Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 22-028
District Docket Nos. XIV-2019-0645E
and IV-2021-0900E

In the Matter of	:
Michael S. Wittenberg	:
An Attorney at Law	:

Decision

Decided: August 1, 2022

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

This matter was before us on a certification of the record filed by the Office of Attorney Ethics (the OAE), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with having violated RPC 1.15(a) (negligent misappropriation of client funds); RPC 1.15(d) (failure to comply with the

recordkeeping requirements of R. 1:21-6); and RPC 8.1(b) (two instances – failure to cooperate with disciplinary authorities).[1]

On March 21, 2022, respondent filed a motion to vacate the default and to file an answer out of time in this matter (MVD), which we denied on April 21, 2022. For the reasons set forth below, we now determine that a reprimand, with conditions, is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1985 and has no disciplinary history. At the relevant times, he maintained a law practice in Jersey City, New Jersey.

On June 22, 2020, in a separate matter (Docket No. DRB 20-020), we considered a certification of the record after respondent failed to cooperate with the underlying ethics investigation and failed to file a verified answer to the formal ethics complaint filed in connection with two separate client grievances.

In that matter, on June 5, 2020, counsel for respondent filed a motion to vacate the default, alleging, as to prong one, that respondent's failure to file a verified answer to the District Ethics Committee's (the DEC's) May 13, 2019 formal ethics complaint was due to respondent's 2017 cancer diagnosis.

[1] As detailed below, although respondent filed an answer to the formal ethics complaint, the hearing panel chair ultimately struck the answer for failure to comply with R. 1:20-4(e) and permitted the matter to proceed as a default. Accordingly, the OAE amended the complaint to include the second RPC 8.1(b) charge.

Respondent argued that, during the summer of 2018, he underwent chemotherapy and had continued undergoing tests as of the date of his motion. As to prong two, respondent argued that he did not violate any RPCs because his client in the matter had failed to provide him with the discovery he required, despite multiple letters seeking her assistance.

We granted respondent's motion to vacate default and remanded the matter to the DEC for a hearing. We noted that our decision was based on respondent's demonstrated illness during the relevant time frame and his claimed defenses to the ethics charges against him.

PROCEDURAL HISTORY

Turning to the facts of the instant matter, on January 5, 2021, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's office address of record, in Jersey City, New Jersey. The United States Post Office (USPS) did not successfully deliver the certified mail; however, the regular mail was not returned.

On March 3, 2021, the OAE re-served the complaint to respondent at his Jersey City office address of record using United Parcel Service (UPS), instead of the USPS. UPS successfully delivered the complaint.

By letter dated March 26, 2021, transmitted by UPS to respondent's Jersey City address,[2] the OAE informed him that, unless he filed a verified answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record would be certified directly to us for the imposition of discipline, and the complaint would be amended to include a willful violation of RPC 8.1(b). UPS successfully delivered the letter to respondent on March 25, 2021.

On April 9, 2021, respondent filed a verified answer to the formal ethics complaint. On May 10, 2021, the OAE sent respondent a letter informing him that his verified answer was deficient because he had failed to provide a full, candid, and complete disclosure of the facts surrounding the allegations of the complaint, as R. 1:20-4(e) requires. The OAE warned respondent that his failure to provide specific facts in reply to each enumerated paragraph of the complaint would result in the OAE's request that he be prohibited from testifying as to issues where he merely denied, or stated he was without sufficient knowledge to admit or deny, the allegations. The OAE directed respondent to file a conforming answer no later than May 24, 2021.

On November 22, 2021, the OAE filed a prehearing report. In the report, the OAE stated that respondent had not filed a conforming, verified answer to

[2] The March 26, 2021, date was a typographical error. The date should have read March 24, 2021.

the complaint and requested that the hearing panel chair issue an order directing respondent to submit a conforming verified answer by a date certain. The OAE cautioned that, should respondent fail to file an amended, conforming verified answer, it would file a motion to strike respondent's April 9, 2021 answer and submit the matter to us as a default.

