Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-158
District Docket No. XIV-2016-0659E

In the Matter of	:
Matthew William Woitkowski	:
An Attorney at Law	:

Decision

Argued: October 21, 2021

Decided: December 22, 2021

Colleen L. Burden appeared on behalf of the Office of Attorney Ethics.

Glenn R. Reiser appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand filed by the District IIA Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.5(b) (failure to set forth in writing the basis or rate of the fee); RPC 1.7(a) (conflict of interest); RPC 1.8(a)

(improper business transaction with a client); RPC 1.8(f) (a lawyer shall not accept compensation for representing a client from a source other than the client unless the client gives informed consent); RPC 1.15(a) (negligent misappropriation); RPC 1.15(b) (two counts – failure to promptly deliver funds belonging to a client or third party and negligent misappropriation); RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-6); RPC 7.1(b) (improper advertising or other communication); RPC 8.1(b) (failure to cooperate with disciplinary authorities); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation).[1]

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

Respondent earned admission to the New Jersey and New York bars in 1996. At the relevant times, he maintained a law practice in Staten Island, New York.

On October 2, 2014, the Court censured respondent for his violation of RPC 1.15(a) (failure to safeguard funds), RPC 1.15(d), and RPC 1.7(b) (concurrent conflict of interest). In re Woitkowski, 219 N.J. 181 (2014). In that

[1] Although the OAE originally charged respondent with having also violated RPC 1.7(a)(2); RPC 1.7(b)(1); RPC 1.8(f); RPC 7.1(b); and RPC 8.1(b), it filed a motion to dismiss those charges prior to the ethics hearing. On September 30, 2019, the hearing panel chair issued an order dismissing those charges.

matter, the OAE filed a motion for reciprocal discipline following respondent's two-year suspension in New York. In re Woitkowski, 84 A.D.3d 15 (2011).

In that case, respondent maintained an Interest on Lawyer Account Fund (IOLA)[2] account in New York at Commerce (now TD) Bank in which he deposited funds "entrusted to him as a fiduciary, incident to his practice of law." He failed to maintain sufficient funds in the IOLA for approximately one year. He also failed to maintain complete and accurate ledgers regarding deposits into and the withdrawals from his IOLA, as required by the New York Code of Professional Responsibility.

Respondent explained that, although he had an IOLA with Richmond County Savings Bank and a second IOLA with TD Bank, he maintained only one ledger for both accounts. As a result, respondent claimed to have confused the accounts he issued checks against, which caused trust checks to be dishonored. Respondent asserted that the checks for both IOLAs were "identical," with the same color and same font, which also contributed to his confusion.

Additionally, we found that respondent engaged in an impermissible conflict of interest, in violation of RPC 1.7(b). Specifically, between November

[2] A New York IOLA and New Jersey Interest on Lawyers Trust Account (IOLTA) are different names for the same type of account.

2007 and December 2008, respondent owned and operated Real Abstract, P.C. (Real Abstract). During that time, he also operated a law office at the same location, representing buyers and sellers in residential real estate transactions. Moreover, during that same period, respondent procured title abstract services and title insurance for buyers he represented in those transactions through Real Abstract, for which they paid sums of money to that entity. Respondent did not disclose to his clients the implications of his personal interest in Real Abstract.

The special referee overseeing the matter in New York found, in aggravation, that respondent had "previously received a Letter of Caution . . . for having issued a check against a deposit of funds that had not yet cleared." Nonetheless, the special referee noted that, at the time of the hearing, respondent fully understood the importance of the recordkeeping rules and had "separately taken steps to remediate the concededly inadequate disclosure of the potential conflict in matters where his title company, Real Abstract, provides title insurance."

We found, in mitigation, that respondent had taken remedial measures to ensure that his misconduct would not be repeated, including retaining ethics counsel and a certified public accountant to assist him in creating and maintaining reconciled IOLA general ledgers and individual client ledgers.

Respondent avoided a term of suspension in New Jersey because, ultimately, we found that the mitigating factors present in the case militated against "the enhancement of [a] censure to a suspension."

In the instant matter, respondent and the OAE entered into a stipulation of facts and an ethics hearing was held on August 19, 2020.

As noted above, respondent was the sole owner of Real Abstract, a title agency. Real Abstract was a title agent for Old Republic National Insurance Company (Old Republic).

At the time of the events described herein, respondent maintained a New Jersey attorney trust account (ATA) at Garden State Community Bank. In connection with his ownership of Real Abstract, respondent maintained a title escrow account (TEA) at Richmond County Savings Bank, in New York.

On October 11, 2016, respondent served as the settlement agent for a mortgage refinance by David A. Jodice and Min Sook Kim. The same date, Wells Fargo, N.A. wired $7,800.10 to respondent's ATA in connection with the refinance.

On October 13, 2016, respondent issued ATA check #1949, payable to Old Republic in the amount of $1,074, for the Jodice and Kim mortgage refinance. However, there were insufficient funds in the account, which resulted in a $986.44 overdraft of respondent's ATA.

The OAE determined that the overdraft occurred because respondent erroneously had disbursed ATA check #1943, payable to Old Republic in the amount of $2,405, for an unrelated Real Abstract client. Those funds should have been disbursed from the Real Abstract TEA. After reviewing respondent's closing instructions, the OAE determined that he had properly disbursed the entire $7,800 that Wells Fargo wired to his ATA.

However, on October 26, 2016, when check #1943 cleared respondent's ATA, $1,074 of the Jodice and Kim escrow funds were negligently misappropriated. On October 27, 2016, respondent realized his accounting error and contacted Garden State Community Bank. The next day, respondent deposited TEA check #6414, in the amount of $2,415.23, in his ATA, which cured the overdraft. When respondent issued ATA check #1943, his TEA held $122,894.90, and, thus, would have covered the $2,405 check for his Real Abstract client.

On February 23, 2017, respondent appeared at the OAE's office for a demand audit. During the audit, the OAE discovered recordkeeping deficiencies, including that respondent failed to maintain an attorney business account (ABA), contrary to R. 1:21-6(a)(2); that he failed to deposit all earned legal fees in an ABA, contrary to R. 1:21-6(c)(G); and that his bank records contained improperly image-processed ATA checks, contrary to R. 1:21-6(b). Respondent

admitted that he deposited his legal fees in a personal account, rather than an ABA, when he earned them. On March 2, 2017, respondent provided proof to the OAE that he had opened an ABA at Garden State Community Bank. Also on that date, respondent provided the OAE with evidence of his attempts to correct the identified recordkeeping deficiencies.

In the stipulation, respondent admitted that he violated RPC 1.15(a) by negligently misappropriating $1,074 of the Jodice and Kim escrow funds by erroneously issuing check #1943 from his ATA, rather than his TEA. Respondent also admitted that he violated RPC 1.15(d) via his non-compliance with the R. 1:21-6 recordkeeping requirements.

