

violated RPC 1.5(a) (unreasonable fee); RPC 1.15(a) (negligent misappropriation of client funds); RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6); and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

For the reasons set forth below, we determine to impose a censure, with conditions.

Respondent was admitted to the New Jersey bar in 2004 and to the Pennsylvania bar in 2005. Respondent has no disciplinary history in New Jersey. At the relevant times, he maintained a practice of law in Philadelphia, Pennsylvania.

Effective July 22, 2019, the Court declared respondent administratively ineligible to practice law for failure to pay his annual assessment to the Lawyers' Fund for Client Protection.

Additionally, effective November 4, 2019, the Court declared respondent administratively ineligible to practice law in New Jersey for failure to comply with continuing legal education requirements.

On March 31, 2020, the OAE filed a motion with the Court seeking respondent's immediate temporary suspension due to a substantial and unexplained shortage in his attorney trust account (ATA). On February 4, 2021,

the Court temporarily suspended respondent, on consent, and dismissed the OAE's pending motion as moot. In re Smith, 245 N.J. 77 (2021).

Respondent and the OAE entered into a January 27, 2021 disciplinary stipulation (S) which sets forth the following facts in support of respondent's admitted misconduct.

The Unreasonable Fee Charge

On December 4, 2017, Cinquetta Frazier retained respondent to represent her in connection with a medical malpractice matter. On March 5, 2018, respondent settled Frazier's matter for \$49,000.

Thereafter, on June 9, 2018, respondent created a settlement statement and mistakenly calculated his fee based on the gross settlement, rather than the net settlement. Respondent also overcalculated his expenses by \$753.50.¹ The settlement statement was neither signed nor dated by Frazier. Respondent claimed that Frazier had signed an earlier settlement statement, but he was unable to produce it.

As a result of his miscalculation, respondent disbursed to himself a \$16,333.33 legal fee from the \$49,000 settlement, and erroneously calculated that Frazier was owed \$21,641.81 after deducting expenses. Had respondent

¹ It appears that the five cent difference in paragraph 15 of the stipulation is a typographical error.

properly calculated the contingent fee, he would have received a contingent fee of \$12,909.55, a difference of \$3,423.78. Further, Frazier would have received \$25,819.09 from the settlement, rather than the \$15,724.01 that respondent disbursed. Thus, respondent disbursed to Frazier \$10,095.08 less than she was entitled to receive.

Due to his mistaken miscalculation of his fee, the OAE charged respondent with having violated RPC 1.5(a) and R. 1:21-7.

Failure to maintain records and failure to cooperate with the OAE

On March 27, 2019, the OAE sent a letter to respondent scheduling an April 25, 2019 demand audit of his financial books and records and directing him to provide, by April 11, 2019: client ledger cards; ATA three-way reconciliations; schedule of client balances; and receipts and disbursements journals for both his ATA and attorney business account (ABA).

By letter dated April 22, 2019, Kim D. Ringler, Esq. informed the OAE that she represented respondent. Ringler requested an adjournment of the demand audit. On April 29, 2019, the OAE replied to Ringler's letter, extending the time for respondent to provide documents to May 17, 2019, and rescheduling the demand audit for May 22, 2019.

In connection with his law practice, respondent maintained two bank accounts at TD Bank: a Pennsylvania ATA and a Pennsylvania ABA. As a result

of the OAE's investigation, respondent opened two bank accounts at Republic Bank: a New Jersey ATA and a New Jersey ABA. Because the New Jersey accounts were not established until the OAE notified respondent of the requirement for such accounts, the OAE's investigation focused on respondent's original TD Bank accounts.

On May 13, 2019, Ringler provided to the OAE an incomplete response to the prior records request – specifically, she provided only ABA and ATA statements. On May 22, 2019, the demand audit occurred, and the OAE discovered that respondent had not maintained records in accordance with R. 1:21-6. The OAE found numerous deficiencies, including: no ATA three-way reconciliations; no client ledger cards; no ATA or ABA receipts and disbursements journals; improper designation on the ATA and ABA; online transfers to and from respondent's ATA; and failure to maintain a New Jersey ATA and ABA.

Thus, on May 29, 2019, the OAE sent Ringler a letter directing respondent to provide additional documents and to take corrective actions by July 8, 2019. On August 16, 2019, after respondent made several unsuccessful attempts to correct his books and records with Ringler's assistance, respondent advised the OAE that he had retained a legal bookkeeper, Rochelle DeJong of R&D Legal Bookkeeping, to assist him in reconstructing his accounts.