Following a January 4, 2022, prehearing conference, at which respondent appeared, the hearing panel chair granted the OAE's request and directed respondent to file a conforming answer no later than January 14, 2022. On January 7, 2022, the hearing panel chair issued a case management order memorializing her directive. Respondent failed to comply with the case management order and did not file a conforming answer.

Consequently, on January 21, 2022, the OAE filed a motion to strike respondent's answer to the formal ethics complaint and to bar respondent from presenting defenses at the disciplinary hearing. In support of its motion, the OAE recounted its efforts, since May 10, 2021, to compel respondent to file a conforming answer to the ethics complaint, to no avail. Relying on In the Matter of Saleemah Malikah Brown, DRB 16-339 (May 31, 2017), and In the Matter of Peter Jonathan Cresci, DRB 18-124 and DRB 18-196 (December 12, 2018), the OAE asserted that respondent's failure to provide any detail in his verified

answer regarding the allegations against him rendered his answer deficient under R. 1:20-4(e).

As we observed in In the Matter of Saleemah Malikah Brown, DRB 16-339 at 10, "R. 1:20-4(e) requires the answer to a formal ethics complaint to set forth, among other things, 'a full, candid, and complete disclosure of all facts reasonably within the scope of the formal complaint.'" Thus, an answer that simply denies an allegation is insufficient. In re Brown, 231 N.J. 166 (2017). Therefore, the OAE filed a motion to strike respondent's non-conforming answer and bar him from offering any defenses.

Respondent neither filed written opposition to the OAE's motion nor filed a conforming answer.

Consequently, on February 15, 2022, following the procedure established in Cresci, the hearing panel chair entered an order striking respondent's answer and prohibiting him from presenting any defenses at the disciplinary hearing.

Accordingly, the OAE certified this matter to us as a default.

On March 3, 2022, Chief Counsel to the Board sent a letter to respondent's Jersey City address, by certified and regular mail, as well as by e-mail, informing him that the matter was scheduled before us on April 21, 2022, and that any motion to vacate must be filed by March 17, 2022. The e-mail was not returned as undeliverable, although no delivery notification was sent by the

destination server. As of the date of this decision, the certified mail had been awaiting delivery scan since March 10, 2022, and the regular mail has not been returned.

Moreover, on March 7, 2022, the Office of Board Counsel (the OBC) published a Notice to the Bar in the New Jersey Law Journal, stating that the matter was scheduled before us on April 21, 2022 and that, unless he filed a motion to vacate the default by March 17, 2022, his failure to answer would be deemed an admission of the allegations of the complaint.

MOTION TO VACATE

On March 21, 2022, the OBC received from Robert J. De Groot, Esq., respondent's counsel, a motion to vacate the default and to file an answer out of time.[3] In order to successfully vacate a default, a respondent must (1) offer a reasonable explanation for the failure to answer the ethics complaint, and (2) assert a meritorious defense to the underlying charges. Generally, if only one of the prongs is satisfied, the motion is denied.

[3] De Groot called the OBC the same day the New Jersey Law Journal published notice of this default and stated that he had been unaware this matter existed, but that he would send a letter of representation. In respondent's prior default matter, mentioned above, De Groot filed, on behalf of respondent, a June 5, 2020 motion to vacate default, which the Board granted. In his moving papers, De Groot also noted that he represents respondent in another legal matter.

As to prong one, respondent claimed that he has suffered from a history of cardiac problems, which began in 2000. Furthermore, respondent asserted that, in mid-2017, "just prior" to the OAE's May 9, 2018 random audit underlying this matter, he was diagnosed with non-Hodgkin's lymphoma. Respondent claimed that, following his diagnosis, he received chemotherapy, which left him exhausted. Respondent did not provide details as to when chemotherapy began or whether it had concluded.[4] However, respondent asserted that, during 2018 through 2019, he devoted his limited energy to representing his clients. Additionally, because "respondent was not accused of misappropriating (nor did he) any monies, he believed that the record keeping [sic] violations were minor and were not of an urgent nature."