As to the allegation that respondent engaged in improper business transactions with his clients, respondent admitted that, as the sole owner of Real Abstract, he drew a salary and profit from his ownership of the company. The size of his draw depended on how well the company did the previous year. Furthermore, respondent, through Real Abstract, acted as a title agent for Old Republic in the State of New York. In contrast, in New Jersey, Real Abstract operated only as a settlement agency, not a title company. Respondent explained that Old Republic is the only underwriter used by Real Abstract in issuing title insurance to clients. In respondent's verified answer, he claimed that, because Real Abstract is not an agent in New Jersey for Old Republic National Title

Insurance, he did not receive a portion of any premium as a title agent in New Jersey normally would. Thus, respondent asserted that he was not required to disclose to clients the connection between Real Abstract and Old Republic. Likewise, respondent denied that there was a conflict of interest because, he asserted, Real Abstract did not act as Old Republic's agent in connection with any of his client's real estate transactions in New Jersey. Rather, respondent contended that all his clients were aware "of [his] relationship" with Real Abstract, because his clients were friends or family members.

Respondent claimed that, when he discussed closing costs with clients, he informed them they had a choice of title company, and that Real Abstract did not issue title insurance in New Jersey. However, respondent also informed his clients that he had a "great relationship" with Old Republic and that "since the premium is set by the state, whether you go to Company A or Company B, the premium will be exactly the same." In the same conversation, respondent advised his clients that they needed "somebody [to] quarterback the transaction" and would need to hire a settlement agent.

When asked how he determined whether the recording of the deed and mortgage fell under his role as a settlement agent or as an attorney, respondent explained that he believed the recording was within the services provided by Real Abstract, because that company was the settlement agency retained by his

clients for such transactions. However, respondent hypothesized that, in the event that his clients utilized his legal services, but used a different settlement agent, he would have followed up with the other settlement agent to make sure the deed and mortgage were recorded. Respondent testified that, when a client was going through a real estate closing, the client was "not going to go through the phonebook and look up settlement agents. They're going to go for the recommendation that their attorney makes." Respondent also conceded that, as an attorney, he could have completed the services required to close a real estate transaction without using Real Abstract as a settlement agent. To record his client's deed or mortgage, respondent testified that, most of the time, a different staff member of Real Abstract, not respondent, would physically travel to the county in which the deed was to be recorded.

Respondent testified that he explained to his clients that, since they were going to be charged the same amount of money no matter which company they utilized, he "ask[ed] them to use Real Abstract, and every client normally – I think every client actually readily agrees, and I'm happy to do so." Respondent testified that his ability to act as the "quarterback" was convenient, but that there were "more advantages than that." Nevertheless, respondent maintained that he did not enter into any business transactions with his clients.

Rather, respondent posited that there was no business transaction because in New Jersey, Real Abstract did not receive a portion of the title insurance premium in a real estate transaction. Respondent testified he had no relationship with Old Republic "other than it's an underwriter that I'm familiar with, that provides me great service."[3] Therefore, because he did not benefit financially from his referral to Old Republic, he did not provide his clients with a writing, as RPC 1.8(a) requires. Respondent also testified that the rate for a settlement agent is fixed in New Jersey and, thus, he did not believe he entered into a business transaction with clients when he asked them to utilize his company for their settlement services.

Respondent clarified that, although the financial cost to his client in a real estate transaction would be the same even if the client used a different settlement agency, respondent received a settlement agent fee, and thus, received a financial benefit from his client's use of Real Abstract to serve as settlement agent in a real estate transaction.

Regarding the OAE's investigation into respondent's retention of excess recording fees, on August 10, 2017, respondent provided the OAE with closing disclosures for the six real estate clients respondent had represented in New

[3] In the joint stipulation of facts, respondent asserted that Old Republic was the only underwriter for Real Abstract and that, in New York, Real Abstract serves as a title agent for Old Republic.

Jersey in the previous two years. Respondent's clients were the buyers in the real estate transactions. As their attorney, respondent referred the six clients to Old Republic for title insurance. Respondent asserted that he did not receive a financial benefit from the referral of his New Jersey clients to Old Republic for title insurance because the cost for title premiums in New Jersey is fixed. Respondent claimed that his clients did not pay an additional cost for title insurance by virtue of his referral to Old Republic.

Respondent acted as the settlement agent for the aforementioned six purchaser clients, as well as two additional clients in real estate transactions. In these transactions, respondent received the following legal fees and settlement agent fees through Real Abstract:

Matter	Settlement Agent Fee	Legal Fee
RE-910	$800	None
RE-984	$550	$1,000
RE-1001	$550	$1,200
RE-1019	$800	$750
RE-1036	$300	$285
RE-1039	$325	None
RE-1047	$325	$900

Respondent admitted that, in the real estate transactions where he acted as both attorney and settlement agent, he did not fully disclose and transmit in a writing, acknowledged by the client, his precise interest in Real Abstract, that the same services could be obtained from other providers; or the terms of the agreement with Real Abstract. Further, he failed to advise his clients orally or

in writing of the desirability of seeking independent legal counsel of their choice concerning the retention of Real Abstract as the settlement agent in the real estate transactions. However, respondent asserted that all his clients were aware that respondent owned Real Abstract.

Additionally, respondent, through Real Abstract, handled several real estate transactions in which he collected an estimated fee for governmental recording costs and then paid the actual governmental recording costs, which were less than the estimate. Respondent explained that, when recording a deed, either he or another employee of Real Abstract would physically bring the deed and mortgage to the county in which it was to be recorded and, once recorded, return the documents to the parties who were entitled to them. Respondent asserted that he retained for himself the difference between the estimated and actual recording costs, referring to the difference as a "service fee" for his recordation of the documents, which was separate from his legal fee. However, no service fee for Real Abstract was disclosed on the HUD-1 forms prepared in those real estate transactions.[4]

To support his retention of the excess, "service fee," respondent testified that it was "practice in the industry" to include the service fee within the

[4] The Closing Disclosure, or CD, replaced the HUD-1 beginning on October 3, 2015. However, twenty-one of the twenty-seven client matters at issue in this matter occurred prior to the cessation of the use of the HUD-1.

"aggregate" fee itemized on the HUD-1 forms. Respondent clarified that his position was that the line item on the HUD-1 that said "recording fee" encompassed the actual recording fee and the "service fee" associated with the recordation. Respondent failed to inform his clients that he retained the difference between the estimated and actual recording costs but explained that he believed they approved his retention of the excess fee because when he first met with his client, he discussed in "detail what their approximate closings costs [were] going to be."

Consistent with the Court's Order in In re Fortunato, 225 N.J. 3 (2016), which was issued on May 19, 2016, the OAE requested, and respondent provided, seven years of HUD-1 forms and Closing Disclosures in real estate transactions in which he represented the buyer, along with a spreadsheet listing each client matter and the differences in the estimated and actual recording fees. As shown in the below chart, respondent retained $4,318 in excess recording fees – including $390 in excess recording fees subsequent to the Court's Order in Fortunato.

