for more than $185,000 in Yonkers Funds to respondent, and presumably directed that the more than $18,000 from the use and occupancy escrow also be sent to respondent. The record establishes that respondent consistently asserted the advance, general retainer arrangement during his interactions with Restituyo and the OAE, and his son, David, corroborated respondent's position regarding the retainer.

The OAE's counterproof was simply (1) De La Rosa's testimony, wherein she refuted having agreed to such a retainer, and (2) De La Rosa's endorsement on the initial Yonkers Funds check to respondent's trust account. That evidence fails to overcome the holding of Stern, that "absent an explicit understanding that the retainer fee be separately maintained, a general retainer fee need not be deposited in an attorney's trust account." Id. at 619.

"The burden of proof in proceedings seeking discipline . . . is on the presenter. The burden of going forward regarding defenses . . . relevant to the charges of unethical conduct shall be on the respondent." R. 1:20-6(c)(2)(C). In this matter, as to the knowing misappropriation charges, we conclude that neither party met its burden and, thus, we cannot find respondent guilty of knowing misappropriation, under any of the theories alleged by the OAE. The

record supports respondent's intent to have created the advance, general retainer agreement. Put bluntly, it appears that he did a poor job perfecting that arrangement.

As respondent openly conceded, his behavior toward De La Rosa and the concept of an advance, general retainer agreement can fairly be described as sloppy and inadequate. Moreover, his behavior toward Restituyo and the OAE can justifiably be couched as evasive and even deceptive. However, as the Court held in Konopka, strong suspicious do not equal clear and convincing evidence. Undoubtedly, much more should be expected of New Jersey attorneys who seek to enter into a more than $200,000 advance, general retainer agreement with a client. Respondent did himself no favors in this case. To the contrary, he placed himself in jeopardy of disbarment. Although we are quite wary of respondent's position in this case, we determine to dismiss the charges that respondent committed the knowing misappropriation of De La Rosa's Yonkers Funds. Specifically, we dismiss the RPC 1.15(a) and the principles of Wilson charges, as well as the RPC 8.1(a), RPC 8.4(b), and RPC 8.4(c) charges directly tied to the OAE's theory of knowing misappropriation. We determine, however, that the record contains the clear and convincing evidence required to conclude that respondent committed other misconduct.

First, respondent's initial, February 1, 2007 retainer agreement with De La Rosa simply stated that he would be representing her on various matters and would bill her monthly. Because respondent had not previously represented De La Rosa, and his letter failed to set forth the basis or rate of his fee, it failed to satisfy the requirements of RPC 1.5(b). By 2013, respondent had rectified this issue, specifically by twice reducing his fee to a new, specified rate, in writings provided to De La Rosa. Notably, De La Rosa testified that respondent had reduced his rate in this manner but denied she had received the corresponding letters of engagement. Moreover, she admitted having received invoices that respondent sent subsequent to the commencement of the purported advanced, general retainer.

After respondent received the Yonkers Funds from De La Rosa, the attorney-client relationship between the parties clearly began to deteriorate. Respondent violated RPC 1.4(b) by repeatedly failing to promptly reply to De La Rosa's inquiries regarding her Yonkers Funds, leading to her retention of Restituyo to assume her pending legal matters and to recoup the balance of the Yonkers Funds from respondent.

Next, respondent's handling of his attorney trust account in the Squiccarini and Boyd matters constituted two instances of negligent misappropriation of entrusted funds, in violation of RPC 1.15(a). Although

respondent refuted the OAE's assertion that he simply adjusted the subaccount balances, without a corresponding deposit or other, proper remedial action, he conceded that the shortfalls were genuine and required his replenishment of entrusted funds via earned fees. We dismiss the charge that his provision of the corresponding, inaccurate trust receipts and disbursements journal to the OAE further violated RPC 8.4(c), because there is no evidence in the record to sustain the finding that his recordkeeping discrepancies were intentional, versus negligent. Respondent's failure to properly maintain and reconcile his trust accounts, however, clearly violated the recordkeeping Rule and, thus, violated RPC 1.15(d).

Respondent did commit the second charged violation of RPC 8.4(c), however, by initially lying to the OAE, during an interview, regarding the source of the initial $20,000 in Yonkers Funds that he returned to De La Rosa. Although respondent, during the same interview, admitted his deception and disclosed the truth to the OAE – that those funds had come from a personal bank account – he acknowledged that he had initially lied to disciplinary authorities, because he "didn't want to go down this road" and admit his mistakes made in his conduct toward De La Rosa.

