Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-258
District Docket Nos. XIV-2019-0245E and
XIV-2021-0417E

In the Matter of	:
Stephen E. Smith	:
An Attorney at Law	:

Decision

Argued: February 17, 2022

Decided: May 26, 2022

Ryan J. Moriarty appeared on behalf of the Office of Attorney Ethics.

Fredric L. Shenkman appeared on behalf of respondent.

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

This matter previously was before us at our November 18, 2021 session, as a post-hearing appeal from a determination of the District IIIB Ethics Committee (the DEC) to dismiss the ethics complaint. We determined to treat the matter as a presentment and to bring it on for oral argument. The formal

ethics complaint charged respondent with having violated RPC 1.5(a) (charging an unreasonable fee); RPC 1.15(b) (failing to promptly deliver to the client funds that the client is entitled to receive); and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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

Respondent earned admission to the New Jersey bar in 1980. He has no disciplinary history. At the relevant times, he maintained a law office in Toms River, New Jersey.

On January 13, 2021, the parties entered a Joint Stipulation of Facts, as follows.

On January 7, 2019, the Office of Attorney Ethics (the OAE) conducted a random compliance audit of respondent's financial books and records. As a result of the audit, the OAE discovered that, when respondent served as a settlement agent in real estate matters, he systematically failed to refund monies he received, in escrow, in excess of the actual recording charges necessary to close those transactions.

On June 14, 2019, the OAE sent a letter to respondent, to which it attached a copy of our decision in In re Fortunato, 225 N.J. 3 (2016) (censure for attorney who engaged in the systematic, unauthorized retention of excess recording fees, couched as "service fees," in addition to his legal fee; the attorney also prepared

and executed inaccurate HUD-1s, in repeated violation of RPC 8.4(c); in mitigation, the attorney asserted that "I have seen many other attorneys do this, and I believe it may be the rule among [transactional real estate] attorneys rather than the exception;" the Court ordered that the attorney review his real estate closing records for the last seven years and return all excess recording costs to the aggrieved parties). Pursuant to Fortunato, the OAE directed respondent to review his real estate matters for the preceding seven years and to provide proof of reimbursement of the excess amounts to all relevant parties.

On June 26, 2019, respondent provided the OAE with his review of his real estate matters completed during the requested period. He also provided the OAE with proof he had refunded the excess recording fees to his clients.

Concerning his retainer agreements, respondent maintained that "[a] small number of clients do not appear to have received one. Most of them were past clients while some were inadvertent omissions."[1] Included in his submission to the OAE was his standard engagement letter, which, he asserted, disclosed to his clients, in Section III, paragraph (h), that he would retain the difference between the estimated and actual recording fees as a "service fee" for recording the documents. Paragraph (h) stated:

[1] Although respondent admitted that, in some instances, he failed to provide the rate and basis for his fee, in writing, in implicit violation of RPC 1.5(b), the OAE did not charge respondent with having violated that Rule.

> Recording and transmittal fees; ($100.00 to $400.00 per document). This fee represents the actual fee paid to the county clerk for recording your documents plus a document transmittal fee and a processing fee paid to this office. As the actual fee paid to the county clerk is determined by the number of pages in the document the actual amount of each of these fees cannot be determined until we have the documents in this office.
>
> [S¶9; Ex.2; Ex.3.][2]

On February 13, 2020, respondent appeared at the OAE's office for a demand interview. During that interview, respondent admitted that he made no specific calculation made to determine what service fee his office would charge to transmit and process the documents in each transaction. Rather, respondent conceded that his service fee was whatever funds remained after payment of the recording fee. Respondent characterized this practice as a "convenient way to handle the flat fee."

Nonetheless, sometime in 2016, respondent created a second engagement letter that he claimed was designed for use with his clients who were first-time homebuyers.[3] Section III, paragraph (h) of that letter differed from respondent's

[2] "S" refers to the January 13, 2021 joint stipulation of facts.
"Ex." refers to the exhibits admitted during the ethics hearing.
"HPR" refers to the hearing panel report, dated June 2, 2021.