On September 29, 2019, Ringler provided the OAE with updated records, which had been created with DeJong's assistance. The OAE found the records insufficient, citing inaccurate and incomplete client ledger cards and three-way reconciliations. As a result, on October 18, 2019, the OAE sent Ringler a letter scheduling a second demand audit for November 7, 2019.

On November 7, 2019, at the second demand audit, the OAE noted the deficiencies with the provided records as well as respondent's inability to reconcile his ATA. The next day, the OAE sent Ringler a letter enumerating additional requested documents and the remedial measures necessary for respondent to conform his financial records to the Rules.

On March 12, 2020, following additional communications between Ringler and the OAE, respondent sent the OAE a letter stating that Ringler no longer represented him. Respondent further noted that he was unable to address the OAE's stated deficiencies and was amenable to a temporary suspension from the practice of law in New Jersey. Respondent stated, "[d]espite my best attempts to recreate all of my records, including my allocation of significant sums on professional assistance, I cannot fully answer all of the questions posed."

Based on the foregoing, the OAE charged respondent with having violated RPC 1.15(d) for failing to maintain required records in accordance with R. 1:21-

6, and with having violated RPC 8.1(b), for failing to maintain or produce to the OAE the records required to conclude the demand audit.

The Negligent Misappropriation Charge

The facts supporting respondent's negligent misappropriation² of client funds are as follows. On March 4, 2019, respondent made three transfers from his ATA to his ABA, totaling \$1,950, on behalf of his client, Leora Tucker, prior to receiving Tucker's settlement proceeds. Four days later, on March 8, 2019, respondent deposited Tucker's proceeds in his ATA. By transferring the \$1,950 to his ABA prior to receiving Tucker's proceeds, respondent invaded the ATA funds of four unrelated clients.

From April 5 through April 8, 2019, respondent made four online transfers from his ATA to his ABA, totaling \$9,800, purportedly on behalf of his client, Mt. Olivet Tabernacle Church (Mt. Olivet), prior to receiving Mt. Olivet's funds. On April 11, 2019, respondent deposited \$90,000 in his ATA on behalf of Mt. Olivet. By transferring the \$9,800 to his ABA prior to receiving Mt. Olivet's funds, respondent invaded the ATA funds of four other clients.

On April 16, 2019, respondent made an online transfer of \$20,000 from his ATA to his ABA. \$10,000 dollars of the transfer was attributable to Mt.

² In the stipulation, the OAE specifically addressed its conclusion that there was insufficient evidence to establish that respondent's misappropriation was knowing.

Olivet, decreasing the client ledger balance to (\$4,800). By transferring those funds, respondent invaded the ATA funds of six unrelated clients.

From November 14 through November 26, 2018, respondent made five online transfers from his ATA to his ABA, totaling \$3,750, on behalf of his client, Sonya Owens. On November 27, 2018, respondent deposited \$45,000 in his ATA on behalf of Owens. By transferring the \$3,750 to his ABA prior to receiving Owens' proceeds, respondent invaded the ATA funds of two unrelated clients.

From December 6 through December 19, 2018, respondent made six online transfers from his ATA to his ABA, totaling \$4,175, on behalf of his client, Dorothea Cavalli. On December 27, 2018, respondent deposited \$25,000 in his ATA on behalf of Cavalli. By transferring the \$4,175 to his ABA prior to receiving Cavalli's proceeds, respondent invaded the ATA funds of five other clients.

On January 29, 2019, respondent made an online transfer of \$7,000 from his ATA to his ABA on behalf of Cavalli. On that date, Cavalli's ledger balance was only \$5,272.63. Therefore, the January 29, 2019 transfer of \$7,000 decreased Cavalli's ledger card balance to (\$1,727.37) and invaded the ATA funds of four unrelated clients.

On August 9, 2019, respondent issued an ATA check in the amount of \$7,000, designated “final settlement,” to his client, Basil Lester. Lester deposited the check the same day. However, on August 9, 2019, Lester’s client ledger card balance was only \$6,532. Thus, the negotiation of the \$7,000 ATA check decreased Lester’s client ledger balance to (\$468) and invaded the ATA funds of five unrelated clients.

Based on the foregoing, the OAE charged respondent with having violated RPC 1.15(a) by repeatedly and negligently misappropriating client funds.