Respondent maintained that he cooperated with the OAE's investigation, produced all requested documents, and thereafter, filed a verified answer to the formal ethics complaint. Respondent acknowledged that his answer was nonconforming and that the hearing panel chair had permitted him an opportunity to file an amended answer by January 14, 2022. However, respondent contended that his failure to file a timely and conforming answer was not due to "recalcitrance – but rather because he was a solo practitioner, with

[4] As noted below, in a February 13, 2020 letter respondent sent to the OAE during its investigation, respondent stated that he completed chemotherapy in early 2018.

serious health problems, and was too overwhelmed to timely file a pleading within 10 days of the panel chair's order in January."[5] Respondent also noted that he was busy preparing, with De Groot, for an unrelated legal matter. Furthermore, respondent argued that he filed an answer, and that it was not a "bare bones effort."

In respect of prong two, respondent asserted that he has meritorious defenses to the OAE's allegations. Respondent claimed that the "gravamen" of the OAE's complaint concerns recordkeeping violations. However, respondent claimed that the OAE has acknowledged that recordkeeping violations occur in 99% of all matters, and that we have never disciplined an attorney for recordkeeping violations alone.[6] He, thus, contended that to impose discipline

[5] As explained below, respondent had been on notice, since May 10, 2021, that his answer was nonconforming.

[6] Respondent is incorrect. First:

> [o]ver 40 years after [the New Jersey Random Audit Program] first began, the conclusion is that the overwhelming majority of private New Jersey law firms (98.5%) account for clients' funds honestly and without incident. While technical accounting deficiencies are found and corrected, the fact is that only 1.5% of the audits conducted over that period have found serious ethical violations, such as misappropriation of clients' trust funds.
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> [Charles Centinaro, 2021 State of the Attorney Disciplinary System Report (May 20, 2022) at 45.]

Second, the Board has imposed discipline ranging from an admonition to a censure solely for recordkeeping violations. See, e.g., In re Druz, 216 N.J. 163 (2013); In re Weber, 221 N.J. 508 (2015); In re Michals, 224 N.J. 457 (2015); In re Druz, 231 N.J. 190 (2017); In re Morton, 231 N.J. 130 (2017); In re Damian, 238 N.J. 240 (2019); In re Garruto, 241 N.J. 549 (2020); In re

on him would be arbitrary and tantamount to subjecting nearly every attorney in New Jersey to discipline.

Although respondent conceded that he "technically" committed recordkeeping violations, he maintained that, without his cooperation, the OAE would not have discovered his recordkeeping deficiencies. Respondent argued it is, thus, "counterintuitive" for the OAE to allege that he violated the recordkeeping Rules when he had maintained and provided the records that proved his violation of RPC 1.15(d). Moreover, respondent pointed to the records he provided to the OAE as proof that he cooperated with the OAE's investigation.

Finally, respondent asserted that he did not negligently misappropriate client funds both because his bank had begun charging fees it previously had not assessed, and because he held sufficient personal funds in his attorney trust account (ATA) to cover the deficits caused by the bank. Without offering proof, respondent argued that he corrected the "de minimis" loss of funds due to the bank charges and two bank errors. Respondent added that he hired a certified public accountant (CPA) to review his records to determine whether a negligent misappropriation of client funds occurred and to help respondent bring his books

Lawrence, 241 N.J. 540 (2020); In re Jeney, 243 N.J. 195 (2020); In re Esposito, 240 N.J. 174 (2019).

into compliance with the recordkeeping Rule.

The OAE did not file opposition to respondent's MVD.

Following our review of the MVD, we determined that respondent offered neither a reasonable explanation for his failure to file a conforming answer to the ethics complaint nor meritorious defenses to the underlying charges.

