Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 22-217
District Docket Nos. IX-2019-0906E and XIV-2018-0139E

In the Matter of	:
Evan D. Weiner	:
An Attorney at Law	:

Decision

Argued: February 16, 2023

Decided: May 9, 2023

HoeChin Kim 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 an admonition filed by the District IX Ethics Committee (the DEC). We determined to treat the admonition as a recommendation for greater discipline, pursuant to R. 1:20-15(f)(4). The formal ethics complaint charged respondent with having

violated RPC 1.5(a) (fee overreaching); 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 7.5(e) (impermissible firm name or letterhead).

For the reasons set forth below, we 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 2012 and to the New York bar in 2010. He has no prior discipline in New Jersey. During the relevant period, he maintained a practice of law in Manalapan, New Jersey. Currently, respondent is associated with Sheeley, LLP, located in New York, New York.

We now turn to the facts of this matter.

Prior to the ethics hearing, the Office of Attorney Ethics (the OAE) and respondent, through his counsel, entered a stipulation of facts confirming most, but not all, the facts alleged in the complaint. Respondent admitted that his misconduct violated RPC 1.5(a); RPC 1.15(a); and RPC 1.15(d). Respondent denied, however, violating RPC 1.15(d) with respect to the OAE's allegation that he had failed to retain certain law firm financial records for a period of seven years, as R. 1:20-6(c)(1) requires. Respondent also disputed having

violated RPC 7.5(e) by practicing law under the name "Weiner Legal Group." Thus, the January 12, 2021 hearing was limited to these disputed issues and mitigation.

During the relevant period, respondent practiced law as a solo practitioner under the name "Weiner Legal Group, LLC."[1] He maintained his attorney trust account (ATA) and two attorney business accounts (ABAs) at TD Bank.

On February 24, 2016, the OAE conducted a random audit of respondent's financial books and records for the period February 2014 to January 2016. Due to respondent's failure to fully comply with the disciplinary auditor's requests for explanations and records, the audit was continued to November 3 and December 2, 2016. The OAE also expanded the audit period through April 2017. The OAE's audit revealed the following recordkeeping deficiencies:

- Failure to maintain running cash balance in ATA checkbook (R. 1:21-6(c)(1)(G));
- Insufficient detail on client ledger cards (R. 1:21-6(c)(1)(B));
- Client ledger cards with debit balances (R. 1:21-6(d));
- Failure to maintain separate ledger for attorney funds held for bank charges (R. 1:21-6(d));

[1] Respondent admittedly practiced under the name "Weiner Legal Group, LLC" for approximately three years, from approximately October 2013 to September 2016. Although respondent closed his law office in September 2016, he continues to use the firm name for his ATA.

- Failure to maintain separate client ledger cards (R. 1:21-6(c)(1)(B));

- Improper ABA and ATA designations (R. 1:21-6(a)(2));

- Failure to maintain ATA and ABA receipts and disbursements journals (R. 1:21-6(c)(1)(A);

- Failure to conduct monthly three-way reconciliations of ATA (R. 1:21-6(c)(1)(H);

- All funds in attorney's care not deposited in the ATA (R. 1:21-6(a)(1));

- Failure to maintain records for seven years (R. 1:21-6(c)(1)); and

- Unauthorized electronic transfers from ATA (R. 1:21-6(c)(1)(A)).

The OAE's audit revealed that respondent had overcharged forty-seven clients in contingent-fee matters by mistakenly calculating his legal fees on the gross recovery amount instead of the net amount, in contravention of R. 1:20-7(d). Respondent also improperly overcharged clients for certain costs. Consequently, during the audit period, respondent received $22,245.12 in excess legal fees and costs.

Further, the OAE's reconstruction and reconciliation of respondent's records revealed an ATA shortage, totaling $15,946.44, as follows:

CLIENT	BALANCE OF FUNDS
Cappas, Cedry	$8,590
Corzo, Giselle (minor)	$3,750
Fernandez, Hilafrancis	$2,905.19
Grainger, Shaurise	$2,216.22
Gram, Billy	$632.19
Hullet, I.	$20
Hullet, J.	$20
Laconti, Kenneth	$20
TOTAL	**$18,153.60**
Balance on April 30, 2017	$2,207.16
SHORTAGE	**$15,946.44**

The OAE determined that respondent's ATA shortage resulted from negative balances in two client matters, plus respondent's improper practice of electronically transferring his legal fees and costs without annotating the associated client ledgers.