The OAE’s Recommended Discipline

The OAE asserted that a six-month suspension is the proper quantum of discipline for respondent’s misconduct and raised no objection to that term running retroactive to the Court’s February 4, 2021 temporary suspension Order.

The OAE argued that respondent’s negligent misappropriation “requires a level of discipline higher than a reprimand,” because “[d]espite his very active personal injury practice and constant receipt of client funds, Respondent did not undertake efforts to ensure that the funds he was receiving, and disbursing were accurate.” The OAE further asserted that respondent’s conduct was “beyond mere negligence and rather fell into the reckless category.”

The OAE cited four disciplinary cases in support of its argument that a six-month suspension is the appropriate quantum of discipline: In re Kim, 222 N.J. 3 (2015) (six-month suspension imposed on attorney whose accounting system and recordkeeping practices were reckless, and whose knowledge of his recordkeeping responsibilities was so lacking that he willfully disregarded his recordkeeping obligations, placing his clients' funds at great risk); In re Bevacqua, 180 N.J. 21 (2004) (six-month suspension was imposed for "inexcusably careless" and "reckless" execution of attorney recordkeeping responsibilities); In re White, 192 N.J. 443 (2007) (six-month suspension imposed, in connection with a motion for reciprocal discipline, when an attorney, who was disbarred in New York, was found guilty of converting client funds, commingling trust and personal funds, and negligently misappropriating over \$2,000 in trust funds during a nine-month period; the attorney claimed his mistakes were due to carelessness but made no attempt to maintain adequate records or to review recordkeeping Rules); and In re Ichel, 126 N.J. 217 (1991) (six-month suspension imposed on attorney who had no prior discipline for his reckless handling of his ATA, as demonstrated by his withdrawal, on ninety occasions, of legal fees from his ATA prior to either a recovery or a settlement).

The OAE further cited In re Gallo, 117 N.J. 365 (1989), in which we imposed a three-month suspension on an attorney, who had no prior discipline,

for poor recordkeeping practices that led to invasion of client funds on numerous occasions. In that case, the attorney had inherited another attorney's practice, which was in a disorganized state, and adopted the same improper practices, including inadequate bookkeeping.

The OAE cited, as mitigating factors, respondent's lack of prior discipline, admission of misconduct, and entry into the stipulation. The OAE further acknowledged respondent's "significant efforts to remediate his recordkeeping deficiencies and reconcile his accounts including engaging experienced ethics defense counsel and a legal bookkeeping firm to recreate his accounts." Although subsequent remedial measures are ordinarily weighed in mitigation, here, the OAE asked us to balance that mitigation against the unsuccessful character of the effort, and the aggravating character of respondent's failure to remediate. See generally, In re Silber, 100 N.J. 517, 521 (1985) (the Court weighed in aggravation "that Respondent deliberately failed to take proper action although he had several opportunities to do so. The Bar must be cautioned that such action or lack of action by an attorney cannot be permitted"); In re Librizzi, 117 N.J. 481, 493 (1990) (the Court weighed, among multiple mitigating factors in a negligent misappropriation and recordkeeping case, that "when he realized his error, he moved quickly and took appropriate corrective measures, including hiring an accountant to handle his trust account.

He still has an accountant and his present system is in compliance with the rules”).

The OAE argued, that, because professionals were unable to accurately recreate respondent’s financial records, we should consider, as an aggravating factor, his failure to fully remediate, as balanced against the mitigating factor of his good faith attempts at subsequent remedial measures.

* * * *

Following a review of the record, we are satisfied that the facts contained in the stipulation clearly and convincingly support the finding that respondent violated RPC 1.5(a), RPC 1.15(a), and RPC 1.15(d). However, we determine to dismiss the charged violation of RPC 8.1(b).

Specifically, respondent’s miscalculation of his fees and expenses in the Frazier matter resulted in his receipt of \$4,177.28 to which he was not entitled. By overstating his expenses by \$753.50 and mistakenly calculating his fee based on the gross settlement award, rather than the net settlement, causing a \$3,423.78 error in his favor, respondent charged an unreasonable fee, and violated RPC 1.5(a).

Further, respondent repeatedly and negligently misappropriated client funds, in five client matters, by transferring funds from his ATA to his ABA, purportedly on behalf of those clients, prior to receiving the clients’ funds.