Finally, respondent violated RPC 8.1(b) by failing to fully comply with the OAE's demands that he produce financial records. Despite the OAE's

efforts, which spanned from February 2015 through May 2016, respondent failed to produce all of the records he had specifically been directed to submit for review.

In sum, we find that respondent violated RPC 1.4(b); RPC 1.5(b); RPC 1.15(a) (two instances); RPC 1.15(d); RPC 8.1(b); and RPC 8.4(c). In connection with the knowing misappropriation theory, we determine to dismiss the additional charges that respondent violated RPC 1.15(a) and the principles of Wilson; RPC 8.1(a); RPC 8.4(b); and RPC 8.4(c). The sole issue left for determination is the appropriate quantum of discipline for respondent's misconduct.

Conduct involving the failure to memorialize the basis or rate of a fee, as RPC 1.5(b) requires, typically results in an admonition, even if accompanied by other, non-serious ethics offenses. See, e.g., In the Matter of Peter M. Halden, DRB 19-382 (February 24, 2020) (attorney failed to set forth in writing the basis or rate of the legal fee, and failed to abide by the client's decisions concerning the scope of the representation; no prior discipline); In the Matter of Kenyatta K. Stewart, DRB 19-228 (October 22, 2019) (attorney failed to set forth in writing the basis or rate of the legal fee, and engaged in a concurrent conflict of interest; no prior discipline); and In the Matter of Alan Monte Kamel, DRB 19-086 (May 30, 2019) (attorney failed to provide the client with a writing setting

forth the basis or rate of his fee in a collection action, failed to communicate with the client, and failed to communicate the method by which a contingent fee would be determined; no prior discipline).

Generally, a reprimand is imposed for recordkeeping deficiencies that lead to 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 engaged in the negligent misappropriation of client funds held in the trust account; violations of RPC 1.15(a), RPC 1.15(d) and R. 1:21-6; 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 found guilty of negligent misappropriation of client funds held in the 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)).

Admonitions typically are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history. See, e.g., In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (attorney failed to reply to repeated requests for information from the district ethics committee investigator regarding his representation of a client in three criminal defense matters, a violation of RPC 8.1(b)); In re Gleason, 220 N.J. 350 (2015) (attorney did not file an answer to the formal ethics complaint and ignored the district ethics committee investigator's multiple attempts to obtain a copy of his client's file, a violation of RPC 8.1(b); the attorney also failed to inform his client that a planning board had dismissed his land use application, a violation of RPC 1.4(b)); and In the Matter of Raymond A. Oliver, DRB 12-232 (November 27, 2012) (attorney failed to submit a written, formal reply to the grievance and a copy of the filed pleadings in the underlying case, despite repeated assurances that he would do so, a violation of RPC 8.1(b)).

A reprimand may result if the failure to cooperate is with an arm of the disciplinary system, such as the OAE, which uncovers recordkeeping

improprieties in a trust account and requests additional documentation. See, e.g., In re Picker, 218 N.J. 388 (2014) (reprimand; an OAE demand audit, prompted by a $240 overdraft in the attorney's trust account, uncovered the attorney's use of her trust account for the payment of personal expenses; violation of RPC 1.15(a); in addition, the attorney failed to comply with the OAE's request for documents in connection with the overdraft and failed to appear at the audit; violations of RPC 8.1(b); the attorney explained that health problems had prevented her from attending the audit and that she had not submitted the records to the OAE because they were in storage at the time; although the attorney had a prior three-month suspension and was temporarily suspended at the time of the decision in this matter, we noted that the conduct underlying those matters was unrelated to the conduct at hand); In re Macias, 121 N.J. 243 (1990) (reprimand for failure to cooperate with the OAE; the attorney ignored six letters and numerous phone calls from the OAE requesting a certified explanation on how he had corrected thirteen recordkeeping deficiencies noted during a random audit; the attorney also failed to file an answer to the complaint).