As a preliminary matter, we continue to be sympathetic to respondent's unfortunate cancer diagnosis. Our sympathy weighed heavily in our consideration of his prior, successful MVD, two years ago, in connection with DRB 20-020. However, respondent's plight with the disease through 2019 cannot be used as an excuse for his failures to comply with the Rules in 2021. Moreover, respondent's March 21, 2022 MVD is strikingly similar to the MVD he filed after he had failed to file an answer, in May 2019, in his previous default matter.

Thus, in the instant matter, respondent had a heightened awareness of the importance of filing a conforming answer. Nevertheless, despite being warned by the OAE in May 2021, November 2021, and January 2022 that he needed to file a conforming answer or would be subject to a motion to strike his answer, respondent now claims that the ten days the hearing panel chair afforded him, in January 2022, to file a conforming answer was insufficient due to his busy law practice and his coordination with De Groot in his defense of a different

legal matter.

Thus, we determined that respondent's MVD provided no reasonable explanation for his failure to file a conforming answer to the ethics complaint. First, although he filed an answer, except for one paragraph, respondent's replies to the enumerated paragraphs simply either admitted, denied, or stated that he is without sufficient knowledge to either admit or deny the facts. He offered no information whatsoever that would satisfy the R. 1:20-4(e) standard or the requirements of In re Gavel, 22 N.J. 248, 263-264 (1956).

Second, respondent repeatedly was warned that he needed to file a conforming answer. The OAE cautioned respondent that, if he failed to do so, it would move to strike his answer and bar his defenses at the disciplinary hearing. Yet, despite knowing for eight months that he was obligated to file a conforming answer, respondent took no action. Respondent's failure to act also included a failure to inform De Groot, his counsel in a different matter (and who represented him in the prior MVD), that this matter was pending.

Third, respondent asserted in his MVD that he analyzed this matter and, despite the OAE's allegation that he negligently misappropriated client funds, he determined this case was nothing more than allegations of recordkeeping violations for which there was no urgency to act. Respondent's decision to focus on what he perceived as a more serious legal matter did not absolve him of his

duty to file an answer to the ethics complaint in this matter.

Thus, the same arguments that persuaded us to grant respondent's MVD regarding his failure to answer a May 2019 complaint, did not pass muster as a reasonable explanation for his failure to file a conforming answer to the formal ethics complaint in this 2021 matter.

In order to have prevailed in his MVD, respondent also was required to satisfy prong two of the MVD standard, demonstrating that he possessed meritorious defenses to the ethics complaint. Stated bluntly, he failed to do so. To the contrary, respondent conceded that the recordkeeping violations that led to the OAE's complaint persist today.

Furthermore, despite respondent's statements that he fully cooperated with the OAE and provided all the requested records, he has not done so, as detailed below, despite his obligation to cooperate with New Jersey disciplinary authorities. Therefore, we determine that respondent has failed to assert meritorious defenses to the allegations set forth in the complaint and, thus, has failed to satisfy prong two.

Accordingly, we determined to deny respondent's MVD and, on April 21, 2022, entered a letter decision to that effect.

THE ALLEGATIONS OF THE COMPLAINT

Moving to our review of the record, we find that the facts recited in the complaint support all the charges of unethical conduct. Respondent's failure to file an answer to the complaint is deemed an admission that the allegations are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Specifically, on May 9, 2018, the OAE conducted a random compliance audit of respondent's financial books and records at his law office in Jersey City, New Jersey. By letter dated June 5, 2018, the OAE informed respondent that, during the random audit, it found recordkeeping deficiencies that required corrective action to conform with R. 1:21-6, including: inactive balances left in his ATA, a violation of R. 1:21-6(d); the total trust funds on deposit exceeded the total trust obligations, a violation of R. 1:21-6(d); improper ATA and attorney business account (ABA) designations, a violation of R. 1:21-6(a)(2); failure to perform monthly three-way reconciliations, a violation of R. 1:21-6(c)(1)(H); and improper image-processed ABA checks, a violation of R. 1:21-6(b).

Following the random audit, the OAE made several unsuccessful attempts to obtain from respondent information sought via its June 5, 2018 letter. On December 31, 2019, after respondent failed to cooperate with the random audit

unit, the matter was docketed for disciplinary investigation.