Client Matter[5]	**Closing Date**	**Recording Fees Collected**	**Actual Recording Fee**	**Difference Retained by Respondent**
RE-884	6/26/2012	$400	$266	$134
RE-885	8/15/2012	$490	$250	$240
RE-886	11/16/2012	$590	$260	$330
RE-889	4/15/2013	$325	$260	$65
RE-892	6/17/2013	$320	$250	$70
RE-893	6/21/2013	$290	$80	$210
RE-895	7/12/2013	$490	$180	$310
RE-907	12/13/2013	$450	$260	$190
RE-908	12/6/2013	$425	$260	$165
RE-910	3/5/2014	$350	$250	$100
RE-911	3/7/2014	$450	$256	$194
RE-912	2/18/2014	$365	$250	$115
RE-915	4/11/2014	$475	$260	$215
RE-920	6/19/2014	$225	$90	$135
RE-950	9/19/2014	$450	$256	$194
RE-960	1/30/2015	$290	$140	$150
RE-967	1/30/2015	$225	$170	$55
RE-970	4/10/2015	$225	$70	$155
RE-983	7/24/2015	$400	$290	$110
RE-984	8/20/2015	$400	$200	$200
RE-985	8/10/2015	$200	$190	$10
RE-1001	11/12/2015	$425	$260	$165
RE-1011	1/25/2016	$425	$193	$232
RE-1019	5/17/2016	$450	$266	$184
RE-1036	***8/13/2016***	***$380***	***$263***	***$117***
RE-1039	***9/14/2016***	***$408***	***$260***	***$148***
RE-1047	***1/27/2017***	***$305***	***$180***	***$125***

Respondent admitted that he was aware that the estimated recording fee would exceed the actual recording fee by virtue of classifying the difference as

[5] The three bolded and italicized transactions represent respondent's retention of the excess fees following the Court's Order in Fortunato.

a service fee. Nonetheless, on the HUD-1 settlement statements prepared and signed by respondent, he failed to disclose the service fee as a disbursement occurring as a part of the real estate transaction. Despite failing to disclose his service fee, respondent affirmed on the HUD-1 forms that the settlement statements he prepared were a true and accurate account of the transactions and the disbursements therein.

Ultimately, respondent contended that, when he prepared and attested to the accuracy of the HUD-1 forms, he believed the information contained therein was "100 percent accurate . . . there's no inaccuracies in them at all," because those were the fees the clients paid, even though respondent did not know at the time how much the service fee would be. Respondent explained that, based on his belief of the accuracy of the HUD-1 forms, the issue in the ethics action was the "classification of those numbers," in that a client was not aware what the specific costs of a fee recordation or service fee were, but they were aware of what the sum total of those two fees would be.

However, respondent conceded that, after determining the actual recording fee, he did not confirm with his clients whether it was acceptable for him to retain the additional fees as a service fee for recording the deed or mortgage. Nevertheless, respondent explained that, during the closing, his clients were aware there would be a service fee associated with recording the

deed and mortgage. Respondent claimed that the industry practice – then and now – was to aggregate certain line items, and that in this case, "the recording fee is an aggregate of the actual government recording fee and [his] service fee." Thus, respondent asserted that all parties in the transaction knew he was going to retain the excess fees, even though they were unaware of the difference between the actual and charged fees.

By letter dated February 12, 2018, respondent provided the OAE with proof that he has issued refunds to the clients whose excess recording fees he retained as "service fees." Within the letter, respondent asserted that it was his position that he did not retain excess recording fees but, rather, those "fees collected were for recording fees and recording services fees." Respondent explained that the fees historically had been an aggregate charge on the HUD-1 form, but that only very recently, lenders have begun to distinguish the actual recording fees from the service fees. Respondent relied upon 24 C.F.R. § 3500[6] to support his position regarding the aggregation of fees on a HUD-1 settlement form. Respondent did not deny that he retained the excess recording fees. Rather, he claimed that, pursuant to 24 C.F.R. § 3500, he was authorized and

[6] With particularity, respondent relied upon 24 C.F.R. § 3500.7(c)(2), which provides in relevant part: "Each such estimate must be made in good faith and bear a reasonable relationship to the charge a borrower is likely to be required to pay at settlement, and must be based upon experience in the locality of the mortgaged property [. . .]." The regulation does not explicitly, or by implication, entitle the estimator to retain the difference between that estimate and the actual fee.

permitted to charge a reasonable fee for providing settlement services that exceeded the actual cost of such services. Consequently, respondent asserted that all the disclosures on the HUD-1 settlement forms he executed were accurate.

Also by letter dated February 12, 2018, respondent informed the OAE that he charged his real estate clients a flat rate, that he normally provided of same to the client in an e-mail, text message "or similar writing." Respondent denied using a "standard formatted retainer agreement." Although respondent claimed it was his practice to confirm his flat fee via an e-mail or text message, his "thorough" search of his e-mails and text messages to find any such writing he provided a client was fruitless.

At the ethics hearing, Birchin Uzun-Fallace, respondent's former client, and Jennifer Hofstetter, a Real Abstract employee, testified as fact witnesses on respondent's behalf.[7]

Uzun testified concerning respondent's representation of her, in May 2016, when she purchased a home. Because she was friends with respondent, she knew that he owned Real Abstract. She also knew about Real Abstract because respondent's office sign said Real Abstract and he utilized pens

[7] Notwithstanding her hyphenated last name, Ms. Uzun-Fallace confirmed that she preferred to be called Ms. Uzun.

containing the company's name, which Uzun used to sign the documents required at a real estate closing.

Uzun testified that she knew respondent asked her to use Real Abstract as the title company for the closing because she recalled that her response was "yeah, why wouldn't I use yours." Uzun did not feel forced to use Real Abstract.

With respect to the recording fees that respondent charged Uzun, she testified that respondent discussed with her the recording fees listed on the HUD-1. Although the HUD-1 form listed Uzun's recording fees as representing $250 to record the deed and $200 to record the mortgage, she testified that the $450 total included "whatever services his company was providing to record those documents," such as obtaining the title and "getting all the files and such, like the clerk's office or whatever." Uzun was unaware that the actual fee to record her deed and mortgage had been only $255.

Uzun confirmed that she paid respondent a $750 legal fee, an $800 settlement agent fee, and an additional $450 to record her deed and mortgage following the closing. Respondent did not ask Uzun if he could retain the difference between the estimated and actual recording fees. Uzun also confirmed that she received a $184 check, in February 2018, from respondent, which represented a refund of the difference between the estimated and the actual recording fees respondent retained.

A Real Abstract employee, Jennifer Hofstetter, also testified at the ethics hearing. Hofstetter testified that she had heard respondent explain to clients that he was going to charge a service fee in connection with recording the deed and mortgage but acknowledged that respondent did not reduce such statements to writing.