Although the OAE concluded that it could not prove knowing misappropriation in connection with respondent's mishandling of clients' funds due to his poor recordkeeping, the OAE has proven, by clear and convincing evidence, that respondent's negligence in handling his recordkeeping resulted in the repeated invasion of other clients' trust funds, in violation of RPC 1.15(a).

Finally, respondent failed to keep accurate and necessary financial records for his law practice. He was unable to produce the demand audit records requested by the OAE, including client ledger cards and three-way ATA reconciliations. Respondent's lack of attention to his recordkeeping practices was so egregious that a bookkeeping firm and Ringler, an experienced ethics attorney, could not reconcile his accounts. He, thus, violated RPC 1.15(d) and R. 1:21-6.

We determine, however, to dismiss the RPC 8.1(b) charge. The facts set forth in the stipulation do not support, by clear and convincing evidence, the conclusion that respondent knowingly failed to comply with the OAE's requests for information. Rather, the evidence supports to conclusion that respondent attempted to comply – albeit unsuccessfully – with every demand made of him by the OAE. He hired counsel and a bookkeeper and produced the records he was able to gather or re-create. He also attended multiple demand audits and interviews.

In sum, we find that respondent violated RPC 1.5(a), RPC 1.15(a), and RPC 1.15(d). We determine to dismiss the RPC 8.1(b) charge. There remains for determination the appropriate quantum of discipline to impose on respondent for his misconduct.

A mistaken miscalculation of a contingent fee typically results in an admonition. See e.g., In the Matter of Michael S. Kimm, DRB 09-351 (January 28, 2010) (attorney improperly calculated his contingent fee on the gross recovery, rather than on the net recovery, a violation of RPC 1.5(c); the attorney also improperly advanced more than \$17,000 to his client, prior to the conclusion of her personal injury case, a violation of RPC 1.8(e); although the attorney had been censured previously, we did not consider it in aggravation because it had been imposed for entirely different misconduct); In re Weston-Rivera, 194 N.J. 511 (2008) (admonition for attorney who negligently took a contingent fee greater than that to which she was entitled; the excess fee occurred as a result of her failure to calculate the fee in compliance with R. 1:21-7(d); the attorney also violated RPC 1.15(a) and RPC 1.15(d)); and In the Matter of Robert S. Ellenport, DRB 96-386 (June 11, 1997) (admonition for attorney who, with his client's consent, received \$500 in excess of the contingent fee permitted by the Court Rules).

Generally, a reprimand is imposed for recordkeeping deficiencies that result in the negligent misappropriation of client funds. See, e.g., In re Mitnick, 231 N.J. 133 (2017) (as the result of poor recordkeeping practices, the attorney negligently misappropriated client funds held in his trust account; violations of RPC 1.15(a), and RPC 1.15(d); significant mitigation included the attorney's lack of prior discipline in a thirty-five-year legal career); In re Rihacek, 230 N.J. 458 (2017) (attorney was guilty of negligent misappropriation of client funds held in his trust account, various recordkeeping violations, and charging mildly excessive fees in two matters; no prior discipline in thirty-five years); and In re Cameron, 221 N.J. 238 (2015) (after the attorney had deposited in his trust account \$8,000 for the pay-off of a second mortgage on a property that his two clients intended to purchase, he disbursed \$3,500, representing legal fees that the clients owed him for prior matters, leaving in his trust account \$4,500 for the clients, in addition to \$4,406.77 belonging to other clients; when the deal fell through, the attorney, who had forgotten about the \$3,500 disbursement, issued an \$8,000 refund to one of the clients, thereby invading the other clients' funds; a violation of RPC 1.15(a); upon learning of the overpayment, the attorney collected \$3,500 from one of the clients and replenished his trust account; a demand audit of the attorney's books and records uncovered various recordkeeping deficiencies, a violation of RPC 1.15(d)).

Nonetheless, in In re Kim, 222 N.J. 3 (2015), upon which the OAE relies in seeking a six-month suspension, the attorney had no knowledge of his recordkeeping obligations, and no formal recordkeeping system; he kept track of his financial matters, including his receipts and disbursements, in his head. In the Matter of Daniel Donk-Min Kim, DRB 14-171 (December 11, 2014) (slip op. at 5-6). As a result, his ATA eventually suffered a shortage. Id. at 59. We determined the attorney’s “arrogance in believing that his mental juggling of his trust funds was sufficient [was], in a word, astonishing.” Id. at 63-64. We voted to impose a three-month suspension due to Kim’s “extreme recklessness in handling client and escrow funds for so many years.” Id. at 65. The Court then imposed a six-month suspension.