[3] Notably, that same year, the Court issued its decisions in In re Rush, 225 N.J. 15 (2016), and In re Fortunato, 225 N.J. 3 (2016), and made clear that excess recording fees must be refunded to the relevant parties.

standard fee agreement, in that it added to the end of paragraph (h) the following: "Any excess charge will be refunded to you." Respondent explained to the OAE that he had started to provide this updated engagement letter to first-time homebuyers, due to the expectation that they would have limited funds and increased expenses. Respondent admitted, however, that, from 2016 to 2018, the engagement letter intended for first-time homebuyers was sent to all clients, not just first-time homebuyers. Therefore, the non-first-time homebuyer clients who received this version of the engagement letter were unaware that respondent intended to keep, as a service fee, the difference between the estimated and actual recording fees.

Ultimately, at the OAE's direction, respondent identified fifty-four matters in which he had retained the difference between the estimated and actual recording fees, in addition to his disclosed legal fee.[4] He admitted that, in some matters, the difference between the actual and estimated recording fees that he

[4] As discussed in greater detail below, the DEC sorted the clients into two groups according to which engagement letter respondent had used. "Cohort A" referred to those clients who had received the engagement letter used before 2016, which did not refer to a refund. "Cohort B" referred to those clients with whom respondent utilized the engagement letter that referred to the refund of excess charges.

Although fifty-four matters were mentioned in the stipulation of facts as cases in which respondent retained excess recording fees, the ethics hearing and the hearing panel report focused only on the twenty-seven clients identified in Cohorts A and B. There is no explanation for the exclusion of the remaining twenty-seven matters; however, because the stipulation indicated that the identified cases were cases in which the service fee respondent retained was greater than the cost to record the closing documents, we infer that respondent underestimated the recording costs in the remaining twenty-seven cases.

had retained was "excessive." Further, in his written reply to the ethics grievance, respondent admitted that he has been retaining excess recording fees for "at least twenty years."

In the matters respondent identified, the excess recording fees were not disclosed as "service fees" being paid to respondent on the form HUD-1 settlement statements.[5] In matters in which respondent served as the settlement agent, he or his paralegal drafted the form HUD-1 settlement statements; in all such matters, respondent reviewed the HUD-1 settlement statements. The form HUD-1 included a certification of the settlement agent, stating that it was a true and accurate account of the transaction and that the settlement agent caused or will cause the funds to be disbursed in accordance with the statement. Although respondent signed the forms as the settlement agent, he failed to disburse the funds consistent with the form HUD-1 settlement statements. Instead, he retained the difference between the estimated and actual recording costs.

After the OAE audit, respondent initially did not issue refunds for any matters he handled between 2012 and 2015, under the theory that his standard engagement letter for that period purported to disclose that he would retain the excess recording fees. However, when the OAE examined the seventeen matters

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

in which respondent acted as settlement agent between 2012 and 2015, it discovered that, in most instances, respondent's "service fee" was greater than the actual recording fee:

Cohort A				
Client Matter	**Year**	**Estimated Recording Fee**	**Actual Recording Fee**	**Amount Respondent Retained**
Skolsky	2012	$750	$210	$540
Uriate & Morales	2012	$350	$180	$170
Bodziak	2012	$550	$180	$370
Devesly	2013	$600	$180	$420
Hunter	2013	$750	$240	$510
Lowe	2013	$350	$190	$160
McKeon & Bacigalupi	2013	$600	$170	$430
Scott	2013	$410	$190	$220
Sidoli	2014	$550	$160	$390
Agostini	2014	$400	$190	$210
Belcaro	2014	$500	$200	$300
Canty	2014	$400	$200	$200
Jiminez-Rios	2014	$500	$270	$230
McClendon & Glenn	2014	$750	$480	$270
Schoenberg	2014	$500	$240	$260
Berrios Sevilla	2015	$650	$310	$340
Marianaccio	2015	$550	$340	$210
Total		$9,160	$3,930	**$5,230**

For the matters handled from 2016 through 2018, respondent retained the amounts shown, from the following clients:

Cohort B				
Client Matter	**Year**	**Estimated Recording Fee**	**Actual Recording Fee**	**Amount Respondent Retained**
Cicetti	2016	$300	$230	$70
Costello	2016	$100	$90	$10
Durieux & Muragila	2016	$295	$230	$65
Florio	2016	$290	$270	$20
Garlington-Green	2016	$300	$270	$30
Cunningham	2016	$270	$220	$50
Rohan	2017	$416	$216	$200
Richmond & Krenick	2017	$550	$230	$320
Pruchnik	2017	$430	$210	$220
Devesly	2018	$400	$235	$165
Total		$3,351	$2,201	**$1,150**

After the OAE filed the ethics complaint underlying this matter, and in consultation with counsel, respondent made proper refunds to all affected clients.

At the April 7, 2021 ethics hearing, respondent testified that the focus of his legal practice from 2012 through 2018 was residential real estate matters. Respondent testified that the HUD-1 forms he prepared in connection with each real estate closing did not contain an estimated recording fee because he routinely used a "flat fee" number on the HUD-1 to represent the recording fee. Thus, he simply transferred the "flat fee" listed on his engagement letter to the

HUD-1 form.[6] Accordingly, the excess fees respondent retained were not disclosed on the HUD-1 forms.

Additionally, respondent testified that, from 2012 through 2015, he provided all real estate clients with an engagement letter that included a "service fee" as part of the estimated recording fees. Thereafter, he created the second engagement letter stating that excess recording fees would be returned to the client, intending to use it for his clients who were first-time homebuyers. When asked if he inadvertently used his original engagement letter for non-first-time homebuyers, he stated he had, but that his intent was to use the second engagement letter. He also acknowledged that he never intended to provide non-first-time homebuyers with the new engagement letter offering a refund of excess recording fees. Moreover, respondent testified that he was not aware of the error until the OAE's auditor asked about his failure to refund excess recording fees in closings that occurred after 2016.

Respondent conceded that, although no client raised an objection to his retention of the excess recording fees, he did not disclose to the clients that he

[6] Although respondent testified that he used the fee he estimated in his engagement letter as the flat fee on the HUD-1 form, his engagement letters inform clients that the recording fees range from $150 to $300 per document and that the actual fee was determined by the number of pages in a document. Moreover, because respondent did not offer clients a number more specific than $150 to $300 per document, depending on the number of pages in the document, his testimony was inconsistent with his actual practice of frequently estimating fees well above $300.

had, in fact, retained the excess funds. Indeed, respondent explained that he did not proactively discuss his engagement letter with his clients; rather, he sent the engagement letter to clients for their review with an invitation to contact respondent with questions.

As mentioned above, the DEC began its consideration of this matter by identifying two "cohorts" of affected clients:

> (1) Cohort A: 17 clients, whose service fees were retained, pre-2015, and for whom their respective portion of the $5,230.00 in service fees has been returned by respondent; and
>
> (2) Cohort B: 10 clients, whose service fees respondent mistakenly retained during the period from 2016-2018, and for whom their respective portion of the 1,150.00 in service fees has been returned by respondent.
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> [HPR at 4-5.]

The DEC determined that the seventeen Cohort A clients pre-dated Fortunato and its progeny. Further, the DEC pointed to In re Masessa, 239 N.J. 85, 86 (2019), in which the Court cautioned that, in the future, a greater level of discipline may be warranted where attorneys engage in purposeful and unauthorized retention of recording fees. Because respondent's retention of recording fees in excess of the reported amount on the settlement statements for Cohort A occurred prior to Fortunato, and because respondent returned to each

client its portion of the $5,230 in excess fees that he had retained, the DEC determined that:

> the imposition of discipline would be an [affront] to our ban on ex post facto laws, as in the case here, where the transactions in question occurred before Fortunato. Critically, the all-important doctrine of stare decisis is necessarily prospective rather than retrospective.
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> [HPR at 5.]

As to the ten Cohort B clients, the DEC determined that, from 2016 through 2018, respondent had mistakenly and unintentionally provided all of his clients with an engagement letter that was intended only for first-time homebuyers. This engagement letter stated the service fee would be refunded but, in practice, respondent failed to do so. Indeed, during his February 13, 2020 interview with the OAE, respondent stated that client refunds were dependent upon the type of engagement letter they received; therefore, if a client received an incorrect engagement letter that did not state a refund would be provided, then that client did not receive a refund, no matter their home-buying experience, and no matter respondent's intention.