Hofstetter also explained that Real Abstract did not document the amount of work required to record the deed. When explaining what constituted a service fee, Hofstetter testified that, during the deed recording process, there were times the county would reject the deed and a Real Abstract employee was required to make two or three trips back and forth to the county of recordation to ensure the deed or mortgage was recorded. In those cases, despite the extra work involved, Hofstetter testified that "the service fee was charged what it was at closing. It was never adjusted." Importantly, Hofstetter clarified that there was no change in the service fee amount charged by Real Abstract to correlate with the amount of effort undertaken to record a deed or mortgage.

After reviewing the evidence and testimony presented at the ethics hearing, the DEC concluded that respondent's New Jersey real estate clients knew of his ownership of Real Abstract. Nonetheless, the DEC concluded that there was no "business relationship" between respondent and his clients, who used Real Abstract, "which would trigger an obligation [for respondent] to

provide an RPC 1.8(a) written notice of his ownership of Real Abstract." Thus, the DEC reasoned that the use of Real Abstract by respondent's clients did not constitute a business transaction.

The DEC found that Real Abstract's role as the settlement agent in the real estate transactions for respondent's clients did not create an adverse financial interest between respondent and his clients. Rather, the DEC concluded that there was no evidence respondent deceived his clients, or that he charged them exorbitant fees to utilize Real Abstract as the settlement agent.

Relying on Milo Fields Trust v. Britz, 378 N.J. Super. 137, 149 (App. Div. 2005), the DEC found that the "spirit and intent" of RPC 1.8 was to avoid the "hoodwinking of helpless clients out of funds in a business venture that is essentially for the benefit of the lawyer." Thus, in the DEC's view, because respondent did not request that his clients invest in Real Abstract, and because the evidence established that Real Abstract performed the services it was retained to complete, respondent did not violate RPC 1.8. The DEC elaborated that, because Real Abstract was not the "business venture" contemplated by RPC 1.8(a), he could not have violated the Rule.

The DEC relied upon Advisory Comm. on Professional Ethics Op. 657, 130 N.J.L.J. 656 (February 24, 1992),[8] to find that respondent did not solicit

[8] Advisory Comm. on Professional Ethics Op. 657 is entitled "Conflict of Interest: Lawyers

from his clients any sort of investment or partnership in other business ventures. Therefore, the DEC determined that respondent's actions were distinguishable from Opinion 657 and thus, found that respondent was not obligated to provide his clients with written notice concerning his ownership in Real Abstract.

Similarly, the DEC concluded that the evidence did not establish that respondent "knowingly intended" to deceive his clients. Accordingly, the DEC concluded that respondent did not violate RPC 8.4(c).

With respect to the five matters in which a closing disclosure was prepared by the lender in advance of a real estate closing, as opposed to respondent's preparation of a HUD-1 form, the DEC found respondent could not have violated RPC 8.4(c) or RPC 1.15(b) because he did not prepare the documents. Likewise, with respect to the remaining twenty-two clients, in which respondent prepared and attested to the accuracy of the HUD-1 forms, the DEC found that respondent verbally explained to his clients that he combined his settlement agent's service

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rendering Non-Legal Services to Their Clients" and provides: "a lawyer may only refer a legal client to a business the lawyer owns, operates, controls, or will profit from, if the lawyer has (1) disclosed to the client in writing, acknowledged by the client, the precise interest of the lawyer in the business, and that the same services may be obtained from other providers, and (2) advised the client, orally and in writing, of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel of the client's choice as to whether utilization of the business in question is in the client's interest." Opinion 657 also reaffirmed the conclusions expressed in ACPE Op. 532 and ACPE Op. 540 that "lawyers must keep their law practices entirely separate from their business enterprises. Consequently, lawyers must operate their practices and businesses in physically distant locations, refrain from joint advertising or marketing of the two, and avoid any other demonstration of a relationship between them."

fee with the recording fee. Furthermore, the DEC found that the HUD-1 statements were accurate because "the amounts disbursed in each closing matched those listed on the HUD-1 Settlement Statement so that each client received a complete and accurate written disclosure [of] all fees charged." The DEC, thus, dismissed the RPC 1.15(b) and RPC 8.4(c) charges because it found there was no evidence that any client or third party was deceived or harmed.

Furthermore, the DEC rejected the OAE's position that respondent's retention of excess recording fees was akin to the misconduct found in Fortunato. The DEC distinguished Fortunato from respondent's misconduct, stating that the attorney in Fortunato did not provide "any additional post-closing services or disclose the excess recording fees to his clients, and exhibited a pattern of misrepresentation." Additionally, the DEC distinguished respondent's case from Fortunato and In re Masessa, 239 N.J. 85 (2019), because Fortunato and Masessa stipulated to the charged RPC 1.15(b) and RPC 8.4(c) violations, and respondent did not.

The DEC found that the more than $76,000 in excess recording fees accumulated by Masessa were evidence of a systemic practice of inflating recording fees, whereas respondent's retention of $4,318 was nominal. The DEC was persuaded that respondent informed his clients of all estimated fees – including service fees.

Moreover, to support its findings regarding respondent's retention of excess recording fees, the DEC ventured outside the evidence in the record to state that:

> at one point, a New Jersey county clerk's office was six months or more behind in recording, and many settlement agents personally brought documents to the clerk's office for recording, which often added many hours to the process. Another factor unknown to those who have not settled real estate transactions is the occasional fickleness of county clerks when it comes to recording fees – a point emphasized by [respondent's] testimony. Despite the published recording fees, it is not unusual for a county clerk to return a document unrecorded due to an alleged deficiency in the recording fee. The wise practitioner guards against that eventuality by personally appearing at the county clerk's recording office with the original documents to be recorded, which is what Real Abstract did for [respondent's] New Jersey real estate clients. The post-closing recording process can be quite more demanding than it would seem to the uninitiated.[9]
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> [HPR,pp11-12][10]

In that context, the DEC concluded that the twenty-two HUD-1 forms respondent prepared were not inaccurate or misleading. The DEC found that respondent's clients were informed of the "totality and specificity of the fees being charged."

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[9] In his summation to us, respondent astutely observed that "the Panel members seemingly possess first-hand knowledge of New Jersey real estate practice consistent with the manner testified by [respondent]."

[10] "HPR" refers to the Hearing Panel Report, dated April 27, 2021.

However, the DEC found that respondent violated RPC 1.5(b), RPC 1.15(d), and R. 1:21-6(c)(1)(C) because he did not provide a written fee agreement for two clients, RE-1019 and RE-1036.

The DEC also found that respondent violated RPC 1.15(a) by issuing an ATA check, instead of a TEA check, to Old Republic for payment of a title insurance premium, which caused the negligent misappropriation of client funds. The DEC also accepted respondent's stipulation that he committed recordkeeping violations, contrary to RPC 1.15(d) and R. 1:21-6.