Consequently, on January 10, 2020, the OAE sent respondent a letter directing that he produce attorney financial records for February 2016 through January 2020. The OAE further directed respondent to provide proof that he resolved $33,847.43 of previously unidentified client funds and $108,718.54 of inactive ATA balances.

On February 11, 2020, respondent provided the OAE with financial records from his ATA and ABA for the years 2016 through 2019, including journals and client ledger cards. In the letter, respondent represented to the OAE – without correspondingly providing proof – that he had disbursed $34,219.39 of the $108,718.54 in inactive ATA balances to twenty-six clients. Additionally, respondent stated that, despite internet, postal, and Department of Motor Vehicles searches, he was unable to locate nine clients, for whom he held a total of $8,536.79. Respondent expressed a future intention to file certifications to deposit the $8,536.79 with the Superior Court Trust Fund Unit after he attempted "one more round of searches." Finally, respondent informed the OAE that he continued to hold $65,962.36 on behalf of a client because he was still in the process of determining the "accurate lien[holder] for [M]edicare and/or health insurance."

With respect to the $33,847.43 in unidentified client funds, respondent claimed – again without providing proof – that he had identified five clients for whom he held $3,800.51. Additionally, respondent disbursed to seven clients $6,769.56 of the unidentified funds and had identified one client for whom he held $9,347.83 pending resolution of outstanding medical bills. Respondent claimed that he was still unable to earmark approximately $13,000 of the unidentified funds in his ATA and would again "attempt to confirm that all checks previously written have been cashed."[7]

Finally, in his letter to the OAE, respondent maintained that, although the OAE had directed him to produce his financial records for 2019, he had been unable to do so because he was "experiencing health issues that took [his] attention away" from providing the records.

On February 13, 2020, respondent sent the OAE another letter explaining that the OAE should disregard his February 11, 2020, correspondence because he sent those records in error. Respondent claimed that, in his effort to "get the first package into the box," he inadvertently had sent a draft of his correspondence.

In the second letter, the information respondent provided to the OAE regarding the $108,718.54 in inactive ATA balances remained the same.

[7] More accurately, respondent failed to account for $13,929.53 in unidentified client funds.

However, with respect to the unidentified client funds in respondent's ATA, the February 13, 2020, letter clarified that, of the seven clients to whom he had disbursed funds, four clients' funds were held in escrow, while the remaining three clients had not cashed their checks. Respondent also added that he identified an additional client to whom he had sent a $15,393.36 check that was never cashed. However, on June 13, 2019, respondent issued the client a replacement check, which the client cashed.

Also in his letter, respondent asserted that he had failed to provide his financial records following the OAE's random audit because he had been diagnosed with cancer in 2017 and had completed chemotherapy in early 2018. Despite completing chemotherapy, respondent was "then subjected to 8 months of follow-up testing with regard to a benign tumor that was discovered on a follow-up scan."

On March 3, 2020, after reviewing the documents respondent had provided, the OAE sent him a letter informing him that he had failed to provide the requested three-way reconciliations and requested that he provide updated ledger cards for his active clients only. The OAE also requested that respondent provide proof that he had resolved the $33,847.43 of unidentified funds and the $108,718.54 of inactive trust ledger balances in his ATA. The OAE requested that respondent provide specific dates he returned funds to clients, along with

the check numbers for each client to whom he remitted payment. The OAE also requested that respondent provide legible ATA deposit slips and client ledger cards.

On May 15, 2020, respondent sent a letter to the OAE stating that, due to the COVID pandemic, he was requesting a thirty-day extension of time to provide the documents the OAE sought. However, with his May 15, 2020, letter, respondent provided legible deposit slips and client ledger cards, as the OAE requested.

Thereafter, on June 15, 2020, respondent provided the OAE with proof that he resolved the previously unidentified funds and inactive ATA balances. However, with respect to monthly three-way reconciliations, respondent submitted what he referred to as "reconciliations on each ledger card," in which respondent kept running balances on each ledger card but did not perform a reconciliation in accordance with R. 1:21-6(c)(1)(H).