However, only after the OAE apprised respondent of his mistake did he refund to each of the ten affected clients their portion of the $1,150 that he had retained, purportedly due to their receipt of an incorrect engagement letter. The DEC found credible respondent's testimony and evidence that, although the

service fee charged to these ten clients was excessive, the overreaching was unintentional. The DEC further determined that, where disciplinary cases hinge upon the reasonableness of fees, discipline is imposed when the fees charged were either intentional or were so reckless as to give rise to an inference of intention. In re Ort, 134 N.J. 146, 157 (1993). Conversely, the DEC found that, in the instant matter, respondent mistakenly had failed to refund the service fees. The DEC found that no other evidence was presented of systemic manipulation or misuse of the fees and costs associated with the real estate closings because no client complained of respondent's practice.[7] According to the DEC, absent such evidence of negligent settlement statements and/or systemic practices of an intentional overreaching, no discipline should be imposed for respondent's retention of the Cohort B clients' service fees.

Moreover, in mitigation, the DEC noted that respondent has an unblemished forty-year career at the bar; he kept a total of $6,380 from twenty-seven clients, which it considered de minimis; and the recording fees reflected on a form HUD-1 statement "can only be estimated at the time the document is prepared and signed."

Therefore, the DEC determined to dismiss the complaint.

[7] The DEC did not square its perception that respondent did not systemically manipulate the fees with respondent's admission that he had been retaining excess fees for twenty years. Further, the absence of a client complaint is not dispositive of whether misconduct occurred.

In his submission to us, respondent relied upon his April 26, 2021 written closing statement that he previously had submitted to the DEC, along with his reply to the OAE's appeal of the DEC's decision. In his brief, respondent attempted to distinguish his conduct from that of the attorneys in Fortunato and Masessa. As to Fortunato, respondent asserted that Fortunato had no colorable right to retain the difference between the estimated recording fees and the actual recording fees. In the instant matter, respondent argued that his first fee agreement clearly allowed, and put clients on notice, that respondent would retain the difference between the two. As such, respondent thought he had disclosed his intent and, therefore, had permission to retain the difference as his transmittal and processing fees.

As to the non-first-time homebuyers who signed the second fee agreement, respondent claimed he mistakenly thought they had signed the first fee agreement. As such, his understanding, at that time, was that he was permitted to retain the difference between the estimated and actual fees because of the language in his engagement letter. Thus, unlike Fortunato, respondent did not attempt to "hide" his conduct or otherwise not disclose it. Upon learning, during the OAE's investigation, of his incorrect use of the second fee agreement, respondent refunded the inappropriately held service fees.

Further, respondent argued that, in Masessa, the attorney admitted conduct "that affected hundreds of real estate clients" and did not have "specific authorization"[8] from his clients to retain the difference between actual and estimated recording costs. He contended that here, "hundreds" of clients were not impacted. Thus, respondent argued that, but for the inadvertent and limited use of the second retainer for non-first-time homebuyers, he had disclosed his intent to his clients and therefore, had permission to retain the amounts in excess of the actual recording fees. Respondent also attempted to distinguish several other cases on the general proposition that those matters involved significantly larger numbers of clients and much greater amounts retained. As such, respondent argued that, because there was no intent to overreach, no discipline should be imposed for any perceived violation of RPC 1.5.