Finally, without specificity, the DEC concluded that, regarding the "disputed RPC charges," it agreed with respondent that "at best the OAE's case amounts to technical violations that are de minimis and inconsequential." Therefore, the DEC determined that a reprimand was the appropriate quantum of discipline for the RPC 1.15(a) and RPC 1.15(d) violations respondent conceded. The DEC noted that any additional RPC violations it found were not deserving of discipline greater than a censure.

In mitigation, the DEC stated that respondent's prompt refund of the "disputed" fees, his cooperation with the OAE, and his promptness in correcting his recordkeeping violations persuaded the DEC that a reprimand was more appropriate than a censure.

In aggravation, the DEC noted that respondent had been censured, in 2014, for misconduct that also arose out of his operation of Real Abstract, which included negligent misappropriation due to recordkeeping violations. However, the DEC distinguished respondent's earlier misconduct by finding that, in the instant matter, respondent did not use Real Abstract to obtain title insurance policies for his New Jersey clients, but would instead refer his clients to Old Republic for title insurance.[11]

In its submission to us, the OAE argued that the DEC erred in dismissing the RPC 1.8(a)(1); RPC 1.8(a)(2); RPC 1.15(b); and RPC 8.4(c) charges. The OAE relied upon its October 8, 2020, written summation to the DEC to argue that respondent violated RPC 1.15(a); RPC 1.15(d); RPC 1.8(a); RPC 1.5(b); RPC 1.15(b); and RPC 8.4(c).

Specifically, the OAE argued that respondent negligently misappropriated client funds by erroneously issuing check #1943 to Old Republic from his ATA rather than his TEA. Following its investigation of the overdraft of respondent's ATA, the OAE discovered that respondent committed multiple recordkeeping violations, including a failure to maintain an ABA; a failure to deposit all earned

[11] The DEC was silent regarding respondent's testimony that, based upon New Jersey statutes, Real Abstract could not provide title insurance policies in New Jersey. The DEC was also silent as to respondent's testimony that Old Republic is the sole underwriter for policies provided by Real Abstract.

legal fees into an ABA; a failure to identify clients on checks; and improperly image-processed trust checks. Respondent admitted his recordkeeping violations and resultant negligent misappropriation, in violation of RPC 1.15(a) and (d) and R. 1:21-6.

The OAE argued that respondent, as the sole owner and operator of Real Abstract, received a salary and drew a profit from the operation of the company. Moreover, Real Abstract offered services in exchange for a fee, and the profit respondent received at the end of the year was derived from how financially lucrative the company was during the year. The services Real Abstract provided could be obtained from other title and settlement companies.

The OAE argued that the service fee respondent charged his clients to record their deeds and mortgages fluctuated based on the county in which the documents were recorded, but always represented the difference between the fee respondent estimated and the fee he actually paid. The OAE asserted that respondent's assumption that his clients had authorized him to keep an amount of fees previously unknown to them was illogical.

The OAE argued that, when respondent signed the HUD-1 settlement statement that included the statement "The HUD-1/Settlement statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement," he

misrepresented the disbursements in the transaction and, thus, violated RPC 8.4(c).

Regarding the allegations that respondent engaged in an impermissible business transaction with his clients, in violation of RPC 1.8(a), the OAE argued that, pursuant to In re Wolk, 82 N.J. 326, 332 (1980), the waiver of conflict requirements under that Rule are more stringent than that of RPC 1.7 and RPC 1.9. The OAE emphasized that RPC 1.8(a) requires a signed client acknowledgment, whereas RPC 1.7 and RPC 1.9 require only that the attorney confirm the conflict and waiver in writing.

The OAE rejected respondent's position that he did not enter into business transactions with his clients. The OAE observed that the service Real Abstract provided to respondent's real estate clients was necessary for the transaction and could have been obtained elsewhere for the same fee, which made it a business transaction.

In support of its position that respondent entered into business transactions with his clients, the OAE relied, in part, on Advisory Comm. on Professional Ethics Op. 657, and In re Mott, 186 N.J. 367 (2006).

Although we addressed a conflict of interest under RPC 1.7 in Mott, the OAE argued that the case was instructive in applying RPC 1.8(a) because Mott prepared, on behalf of his buyer-clients, real estate agreements that provided for

the purchase of title insurance from the title company he owned. Similarly, the OAE argued that we found that an attorney engaged in a conflict of interest in In re Poling, 184 N.J. 297 (2005), when that attorney prepared, on behalf of buyer-clients, real estate agreements that pre-provided for the purchase of title insurance from a title company the attorney owned. Poling also did not disclose to the buyers that he owned the company and did not disclose to the clients that the title insurance could be purchased elsewhere. Thus, the OAE asserted that, in cases in which attorneys used their title companies and clients paid the fixed settlement rates, we have found a conflict when the attorneys did not obtain the clients' informed, written consent.

Furthermore, the OAE argued that the language of RPC 1.8(a) applies to all business transactions, not just transactions that are potentially adverse to a client. The OAE did not dispute that respondent's clients knew he owned Real Abstract but argued that RPC 1.8(a) required informed written consent to the business transaction, not just a mere awareness. Thus, the OAE argued that respondent violated RPC 1.8(a) by failing to obtain written consent from his clients to use Real Abstract in their real estate transactions.

The OAE also argued that, by retaining the difference between the estimated and actual recording fees as a "service fee," respondent violated RPC 1.15(b) and RPC 8.4(c). The OAE argued that, when respondent attested to the

accuracy of the HUD-1 forms he prepared, he knew he was going to keep for himself the difference, no matter the amount, and regardless of the effort put in to record the documents.

The OAE asserted that respondent's conduct in retaining the excess recording fees was akin to the misconduct addressed in Fortunato. Furthermore, the OAE maintained that we had addressed the same type of misconduct in Masessa, and had rejected Masessa's claim that as a settlement agent, he could keep excess recording fees for himself as a "service fee." The OAE cited to the variance in the service fees "charged" by respondent to reject his argument that he charged a permissible "average fee."

Likewise, the OAE contended that respondent's retention of the excess fees rendered the HUD-1 forms he prepared misrepresentative of the true disbursements in the real estate transactions. Thus, the OAE argued that respondent violated RPC 8.4(c) because he knew that, despite the difference between the estimated and actual recording fee, he was going to retain the excess funds for himself as a "service fee."

For the totality of respondent's ethics violations, the OAE argued that he should receive either a censure or a short-term suspension. In aggravation, the OAE argued that respondent's 2014 censure was "strikingly similar" to the misconduct in the present case. The OAE contended that, despite previously

receiving a lengthy suspension in New York for recordkeeping violations and negligent misappropriation, and a reciprocal censure in New Jersey, respondent "did not fully learn from that experience." Thus, the OAE argued that, under the theory of progressive discipline, great weight should be given to respondent's disciplinary history.