Finally, in matters involving misrepresentations to ethics authorities, the discipline has ranged from a reprimand to a term of suspension, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating or mitigating factors. See, e.g., In re DeSeno, 205 N.J. 91 (2011)

(reprimand for attorney who misrepresented to the district ethics committee the filing date of a complaint on the client's behalf; the attorney also failed to adequately communicate with the client and failed to cooperate with the investigation of the grievance; prior reprimand); In re Otlowski, 220 N.J. 217 (2015) (censure for attorney who made misrepresentations to the OAE and the client's lender by claiming that funds belonging to the lender, which had been deposited into the attorney's trust account, were frozen by a court order; to the contrary, they had been disbursed to various parties); In re Freeman, 235 N.J. 90 (2018) (three-month suspension for pool attorney with the Office of the Public Defender (OPD); the attorney failed to communicate with his client about an upcoming hearing on a petition for post-conviction relief; the attorney appeared at the hearing without the client, took actions that were contrary to the client's wishes, and made misrepresentations to the court and the OPD; those statements would later negatively impact the client's ability to pursue an appeal; during the ethics investigation, the attorney lied to the DEC investigator, and later to the hearing panel; violations of RPC 1.2(a), RPC 1.4(b), RPC 3.3(a), RPC 4.1(a), RPC 8.1(a), and RPC 8.4(c) found); In re Silberberg, 144 N.J. 215 (1996) (two-year suspension imposed on attorney who, in a real estate closing, allowed the buyer to sign the name of the co-borrower; the attorney then witnessed and notarized the "signature" of the co-borrower; the attorney

stipulated that he knew at the time that the co-borrower was deceased; after the filing of the ethics grievance against him, the attorney falsely stated that the co-borrower had attended the closing; on another occasion, the attorney sent a false seven-page certification to the district ethics committee in order to cover up his improprieties); and In re Penn, 172 N.J. 38 (2002) (three-year suspension for attorney who failed to file an answer in a foreclosure action, thereby causing the entry of default against the client; thereafter, to placate the client, the attorney lied that the case had been successfully concluded, fabricated a court order, and signed the name of a judge; the attorney then lied to his adversary and to ethics officials; the attorney also practiced law while ineligible).

Based on applicable precedent, the discipline warranted for the totality of respondent's misconduct is a short term of suspension. Standing alone, respondent's initial failure to comply with RPC 1.5(b), his deficient recordkeeping that twice caused the negligent misappropriation of client funds (RPC 1.15(a) and (d)), and his failure to cooperate with the OAE's financial investigation (RPC 8.1(b)) warrant at least a censure. Respondent's repeated, intentional failure to communicate with De La Rosa regarding her pending matters and the Yonkers Funds (RPC 1.4(b)) enhances the applicable sanction to a short term of suspension. When his misrepresentation to the OAE regarding the initial $20,000 disbursement of the Yonkers Funds (RPC 8.4(c)) is added to

the calculus, a term of suspension is cemented.

To craft the appropriate discipline in this case, however, we also must consider both aggravating and mitigating factors. In aggravation, respondent caused significant, demonstrable harm to De La Rosa by allowing the Santana matter to proceed to an $830,000 default judgment. She was forced to retain new counsel, who was able to settle the matter for $50,000. Moreover, based on his own testimony and his desire for the advanced retainer, respondent knew that De La Rosa was experiencing financial difficulties in her career as a Manhattan restauranteur. Yet, he refused to promptly return the Yonkers Funds to her, despite the language of the purported retainer agreement, which clearly acknowledged that the funds were hers and would be returned upon demand. In mitigation, this is respondent's first discipline in nearly fifty years as a member of the bar, a fact that we accord significant weight.

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

Member Joseph voted to impose a six-month suspension.

Member Zmirich voted to recommend to the Court that respondent be disbarred, finding that he knowingly misappropriated client funds entrusted to him.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bruce W. Clark, Chair

By: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

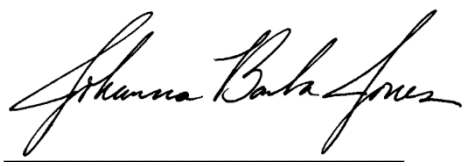
In the Matter of Jay J. Friedrich
Docket No. DRB 20-234

Argued: January 21, 2021

Decided: May 27, 2021

Disposition: Three-month suspension

Members	Three-month suspension	Six-month suspension	Disbar
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph		X	
Petrou	X		
Rivera	X		
Singer	X		
Zmirich			X
Total:	7	1	1



Johanna Barba Jones
Chief Counsel