On August 19, 2020, the OAE conducted a demand audit of respondent's books. During the demand audit, the OAE discovered that respondent's bank had made two errors, which went undetected due to respondent's poor recordkeeping. In one matter, on October 6, 2018, respondent issued a check to a client in the amount of $5,436.22. However, the bank negotiated the check for $5,486.22, which created a $50 shortfall in respondent's ATA. In the second

matter, respondent issued a check to another client in the amount of $8,030.87. However, the bank negotiated the check for $8,030.97, which created a $0.10 shortfall in respondent's ATA.

Separately, the OAE learned that, from July 31, 2019 onward, PNC bank had begun charging respondent monthly "corporate account analysis charges" (bank charges) against his ATA.[8] Because respondent did not perform monthly three-way reconciliations, he was not aware of the bank charges until the OAE alerted him, during the demand audit. Although respondent maintained a $100 reserve of personal funds in his ATA, by October 31, 2018, due to the undetected bank errors, his personal funds had been reduced to $49.90. By October 31, 2019, there was a negative balance of $15.48 in the personal funds respondent held in his ATA. Therefore, beginning in November 2019, ATA transactions began to invade funds respondent was required to hold, inviolate, for clients.

Respondent's bank records reflected that, from October 31 through December 31, 2019, he held funds for at least nine different clients. Therefore, after the bank charges and errors depleted the $100 reserve of personal funds

[8] Beginning with his February 2019 ATA bank statement, respondent was informed that, beginning on June 19, 2019, or June 20, 2019, his account would change and there would be various service charges associated with the account. For example, PNC Bank stated it would charge respondent $0.75 for a deposit ticket; $0.20 for each check paid; $0.15 per each ACH credit/debit received; $0.15 for each item deposited; and either $0.12 per $100 or $0.10 per $100 for different types of cash deposits. This information was carried over on each monthly statement through June 2019.

respondent maintained in his ATA, the fees the bank continued to charge to respondent's ATA, between October 31 and December 31, 2019, resulted in the invasion of the funds belonging to at least nine different clients.[9]

Following the demand audit, by letter dated August 24, 2020, the OAE directed respondent to produce, no later than September 8, 2020: (1) proof that he deposited personal funds in his ATA to cover the bank charges and the two bank errors, and (2) three-way reconciliations of his ATA from May through July 2020, inclusive of bank statements, client ledger cards, receipts and disbursement journals, and his checkbook ledger.

Approximately three weeks later, the OAE left respondent a voicemail message and sent him an e-mail requesting proof that he had contacted PNC Bank about correcting his ABA check images. The same date, respondent sent a reply e-mail indicating that he received the OAE's messages and would provide the additional documents.

On October 1 and October 5, 2020, the OAE communicated with respondent and directed that he produce the documents it had requested.

[9] The OAE mistakenly stated that the bank first charged respondent bank fees on October 31, 2019. Respondent's ATA bank statements reflect that, for several months, respondent was warned that, beginning in June 2019, the bank would assess service charges for different types of transactions. PNC Bank began assessing fees against respondent's ATA, which steadily depleted the $100 reserve of personal funds respondent maintained in the ATA, as shown from the July 31, 2019 ATA statement, forward.

On October 6, 2020, respondent sent a reply e-mail indicating that he was "unexpectedly out of the office with some personal issues over the past couple of weeks," but that he would send the requested documents by October 10, 2020.

On October 13, 2020, the OAE again sent respondent an e-mail inquiring when it would receive the overdue documents it had requested.

To date, respondent has failed to provide proof that he has replenished funds in the ATA to cure the past invasions of client funds, and has failed to provide the OAE with the requested updated bank records or proof that his financial books and records are in compliance with R. 1:21-6.