Regarding mitigation, the OAE maintained that respondent's admission to wrongdoing should not be given great weight since he did not admit to violating all the RPCs charged in the formal ethics complaint. Likewise, the OAE maintained that, although respondent refunded to his clients the excess fees he had retained, he was obligated to do so by virtue of the precedent of Fortunato. Thus, respondent's refunds were not a selfless act, but rather, were required due to his unethical conduct. Similarly, the OAE maintained that respondent's cooperation with the investigation is not a mitigating factor because, under R. 1:20-3(g)(3), he is required to cooperate with disciplinary authorities. Finally, the OAE rejected respondent's assertion that, under HUD regulations, he was permitted to charge his clients a "reasonable settlement fee" because HUD regulations did not override respondent's obligation to comport his conduct to the Rules of Professional Conduct. The OAE also argued that his service fees were inherently unreasonable because they "fluctuated wildly" and were not correlated to the actual work done to record a deed or mortgage.

At oral argument before us, the OAE maintained its previous positions that respondent violated all of the RPCs charged, and disagreed with the DEC's determination to dismiss the RPC 1.8(a), RPC 1.15(b), and RPC 8.4(c) charges. The OAE emphasized that respondent entered into business transactions with his clients because he provided a service that was necessary to complete the real estate transactions. Moreover, the OAE likened respondent's misconduct to that of the attorney in Fortunato and recommended that respondent receive either a censure or a short-term of suspension.

In his submission to us, respondent asserted that he agreed with the conclusions and recommendations of the DEC in its hearing panel report. Respondent maintained his position that he did not enter into business transactions with his clients because he did not trick his clients out of funds in a business venture. Respondent asserted that he offered his clients the services of his title company to "quarterback" the real estate transaction and was not motivated by financial gain. Thus, according to respondent, he did not engage in the type of business transaction contemplated by RPC 1.8(a). Respondent argued that under Milo Fields Trust, the OAE failed to establish that any of respondent's clients had been hoodwinked, which was "at the crux of the RPC 1.8 written disclosure requirements."

According to respondent, the record is devoid of evidence that he gained a "pecuniary interest adverse to a client" simply because his clients used his title company as their settlement agent. Respondent asserted that his testimony established that his settlement agent fees in New Jersey are standardized by statute.

Likewise, respondent agreed with the DEC that he did not violate RPC 8.4(c), contending that the record established that he disclosed to his clients the service fee he retained in the real estate transaction. Respondent emphasized that the excess fees kept by the attorneys in Fortunato and Masessa were a much larger amount than the "only $4,318 [he retained] over a 7-year period." Furthermore, respondent asserted that, because his clients received "complete and accurate written disclosure off [sic] all fees charged in their real estate closing," the HUD-1 forms could not have been inaccurate. Moreover, respondent argued that because the OAE failed to establish clear and convincing evidence that he knowingly signed inaccurate or misleading HUD-1 forms, the DEC correctly determined he did not violate RPC 8.4(c).

Ultimately, respondent agreed with the mitigating factors the DEC found and urged us to impose a reprimand for his admitted violations of RPC 1.5(b), RPC 1.15(a), and RPC 1.15(d).

During oral argument before us, respondent urged us to grant deference to

the credibility and fact-finding determinations made by the DEC. Respondent argued that he merely referred his clients to the title company he owned to act as a closing agent. Respondent claimed that his conduct in the instant case is different from his previous misconduct in New York because he did not receive any financial benefit for the "ministerial services" he provided his clients. Respondent claimed that if he had engaged in a "true business transaction" with his clients, he would have needed to provide a written disclosure, consistent with RPC 1.8(a), but that in the instant case, for his "ministerial services," the requirement to provide a written disclosure was not triggered.

Furthermore, respondent argued that his conduct was unlike the conduct found in Fortunato and Masessa because he only retained $4,318 in excess fees from his family and friends, whereas Masessa collected more than $76,000 in excess fees from his clients.

Respondent also distinguished his conduct from the misconduct we found in In re Rush, 225 N.J. 15 (2016), because, in that case, Rush failed to disclose a $12,000 settlement adjustment.

Ultimately, respondent asserted that he agreed with the DEC's determination and agreed that a reprimand was the appropriate sanction for his misconduct.

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. Specifically, we find that respondent's violations of RPC 1.5(b), RPC 1.15(a), and RPC 1.15(d) are supported by clear and convincing evidence. However, we disagree with the DEC's conclusion that respondent did not violate RPC 1.8(a)(1); RPC 1.8(a)(2); RPC 1.15(b); and RPC 8.4(c). To the contrary, we find that the record clearly and convincingly establishes that (1) respondent entered into business transactions with his clients without first obtaining a written consent, and (2) respondent retained excess recording fees, which he misrepresented on his clients' HUD-1 settlement statements.

Specifically, respondent violated RPC 1.5(b) because he did not communicate the basis or rate of his fee in writing and was unable to produce to the OAE any of the e-mails or text messages he represented to have sent to his clients confirming his flat fee, despite his claimed thorough search for the communications.

Additionally, there is no question that respondent entered into business transactions with his clients, in violation of RPC 1.8(a)(1) and RPC 1.8(a)(2), by requesting that they use Real Abstract as the settlement agent to provide settlement services for their real estate transactions. Although respondent argued that his clients' use of Real Abstract to provide settlement services did not create

an adverse pecuniary interest between him and his clients, the plain language of the Rule states that a lawyer shall not enter into a business transaction with a client.

We reject respondent's invitation to construe RPC 1.8(a) as a Rule that exclusively prohibits the hoodwinking of helpless clients out of funds in connection with a business venture. Respondent's interpretation deviates from the plain language of the Rule and well-settled precedent. The Rule prohibits an attorney from entering a business transaction with a client or knowingly acquiring an "ownership, possessory, security, or other pecuniary interest adverse to a client" unless the attorney first discloses to a client in writing the full terms of the transaction and the client is advised to seek independent legal counsel. Indeed, the Advisory Committee on Professional Ethics has held that a lawyer may refer a legal client to a business the lawyer owns only when the attorney has satisfied the requirements of RPC 1.8(a)(1) and RPC 1.8(a)(2).

Here, there is no question respondent referred his clients to Real Abstract. He testified that he asked his clients if they could use his company so that he could "quarterback" the real estate transactions and admitted there were more "advantages." We need not speculate as to what the advantages were – respondent admitted that, as the sole owner of Real Abstract, he earned a salary

from the company and drew a profit based upon how well the company performed in a given year.