Similarly, respondent asserted that he had made an unwitting mistake in sending the second fee agreement to clients for whom it should not have been

[8] This "specific authorization" language is found in the Court's Order in In re Masessa, 239 N.J. at 86:

> And the parties having stipulated that respondent did not have the specific authorization from his clients to retain the difference between actual and estimated recording costs; that he drafted and signed hundreds of HUD-1s, confirming they were true and accurate accounts of the transaction and the disbursement of funds, which were misrepresentations; and that by retaining the difference between the estimated and actual recording costs, he failed to disburse the funds consistent with the HUD-1 statements.

used. He proceeded to argue that he could not have known that a party had an interest in the excess recording fees, which would be implicit in finding a violation of RPC 1.15(b). Nonetheless, although respondent conceded his belief that the difference between the actual and estimated recording fees that he had kept for himself was "excessive" in some cases, he remained firm in his assertion that, "it was not that [respondent] didn't have a right to retain the difference, rather, it was, in certain instances, the amount retained as a transmittal fee was disproportionate." From 2012 through 2015, the excessive and disproportionate fee retention occurred in seventeen cases where he kept $5,230 for himself rather than refund the money to his clients. However, following the OAE's audit, he refunded the money to his clients.

Moreover, respondent asserted that he lacked the intent required to find a violation of RPC 8.4(c), because his provision of the second fee agreement was inadvertent. Again, because the first fee agreement contained a disclosure statement, respondent believed he had given proper notice and was entitled to the excess recording fees.

Finally, respondent asserted that the amount listed on the HUD-1 forms for the recording fee was accurate because he did not segregate the portion of the fee as the actual fee and his service fee. Thus, respondent argued that the HUD-1 forms did not contain misrepresentations of the recording fee. Indeed,

respondent maintained that his practice of serving as both the settlement and disbursement agent is common in the field and colloquially known as the "North Jersey" way of conducting a real estate closing. He also added that he obtained his form retainer agreement from a real estate law and practice manual and has modified it throughout the years that he has practiced real estate law.

In mitigation, respondent argued that he has more than forty years at the bar without a disciplinary infraction; has a good reputation and character; has shown remorse and has readily admitted to the conduct; no client was harmed because he returned the funds; and the circumstances giving rise to the misconduct are unlikely to occur again because he no longer serves as both settlement and disbursement agent. Thus, respondent asserted that an admonition was the appropriate quantum of discipline for his misconduct.

With respect to the RPC 1.5(a) allegations, respondent contended that, although he admitted that, in seventeen cases, he kept an excessive transmittal fee in addition to his legal fee, the Rule requires a showing that the attorney intended to overreach. Notwithstanding respondent's admission that he withheld an excessive fee from his clients, he maintained that the admission was not an assertion that he intended to overreach because he did not calculate the difference between the actual and estimated recording fees – his practice was simply to keep the difference, no matter the amount, as a matter of

"convenience." Thus, because respondent did not know the amount of the service fee he kept in each case, he could not have intended to overreach.

Additionally, respondent argued that he did not violate RPC 1.15(b) because the complaint did not clearly plead that his violation was the result of the timing of his refund of the excess fees to clients in Cohort A or Cohort B. Regardless of the context, respondent argued that the analysis is the same and that, because he did not intend to retain the excess fees, he did not violate the Rule. Furthermore, respondent argued that any violation of the Rule was de minimis and his clients have been made whole by virtue of his refunds following the OAE's audit.

Similarly, respondent argued that he did not violate RPC 8.4(c) because, at the time he signed the HUD-1 forms for his clients, he did not know the actual recording fee, so his use of a flat fee was not a misrepresentation. He attempted to distinguish his conduct from the misconduct we found in Fortunato and Masessa because, according to respondent, he was authorized to retain the difference in the actual and estimated fees in seventeen cases, and those cases were decided prior to our decision in Fortunato. Respondent was silent regarding the excess fees he retained in the ten Cohort B cases that post-dated Fortunato.

At oral argument before us, respondent asserted that he disclosed to his clients that he would retain any amount above the estimated recording fee and,

thus, did not commit misconduct. Respondent conceded that he erred in the letters he sent to first-time homebuyers after 2016, but maintained that he eventually refunded the excess fees, so there was no harm to any client.

Ultimately, respondent argued that the OAE had an obligation to prove intent for each RPC, had not done so, and the DEC was therefore correct to dismiss the complaint.

On January 10, 2022, the OAE notified us that it would be relying upon its May 10, 2021 written summation submitted during the ethics hearing. In its summation and at oral argument before us, the OAE argued that respondent's misconduct is not a matter of first impression and that respondent's practice of retaining the difference between actual and estimated recording fees has repeatedly been found to be a violation of the Rules of Professional Conduct.