Based on the foregoing facts, we find that respondent violated RPC 1.15(d) by wholly failing to maintain proper financial records, including monthly reconciliations of his accounts, as R. 1:21-6 requires. Consequently, respondent allowed more than $130,000 in entrusted funds to languish in his ATA for years, in the form of inactive client balances and unidentified funds; he held trust funds on deposit which exceeded his total trust obligations; he failed to properly designate his ATA and ABA; and he did not ensure his ABA checks were properly image-processed. Respondent's recordkeeping violations, specifically his failure to perform three-way reconciliations, resulted in his negligent misappropriation of the funds of at least nine clients, a violation of RPC 1.15(a).

Additionally, despite the OAE's multiple requests, respondent's failure to provide the OAE with proof that he brought his records into compliance with R. 1:21-6, or had cured his negligent misappropriation of client funds, violated RPC 8.1(b).

Finally, the OAE followed the procedures promulgated in Cresci, repeatedly warning respondent that his verified answer was deficient and that he needed to file a conforming answer. He failed to do so. The OAE subsequently filed a successful motion to strike respondent's deficient answer. Respondent still failed to file a conforming answer. Thus, respondent's failure to file an amended, conforming answer violated RPC 8.1(b).

In sum, we find that respondent violated RPC 1.15(a); RPC 1.15(d); and RPC 8.1(b) (two instances). The sole issue left for our determination is the appropriate quantum of discipline 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 Osterbye, 243 N.J. 340 (2020) (the attorney's poor recordkeeping practices caused a negligent invasion of, and failure to safeguard, funds owed to clients and others as a result of real estate transactions; his inability to conform his recordkeeping practices despite multiple opportunities to do so also violated RPC 8.1(b)); In re Mitnick, 231 N.J. 133 (2017) (the attorney was reprimanded for violations of

RPC 1.15(a) and (d); as the result of poor recordkeeping practices, the attorney negligently misappropriated client funds held in his trust account; no prior discipline in thirty-five years at the bar); In re Rihacek, 230 N.J. 458 (2017) (the attorney was reprimanded for negligent misappropriation of client funds held in the trust account, various recordkeeping violations, and charging mildly excessive fees in two matters; no prior discipline in thirty-five years at the bar).

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

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

Based on the above precedent, a reprimand is the baseline sanction for respondent's combined misconduct resulting in negligent misappropriation.

However, to craft the appropriate discipline, we also consider aggravating and mitigating factors.

In aggravation, "a respondent's default or failure to cooperate with the investigative authorities acts as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced." In re Kivler, 193 N.J. 332, 342 (2008) (citations omitted). Accordingly, the enhanced sanction of a censure may be warranted.

However, in mitigation, respondent has practiced for thirty-seven years with no final discipline entered against him.

Therefore, on balance, we determine that the aggravating and mitigating factors are in equipoise and that a reprimand is sufficient discipline to protect the public and preserve confidence in the bar.

Considering the nature of respondent's misconduct, we determine to impose conditions. Respondent's persistent and egregious recordkeeping deficiencies, which resulted in more than $130,000 in entrusted funds languishing in his ATA for years, warrant the requirements that respondent: (1) provide proof, within thirty days of the Court's disciplinary Order in this matter, that he has replenished his ATA to cure his past invasions of client funds; (2) complete two recordkeeping courses pre-approved by the OAE, with proof of completion to be submitted to the OAE within ninety days of the Court's

disciplinary Order in this matter; and (3) submit monthly reconciliations of his attorney accounts to the OAE, on a quarterly basis, for a two-year period.

Chair Gallipoli and Member Menaker were recused.

Member Joseph 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
Peter J. Boyer, Vice-Chair

By: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael S. Wittenberg
Docket No. DRB 22-028

Decided: August 1, 2022

Disposition: Reprimand with conditions

Members	Reprimand	Recused	Absent
Gallipoli		X	
Boyer	X		
Campelo	X		
Hoberman	X		
Joseph			X
Menaker		X	
Petrou	X		
Rivera	X		
Singer	X		
Total:	6	2	1

Johanna Barba Jones
Chief Counsel