Respondent's argument that, because settlement agent fees are fixed in New Jersey, his clients would have paid the same no matter which company they used, and thus, he cannot be found guilty of an RPC 1.8(a) violation misses the mark. It may be true that clients would pay the same rate no matter which company they used for settlement services in a real estate closing, however, here the financial benefits of those capped payments inured to the benefit of Real Abstract, and therefore, respondent. Whether or not there is a statutory cap upon a service fee, attorneys are still required to inform clients, in writing, of the terms of the transaction, along with counseling those clients to seek independent legal counsel concerning the transaction. The undisputed record in this matter demonstrates that respondent did not do so, and thus, we determine that he violated RPC 1.8(a)(1) and RPC 1.8(a)(2).

Furthermore, respondent violated RPC 1.15(a) and RPC 1.15(b) by collecting estimated recording fees from his clients in real estate transactions, and then improperly retained the excess recording fees. Although respondent claimed that his clients knew he was going to collect a "service fee" for his efforts in recording the deed and mortgage, the record clearly demonstrates that the clients were not informed of the amount of the service fee would be, either

in advance or afterward. Thus, because his clients were without the information necessary to authorize retention of a service fee, respondent's conduct violated the Rules. We, along with the Court, have repeatedly rejected these hollow arguments, including in Fortunato, Li, and Masessa.

Although respondent attempted to distinguish his conduct from the misconduct addressed in Rush, respondent's arguments miss the mark. In Rush, we found that the attorney estimated excess recording fees and kept the difference for himself. Rush had argued that he was entitled to a reasonable service fee for recording a deed and mortgage under the Real Estate Settlement and Procedures Act (RESPA), 12 U.S.C. § 2601 to 2617. We rejected that argument, finding that, pursuant to stare decisis, regardless of RESPA case law, a New Jersey attorney's knowing execution of inaccurate HUD-1 statements, with limited exceptions, constitutes a misrepresentation, in violation of RPC 8.4(c).

Likewise, respondent's reliance upon HUD regulations is misplaced. Although 24 C.F.R. § 3500.7(c)(2) permitted respondent, as a settlement agent, to keep an estimated recording fee that was made in good faith, his obligations under the Rules of Professional Conduct and the holding of Fortunato required him to immediately refund the excess recording fees to his clients. However, respondent did not do so until after the OAE began its investigation. Even then,

respondent maintained that he did so willingly, notwithstanding the Court's directive in Fortunato. [12]

Moreover, when respondent executed the final HUD-1 forms, confirming that they were true and accurate accounts of the transactions, and affirming that he had "caused or will cause the funds to be disbursed in accordance with this statement," he violated RPC 8.4(c), because in all twenty-seven transactions, the HUD-1 was neither an accurate account of the transaction, nor were the funds disbursed in accordance with the final HUD-1 form, which respondent was aware of by virtue of his classification of the fees as a "service fee."

[12] For completeness, we observe that HUD regulations no longer govern this topic. Instead, as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, the Consumer Fraud Protection Bureau (CFPB) regulations now govern. The comment upon 12 C.F.R. § 1026.19(e)(3)(1) agrees with our determination and respondent's ethical obligations as an attorney:

> 2. Charges "paid by or imposed on the consumer." For purposes of § 1026.19(e), a charge "paid by or imposed on the consumer" refers to the final amount for the charge paid by or imposed on the consumer at consummation or settlement, whichever is later. "Consummation" is defined in § 1026.2(a)(13). "Settlement" is defined in Regulation X, 12 CFR 1024.2(b). For example, at consummation, the consumer pays the creditor $ 100 for recording fees. Settlement of the transaction concludes five days after consummation, and the actual recording fees are $ 70. The creditor refunds the consumer $ 30 immediately after recording. The recording fee paid by the consumer is $ 70.
>
> [Comment 2 upon 12 C.F.R. § 1026.19(e)(3)(1) Supplement I — Part II of V (current through December 8, 2021).]

As a result of the OAE's demand audit into respondent's bookkeeping, respondent admitted that he committed multiple recordkeeping infractions, as well as negligent misappropriation, in violation of RPC 1.15(d) and R. 1:21-6.

In sum, we find that respondent violated RPC 1.5(b); RPC 1.8(a)(1); RPC 1.8(a)(2); RPC 1.15(a); RPC 1.15(b); RPC 1.15(d); and RPC 8.4(c). The only remaining issue for our determination is the appropriate quantum of discipline to be imposed for respondent's misconduct.

Generally, a reprimand is imposed for recordkeeping deficiencies that result in the negligent misappropriation of client funds. See, e.g., In re Mitnick, 231 N.J. 133 (2017) (as the result of poor recordkeeping practices, the attorney negligently misappropriated more than $40,000 in client funds held in his trust account; violations of RPC 1.15(a), and RPC 1.15(d); significant mitigation included the attorney's lack of prior discipline in a thirty-five-year legal career) and 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).

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, a violation of RPC 1.5(b); he also 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, a violation of RPC 1.5(b); concurrent conflict of interest also found; 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, a violation of RPC 1.5(b); he also failed to communicate with the client and failed to explain the method by which a contingent fee would be determined; no prior discipline).

Discipline greater than an admonition has been imposed when an attorney engages in multiple business transactions without the informed consent of the client, aggravating factors are present, or the attorney is guilty of additional ethics infractions. See, e.g., In re Futterweit, 217 N.J. 362 (2014) (reprimand imposed on attorney who agreed to share in the profits of his client's business, in lieu of legal fees, without first advising the client, in writing, of the desirability of seeking the advice of independent counsel and obtaining the client's written consent to the transaction; violation of RPC 1.8(a); the attorney also violated RPC 1.5(b) by failing to provide the client with a writing setting

forth the basis or rate of his fee; in aggravation, we noted that the attorney had given inconsistent statements to the district ethics committee, that he had received an admonition for failure to communicate with a client, and that he had never acknowledged any wrongdoing or showed remorse for his conduct); and In re Kazer, 189 N.J. 299 (2007) (reprimand for attorney who made nineteen loans to eleven clients; altruistic motivations considered in mitigation).

It is well-settled that, absent egregious circumstances or serious economic injury, a reprimand is the appropriate discipline for a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). See also In re Rajan, 237 N.J. 434 (2019) (the attorney engaged in a conflict of interest and an improper business transaction with a client by investing in a hotel development project spearheaded by an existing client; no prior discipline); In re Drachman, 239 N.J. 3 (2019) (the attorney engaged in a conflict of interest by recommending that his clients use a title insurance company in eight, distinct real estate transactions, without disclosing that he was a salaried employee of that company; no evidence of serious economic injury to the clients; the attorney also violated RPC 5.5(a)(1) by practicing law while ineligible to do so; no prior discipline); and In re Allegra, 229 N.J. 227 (2017) (the attorney engaged in a conflict of interest by engaging in a sexual relationship with an emotionally vulnerable client; the attorney also engaged in an improper business transaction with the same client

by borrowing money from her; he promptly repaid all the funds and had no prior discipline).