The OAE further argued that respondent's "service fee" had no correlation to the "minimal work necessary" to record the real estate closing documents and maintained that respondent was the individual who estimated what the recording fee would be and had access to information that would enable him to more accurately estimate the recording fee and include it on HUD-1 forms. Nevertheless, the OAE contended that respondent's use of a "flat fee" for recording fees, in addition to the legal fee he charged clients, systematically increased the funds that he received from his clients.

The OAE disagreed with respondent's argument that no client objected to his retention of the excess fees, and emphasized that respondent admitted that he never proactively reviewed his engagement letters with his clients; therefore, his clients' silence could not be construed as a lack of an objection. Indeed, had respondent reviewed his engagement letters with clients, the OAE asserted that respondent would have realized the claimed error in his letters that began in 2016, rather than as a result of the OAE's audit, in January 2019.

Ultimately, the OAE argued that respondent's misconduct did not differ from the misconduct we addressed in Fortunato; Masessa; In re Li, 239 N.J. 141 (2019); and In re Esposito, 240 N.J. 174 (2019) (censure imposed following a motion for discipline by consent wherein the attorney admitted he violated RPC 1.15(b) and RPC 1.15(d) after he failed to timely disburse excess fees collected in five real estate matters; the attorney admitted that, through an oversight, he had failed to diligently reconcile each transaction as it took place and did not intend to retain client funds that were not the result of a legitimate charge). Therefore, the OAE maintained that the DEC improperly determined that it failed to prove by clear and convincing evidence that respondent committed misconduct when he failed to refund excess recording fees to his clients.

Additionally, the OAE argued that respondent's retention of the excess recording fees violated RPC 1.5(a). Respondent's own admission, the OAE

asserted, supported its position that the fees were excessive given the minimal amount of work necessary to record real estate closing documents. For example, the OAE argued that the minimal effort it took for respondent to transport the closing documents to the county clerk's office did not justify the transmittal fee. That task also required no legal acumen to complete. Indeed, the OAE asserted that respondent's legal experience would not justify the retention of a potentially higher legal fee since the monies retained were intended to pay for tasks that required no legal work. Therefore, the OAE contended that, not only was respondent's assertion that there must be an intent to overreach in a fee for there to be an RPC 1.5(a) violation incorrect, but it was belied by the minimal, non-legal work required to complete a closing. Thus, respondent's fee was unreasonable.

Therefore, the OAE argued that a censure was appropriate for respondent's misconduct. According to the OAE, there is no reason to depart from the discipline imposed in Fortunato, Li, and Masessa. Furthermore, the OAE argued that, unlike the attorneys in those cases, respondent also violated RPC 1.5(a) as a result of his systematic practice of retaining excess recording fees. Finally, the OAE renewed its observation that the facts did not appear to demonstrate that respondent's misconduct occurred after the Court issued its

decision in Fortunato and, thus, would not warrant discipline greater than a censure.

Following a de novo review of the record, we determine that, contrary to the DEC's findings, the record shows by clear and convincing evidence that respondent violated RPC 1.5(a); RPC 1.15(b); and RPC 8.4(c).

Respondent admitted that his routine practice for the past "at least twenty years" has been to retain excess recording fees, a practice which we and the Court have repeatedly found violates the Rules of Professional Conduct.

Respondent's defenses to his systematic and improper practice fail. First, respondent asserted that, in the seventeen Cohort A matters, his engagement letter provided notice to his clients that he would keep the excess recording fees as a service fee. Although respondent has attempted to distinguish our decision in Fortunato by claiming that he provided notice to his clients at the outset that he would keep the excess recording fees as a "service fee," that position is not supported by New Jersey disciplinary jurisprudence. In fact, we have explicitly rejected an attorney's attempt to legitimize his practice of inflating and subsequently retaining excess recording fees by claiming his clients were aware of his practice. See In re Weil, 214 N.J. 45 (2013) (finding that preparation of the HUD-1 is not an "invitation for creativity," where the attorney had utilized it to generate additional fees).