Specifically, on August 19, 2015, in one client matter, respondent disbursed an ATA check, in the amount of $458.66, payable to his client, Rosendo Martinez. The OAE was unable, however, to find a corresponding deposit in the ATA. Thus, respondent's improper disbursement in connection with the Martinez matter created a shortage in the amount of $458.66.

On July 30, 2015, in a second client matter, respondent attempted to deposit a settlement check on behalf of client Luiz Hernandez, in the amount of $8,500. The next day, on July 31, 2015, respondent disbursed a check to his client in the amount of $5,107.07 and disbursed $3,392.93 in fees to himself.

The settlement check, however, was returned on August 4, 2015 for lack of an endorsement. Respondent never corrected the $8,500 shortage because he failed to remediate and re-deposit the settlement check.

Respondent's electronic transfers of his legal fees and expenses, and his failure to record same on client ledger cards or elsewhere, also contributed to the ATA shortage. Specifically, the OAE determined that respondent had created a shortage totaling $6,987.78 via this misconduct. In total, the three negative balances ($8,500 + $6987.78 + $458.44) comprised the $15,946.44 shortfall.

Given the outcome of the audit, the OAE docketed the matter for a disciplinary investigation. On June 14, 2018, the OAE notified respondent of the random audit results, directed him to submit proof that he had reimbursed the forty-seven clients he had overcharged for legal fees and expenses, and directed him to submit proof that he corrected his ATA shortage.

On July 19 and August 20, 2018, respondent complied with the OAE's directives and submitted to the OAE his corrected settlement statements (along with the earlier, incorrect settlement statements), letters of explanation, and disbursement checks demonstrating that he had refunded all the overcharges to his clients. On December 21, 2018, respondent provided the OAE with corrected client ledgers, letters of explanation, and disbursement checks, demonstrating that he had corrected some client shortages in his ATA and disbursed the

remaining funds to his clients. Respondent explained that his delay in correcting the ATA shortage was due to the fact he needed to earn the funds necessary to replenish his ATA.[2]

As of June 1, 2019, however, respondent's ATA balance was $13,471.06 and, on January 12, 2021, respondent confirmed at the ethics hearing that the balance still remained in his ATA. Respondent, thus, admitted that not all the client reimbursement checks had been negotiated.

Because respondent had closed his solo practice of law in New Jersey, the OAE did not require him to submit proof that he had corrected the other recordkeeping deficiencies.

Respondent testified that he had mistakenly calculated his legal fees in contingent-fee client matters based upon the gross, rather than net, settlement amount, based upon his erroneous understanding of how fees should be calculated. Based on his discussions with another attorney, R.S., respondent believed he understood the business side of the law practice and developed a fee agreement, using a form R.S. had obtained from his previous law firm. Respondent admitted he had deducted expenses before calculating his fee:

> The – the way I was led to believe at the time, the fee should be computed, was once we received the balance the fee would come out of the gross, and then expenses

[2] The OAE investigator testified that the previously assigned auditor had concluded that respondent did not commit knowing misappropriation of client funds.

> would be taken out, and of those expenses we were able to bill for certain expenses that the Ethics Committee has informed me you are not allowed to bill for, and then that would result in the net going to the client.
>
> Which led to us underpaying the clients and us taking a larger portion of the settlement fee, which we were not supposed to take.
>
> [T60.][3]

Respondent testified that he now understood that his method had been incorrect and that he has made efforts to refund excess fees to his clients.

In October 2013, approximately one year following his admission to the New Jersey bar, respondent formed Weiner Legal Group, LLC. Respondent testified that he had selected the firm name because, at the time, he had intended that another attorney, the aforementioned R.S., would join his firm upon R.S.'s admission to the New Jersey bar.

Respondent explained that he viewed "legal group" to mean the same as "law firm:"

> We – we came up with the name Weiner Legal Group because my name is Evan Weiner, and legal group I thought was the same as law firm, and I believe Weiner Law Group was already taken, so we – we thought it's

[3] "T" refers to the transcript of the January 12, 2021 ethics hearing.
"OAES" refers to the OAE's February 9, 2021 post-hearing submission.
"OAEb" refers to the OAE's October 20, 2022 brief to us.
"Rb" refers to respondent's January 26, 2023 letter brief to us.

> me, it's gonna be a second attorney, we're gonna have paralegals, secretaries; law group would work.
>
> [T52.]

Respondent testified that, at the time he opened the firm, it was comprised of himself, R.S., and a secretary or paralegal. Because R.S. was not yet admitted to the New Jersey bar, respondent explained that he "did paralegal work, he did some office work, running the office, managing everything that's going on and basic paralegal work."