In a recent case, In the Matter of Dennis Aloysius Durkin, DRB 19-254 (June 3, 2020), we applied the Kim precedent and imposed a one-year suspension. In that case, the attorney’s complete lack of a recordkeeping system neither jeopardized nor resulted in the invasion of trust account funds, but he relied on estimates and maintained a running balance of his ATA and ABA in the form of a Quickbooks check register, which identified neither the client nor the matter. Id. at 81-83. The Court agreed. In re Durkin, 243 N.J. 542 (2020).

Thus, pursuant to New Jersey disciplinary precedent, the appropriate range of discipline for the totality of respondent’s misconduct is a censure to a

short term of suspension. However, in crafting the appropriate quantum of discipline, we also consider mitigating and aggravating factors.

Here, respondent had a recordkeeping system, albeit a grossly deficient one. Although his recordkeeping deficiencies were not as egregious as those encountered in Kim, where the attorney was making calculations in his head, or Durkin, where the attorney failed to maintain any recordkeeping system, instead relying on a check register program with a running balance of funds, his repeated failure to account for his clients' ATA funds is alarming. Even professionals were unable to reconcile respondent's books, and he eventually conceded that he could not satisfy the OAE's requests for required financial records and consented to a temporary suspension. Funds were unidentified, unattributable to particular clients, and not documented in accordance with R. 1:21-6. Respondent did not even maintain a New Jersey ATA and ABA as required by the recordkeeping Rules until the OAE prompted him to do so.

At oral argument, in response to our question about whether respondent committed knowing misappropriation, the OAE again represented that it was unable to determine, based on the record in this matter, that respondent's misappropriation was knowing. Further, the OAE stated, and respondent confirmed, that no clients were harmed by respondent's poor recordkeeping.

In turn, respondent noted that he had learned lessons over the two years that he had been working with the OAE and realized his errors; that he had withdrawn from practice in New Jersey and did not renew his attorney registration; and that he had no plans to practice in New Jersey in the future.

In mitigation, respondent has no disciplinary history in over sixteen years as a member of the bar, and made good faith, remedial efforts to improve his recordkeeping practices, including the hiring of a legal bookkeeping firm. Moreover, he stipulated to his misconduct and consented to a temporary suspension in New Jersey. Notably, respondent is administratively ineligible to practice law in New Jersey and has indicated that he no plans to practice law in New Jersey in the future.

In aggravation, as the OAE noted, some of the ATA funds scrutinized in the course of the OAE's investigation remain unattributable to clients, due to respondent's poor practices.

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

In addition, in light of respondent's demonstrated failure to comply with the recordkeeping Rules, we require respondent, if and when he is reinstated to the practice of law in New Jersey, to complete two recordkeeping courses pre-

approved by the OAE, with proof of completion to be submitted to the OAE within ninety days of such reinstatement. Further, upon any reinstatement, respondent is required to submit monthly reconciliations of his attorney accounts to the OAE, on a quarterly basis, for a two-year period.

Moreover, respondent is required to satisfy all the OAE's outstanding financial record requests. We further determine to prohibit respondent from applying for pro hac vice admission before any New Jersey court or tribunal until further Order of the Court.

Finally, respondent is required, within sixty days of the date of the Court's Order in this matter, to (i) disgorge to Frazier the retained fees, expenses, and settlement funds totaling \$10,095.08, or provide documentary proof to the OAE that he previously so disgorged, and (ii) place any unidentified client trust funds with the Superior Court Trust Fund Unit.

Chair Gallipoli and Member Menaker voted to impose a six-month suspension, retroactive to February 4, 2021, the date of respondent's temporary suspension, with the same conditions.

Member Hoberman voted to impose a three-month suspension, retroactive to February 4, 2021, with the same conditions.

Member Rivera was 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: 

Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Royce W. Smith
Docket No. DRB 21-021

Argued: June 17, 2021

Decided: September 23, 2021

Disposition: Censure

<i>Members</i>	Censure	Three-Month Suspension	Six-Month Suspension	Absent
Gallipoli			X	
Singer	X			
Boyer	X			
Campelo	X			
Hoberman		X		
Joseph	X			
Menaker			X	
Petrou	X			
Rivera				X
Total:	5	1	2	1



Johanna Barba Jones
Chief Counsel