To be sure, respondent's defense underscores that there can be no exception to the prohibition against attorneys retaining excess recording fees. In one respect, respondent attempted to distinguish his conduct from the misconduct we found in Masessa because, as respondent argued, Masessa conceded he did not have "specific authorization" to retain the excess recording fees. Respondent's argument misses the mark. Masessa would not have escaped discipline had he obtained his clients' "specific authorization" to keep the excess recording fees because at the time Masessa, as in respondent here, entered into a fee "agreement," none of the parties knew what the excess charge would be, and therefore, the clients could not authorize Masessa to retain the excess recording fees. Thus, in this matter, and in future matters, even if an attorney obtains claimed "specific authorization" to retain as-yet unknown fees from a client in order to perform the non-legal work of recording a deed, we cannot and will not view that conduct as ethical.

To be clear, it is misconduct for an attorney to attempt to subvert the clear holding of Fortunato by including language in a retainer agreement purporting to legitimize the unethical practice of retaining excess recording fees. To allow otherwise would leave the process ripe for abuse and the public vulnerable to exploitation. If an attorney wishes to be compensated for the non-legal work of recording a deed, then the attorney must make that cost explicit.

Even if notice to the client could serve as a defense or exception to Fortunato, respondent's purported notification here would have been inadequate. The section in respondent's fee agreement that purportedly gave the client notice is entitled "Recording and transmittal fees; ($150.00 to $300.00 per document)." This section merely informs the client that recording and transmittal fees will range between $150 and $300, per document. Not only is there no notice of respondent's intention to keep any excess fees but, in thirteen of seventeen matters, respondent's estimate of the recording fees was higher than the range set forth in the fee agreement.

Further still, the purported notice on respondent's engagement letter closed with the affirmation that, "[a]s the actual fee paid to the county clerk is determined by the number of pages in the document the actual amount of each of these fees cannot be determined until we have the documents in this office." It is unreasonable to expect that clients, without any further explanation, would understand that statement as notice to them that respondent would keep the excess fees, which ranged between $200 and $500 of his estimate. Indeed, respondent testified that his practice was merely to send to a client his fee agreement, and he only explained the provision to the client if the client called to ask questions. Therefore, 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 what the amount of the service fee would be, either in advance or afterward.[9] Thus, because respondent's clients were without the information necessary to authorize respondent's retention of a service fee, his conduct violated the Rules.

In view of respondent's routine practice of keeping the excess fees, no matter the amount, we conclude that respondent intended to covertly pad his legal fees, a violation of RPC 1.5(a). Indeed, respondent himself characterized the fees as "excessive."

We likewise reject respondent's second defense, that he accidentally retained excess recording fees in the ten Cohort B matters, because, in error, the clients received the engagement letter that did not contain notice that he would keep any excess recording fees. Respondent contended that he intended to send this engagement letter only to first-time homebuyers. Respondent would have us believe that he suddenly determined, after more than twenty-five years of real estate transactions, that he would refund the excess recording fees to first-time homebuyers, out of a recognition that they had limited resources. However, we

[9] As noted by one prominent commentator, "'[t]he lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services.'" Kevin H. Michels, New Jersey Attorney Ethics, § 33:3-2(d)(1) at 838-839 (2022) (quoting ABA Formal Opinion 93-379 (December 6, 1993) at 10. "Failure to disclose any of the components of a bill, including but not limited to a profit margin on reimbursable services and materials, might be construed as overreaching in violation of RPC 1.5(a) or as conduct involving dishonesty, fraud, deceit or misrepresentation in violation of RPC 8.4(c)." Id. at 839 (emphasis added).

view this pivot as a tacit admission that the excess recording fees were not, in fact, legal fees, and that he knew he was causing his clients financial harm. Nor can we overlook that respondent's realization regarding the financial status of first-time homebuyers and determination to refund the excess fees occurred during the same year the Court decided Fortunato. Thus, we reject the accident defense.

Respondent informed the OAE, during his demand interview, that transactional real estate is thirty percent of his practice. Yet, despite respondent's purported intent with respect to first-time home buyers, he was seemingly unaware, until the OAE's involvement, that he failed to refund the excess recording fees in the ten matters in Cohort B. Thus, respondent's failure to refund the excess recording fees to any of his clients until the OAE became involved is a violation of RPC 1.15(b).