For respondent's most egregious misconduct, Fortunato is the seminal case. In that case, the attorney received a censure for, among other violations, collecting estimated recording costs from clients or third parties, paying the actual recording costs associated with the transactions, but keeping the balance of the excess recording costs rather than distributing the funds to appropriate recipients. Just like respondent, Fortunato attempted to characterize those excess funds as a "service fee."

Again, like respondent, Fortunato also was guilty of misrepresentation by failing to disclose the purported service fees on the final settlement statement to the clients. In four matters, Fortunato retained excess amounts that totaled more than $1,600. He also negligently misappropriated client funds by failing to timely deposit a certified check in connection with a closing, which resulted in a $38,456 overdraft in his trust account and the invasion of $237,513.60 in client funds, maintained on behalf of forty-two clients.

Because Fortunato characterized his retention of excess fees as a "service fee" and maintained that his practice represented the rule, not the exception, among closing attorneys, we believed that he may have engaged in the practice on prior occasions. Thus, in addition to directing Fortunato to return the

identified excess fees to the appropriate parties, we directed that he review his records for the last seven years to identify any other closings in which he overstated and retained fees and costs that differed from the amounts set forth in the closing statements.

More recently, the Court also imposed censures in two additional matters for nearly identical misconduct. See In re Li, 239 N.J. 141 (2019), and In re Masessa, 239 N.J. 85 (2019).

In Li, from 2009 through 2016, in connection with his transactional real estate practice, the attorney collected inflated, "flat" recording fees from his clients and improperly retained the excess recording fees, in addition to his agreed fee listed on the settlement statement form. The attorney did not have his clients' authorization to retain the excess fees. During the relevant period, the attorney knowingly overcharged 738 clients for recording costs totaling $119,660.

In all the transactions, the attorney knew that the final settlement statement was not an accurate account of the transaction and that the settlement funds were not disbursed in accordance with the final settlement statements. The attorney also charged other improper fees to his clients, described in the settlement statements as "title binder review fees" of $100 and "legal documentation and notary fees" of $50. The attorney admitted that those costs,

totaling $66,450, were excessive and were included in the flat legal fee he had charged the clients for the transactions. Finally, the attorney admitted that he committed multiple recordkeeping violations.

In Masessa, from 2010 through 2017, the attorney engaged in the systematic practice of overcharging recording costs and retaining excess funds as the settlement agent in real estate closings, without client authorization. Over the seven-year period, the attorney's misconduct affected hundreds of real estate clients. During the same time frame, he signed hundreds of settlement statements, confirming their accuracy. In all the transactions, the settlement statements were neither an accurate account of the transactions nor true reflections of the disbursement of settlement funds. The attorney, thus, admitted that he had systematically violated RPC 1.15(b) by retaining the inflated recording costs, instead of promptly notifying his clients or third parties of his receipt of funds to which they were entitled and by failing to promptly disburse those funds to them. He further admitted that, by executing the settlement statements in the transactions, he had engaged in a pattern of misrepresentation. The attorney overcharged and retained costs totaling $76,254.

Respondent repeatedly attempted to distinguish his misconduct from the misconduct we found in Masessa because he "only" retained $4,318 in excess fees, whereas Masessa retained more than $76,000 in excess fees. We reject

respondent's argument because the amount of the ill-gotten profit is only relevant in terms of aggravation, not whether the conduct was unethical.

Indeed, although the Court imposed a censure on both Li and Masessa as a matter of stare decisis, it cautioned that, in the future, the purposeful, systematic, and unauthorized practice of retaining excess recording fees in real estate transactions would be met with more stringent discipline.

Here, respondent's misconduct was discovered in 2016, following the OAE's receipt of notice of an overdraft in respondent's ATA. During the OAE's investigation, the OAE determined that respondent had retained excess recording fees in twenty-seven real estate matters. Twenty-four of the transactions occurred prior to and contemporaneous with the Court's 2016 Order in Fortunato. However, three of the real estate transactions in which respondent retained excess recording fees occurred post-Fortunato. All twenty-seven transactions occurred in advance of the Court's 2019 announcements in Li and Masessa that "in the future, attorneys who engage in the purposeful, systematic, and unauthorized charging and retention of excess recording fees, or the implementation of other deceptive, income-generating practices, may be subject to a greater level of discipline." Masessa, 239 N.J. at 86; Li, 239 N.J. at 142.

Nevertheless, following the Court's adoption of our decision in Fortunato, the bar was on notice that claiming the retention of an excess recording fee was

a "service fee" would not pass muster. Now, we are faced with the decision regarding how to treat an attorney who retained excess recording fees between the Court's adoption of our decision in Fortunato and the Court's explicit re-articulation of Fortunato's holding in Li and Masessa.

Here, respondent was before us because he deliberately devised a system whereby he provided legal representation and settlement services to his clients in real estate transactions. He has admitted that he asked clients to select the company he owned to serve as settlement agent. He also admitted that clients usually have agreed to use Real Abstract because clients are ill-informed about which companies to use for those services.

Thereafter, respondent collected both a legal fee and a settlement agent fee in his representation of his clients. Not satisfied with those two fees, respondent, in twenty-seven matters, systematically collected estimated recording fees and retained the excess fees once a deed or mortgage was recorded. Respondent attempted to brand the excess fee as a service fee, which clients allegedly verbally agreed to pay him. Respondent's service fee, which was unknown to his clients at the time of closing, ranged from $55 to $330 to travel to the locality to record the property documents. Respondent's staff admitted that Real Abstract would retain the difference between the estimated

and actual recording fee, no matter how much or how little work went into the recordation of a deed.

Post-Fortunato, respondent was on notice that his practice of retaining excess fees was, at the very least, unethical and warranted a censure but would be met with "more severe discipline" in the future. Nevertheless, respondent continued his practice, in three matters, under the guise of retroactively charging clients an unknown service fee.

There are no mitigating factors to consider.

In aggravation, respondent is before us a second time for recordkeeping violations and negligent misappropriation, despite previously correcting his recordkeeping practices and hiring ethics counsel to guide him.

Worse still, this is the second time respondent is before us for irregularities arising from the joint operation of his title company, Real Abstract, and his law practice. It is clear that respondent has not learned how to manage the tension between ethically representing, as an attorney, a client in a real estate transaction, and functioning as a settlement agent for that same client.

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

Thus, considering the totality of respondent's misconduct, we determine that a three-month suspension is the appropriate quantum of discipline for respondent's misconduct.

Members Boyer, Joseph, and Petrou voted to impose a censure.

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 Matthew William Woitkowski
Docket No. DRB 21-158

Argued: October 21, 2021

Decided: December 22, 2021

Disposition: Three-month suspension

Members	Three-Month Suspension	Censure
Gallipoli	X	
Singer	X	
Boyer		X
Campelo	X	
Hoberman	X	
Joseph		X
Menaker	X	
Petrou		X
Rivera	X	
Total:	6	3

Johanna Barba Jones
Chief Counsel