Finally, respondent never disclosed the purported "service fees" to his clients or third parties and misrepresented the amounts required for recording fees on the final form HUD-1, in violation of RPC 8.4(c). For example, in most of the seventeen matters in Cohort A, respondent retained fees in excess of the actual recording fees, derived from his intentional over-estimation of the filing fees, which were not reflected on the HUD-1.

Overall, respondent's arguments do not radically differ from those of the many attorneys who have come before us and unsuccessfully claimed that excess recording fee retention in violation of Fortunato can be justified on the basis that it is a standard practice.

In sum, we find that respondent violated RPC 1.5(a); RPC 1.15(b); and RPC 8.4(c). The sole issue remaining for determination is the appropriate quantum of discipline for respondent's misconduct.

For respondent's most egregious misconduct, Fortunato is the seminal case.[10] In that case, the attorney was censured 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."

Fortunato, like respondent, also was guilty of misrepresentation by failing to disclose the purported service fees to the clients on the final settlement

[10] Although Fortunato is the seminal case for misconduct involving the retention of excess recording fees, we previously have imposed discipline for the same misconduct. See In re Rush, 225 N.J. 15 (2016) (reprimand for attorney who, in two real estate matters, improperly retained more than $700 in excess recording fees, and falsely attested that the HUD-1 forms he had signed were complete and accurate accounts of the funds received and disbursed in connection with those transactions; in mitigation, he stipulated to his misconduct and had no prior discipline).

statement. 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 imposed censures in matters for nearly identical misconduct. See In re Li, 239 N.J. 141 (2019), and In re Masessa, 239 N.J. 85 (2019). See also, In the Matter of Miriam B. Weinstein, DRB 20-349 (May 24, 2021); In re Weinstein, 246 N.J. 329 (2021) (censure for attorney who systematically retained the difference between estimated and actual recording fees as additional legal fees, which she failed to disclose on the HUD-1 settlement statements in the real estate transactions; the attorney also was guilty

of recordkeeping violations); In re Brenner, 244 N.J. 267 (2020) (attorney censured for systematically retaining the difference between estimated and actual recording fees as additional legal fees, which he characterized as a "service fee;" the attorney refunded the excess fees prior to the date of his first investigative contact with the OAE); In re Huneke, 241 N.J. 545 (2020) (in a default matter, attorney censured for retaining the difference between estimated and actual recording fees as additional legal fees; the attorney also had a disciplinary history and failed to cooperate with disciplinary authorities).

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 systematically had 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.

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. Because the period of misconduct in the instant matter occurred prior to the Court's pronouncement in this regard, more stringent discipline is not warranted. Therefore, respondent's misconduct warrants a censure, even when considering his unblemished forty years at the bar.

Indeed, in a recent matter, we determined that, on balance, notwithstanding the attorney's long-standing, unblemished legal career, and as a matter of stare decisis, a censure was appropriate for misconduct in real estate transactions, spanning from late 2013 through mid-2017, involving improper charges for recording fees in seventy-seven matters, totaling $22,148. In the Matter of Gerard A. Del Tufo, DRB 21-071 (September 23, 2021) (slip op. at 28). That censure came with a warning that, should the attorney resume his unethical practice in respect of real estate transactions, more severe discipline will follow. Id. Del Tufo remains pending with the Court.

Therefore, in the instant matter, pursuant to Li and Masessa, respondent's charging and retention of excessive fees, alone, warrants a censure, even considering his long and otherwise unblemished career.

Member Campelo did not participate.

Member Hoberman 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 Stephen E. Smith
Docket No. DRB 21-258

Argued: February 17, 2022

Decided: May 26, 2022

Disposition: Censure

Members	Censure	Did Not Participate	Absent
Gallipoli	X		
Singer	X		
Boyer	X		
Campelo		X	
Hoberman			X
Joseph	X		
Menaker	X		
Petrou	X		
Rivera	X		
Total:	7	1	1

Johanna Barba Jones
Chief Counsel