R.S., however, never obtained admission to the New Jersey bar. Respondent testified that he had frequent discussions with him, inquiring when he would be admitted:

> I had numerous discussions with him about it. He gave me multiple different reasons why, varying from some minor ethics issue related to a possible drunk driving, to character and fitness, to missing paperwork, to – I think he needed a letter from of his professors at the time.
>
> He was never very clear on why he wasn't sworn in, just that he wasn't sworn in while he was working for me.
>
> [T55.]

Respondent explained that he handled all the legal aspects of the firm, including managing the books and records and operating the bank accounts. He admitted, however, that he lacked any experience in this regard and, in

hindsight, acknowledged that he should have hired someone "who knew how to manage the books, because we obviously did it incorrectly."

Respondent admitted he used the firm name, consistently, in every facet of his legal practice, including the firm's correspondence, banking documents, signage for the firm's physical space, and website. Respondent denied intending to mislead clients into thinking his law firm was larger than a solo practice, or to gain a competitive advantage. Rather, he believed the firm's name accurately reflected the type of services his firm provided.

Respondent testified that, in late 2015, or early 2016, he hired a New Jersey attorney, D.J., who worked with the firm until its closure, in September 2016. Respondent also explained that the firm employed a number of secretaries, and one or two paralegals, although he stated that he could not recall their names. Respondent clarified that, from the day the firm opened to the day it closed, the firm continuously employed at least one additional person. Respondent admitted, however, that other than D.J., none were New Jersey attorneys.

Respondent admitted that, despite having received the OAE's June 14, 2018 letter, which notified him that the OAE considered his law firm name to be misleading, in violation of RPC 7.5(e), his ATA remains open under that name.

Respondent further admitted that there were outstanding checks from his ATA that had not yet been negotiated by the payees, and that a balance of approximately $13,000 had remained in his trust account since June 2019.

> Q: Did you then track all of those checks that you issued to make sure they were negotiated by your clients?
>
> A: Are you asking if I asked the clients if they cashed in the checks?
>
> Q: No. I'm asking if you looked in your monthly statements to make sure that all those checks were negotiated against the funds in your attorney trust account.
>
> A: I don't believe they all have at this time, no.
>
> Q: Okay. And it looks as though there's been no activity of that approximate $13,000 balance since June 2019.
>
> A: That appears to be correct, yeah.
>
> Q: Right? Have you – have you tracked your checks to see which ones are still outstanding?
>
> A: I have at one point; I don't recall which ones at this time.
>
> [T76-T77.]

Respondent represented that, upon the conclusion of the disciplinary matter, he intended to turn over to the Superior Court Trust Fund Unit any money remaining in his ATA.

Respondent expressed embarrassment and apologized for his admitted misconduct.

In his January 27, 2021 post-hearing submission to the DEC, respondent admitted to having violated RPC 1.5(a); RPC 1.15(a); and RPC 1.15(d).

Respondent denied, however, violating RPC 1.15(d) by virtue of R. 1:21-6(c)(1). He asserted that R. 1:21-6(c)(1) imposes an affirmative obligation to both "maintain" and "retain" records. The OAE charged him with, and respondent readily admitted to having committed, numerous violations stemming from his failure to "maintain" his financial records, as the Rule requires. Specifically, respondent admitted having failed to maintain three-way reconciliations, ABA or ATA receipts and disbursements journals, or separate client ledger cards.

Respondent disputed, however, also having violated the Rule by failing to "maintain" these records for seven years, as the complaint alleged. First, respondent claimed that this charge amounted to "piling on" because he had already admitted to more specific violations of the Rule stemming from his failure to prepare and maintain these required records during the several years his law firm was in existence. According to respondent, his purported failure to maintain those very records for seven years, as the OAE alleged, was "subsumed within the other provisions of R. 1:21-6 cited in the Complaint." Further,

respondent did not operate his law firm for seven years and, thus, it would have been impossible to maintain records for that period. "Simply stated, the ill-phrased Complaint charging Respondent with violating R. 1:21-6(c)(1) is not supported by clear and convincing evidence and must be dismissed."

Respondent also denied having violated RPC 7.5(e), asserting that his former law firm's name, Weiner Legal Group, was accurate, descriptive of the firm, and not "misleading, comparative, or suggestive of the ability to obtain results." Respondent reiterated his position that he selected the firm name with the expectation that another attorney would join his firm, and that the firm always employed a secretary and paralegals. Further, respondent claimed that term "legal group" was no different than "law firm" or "law office."[4]

Citing disciplinary precedent discussed below, respondent asserted that discipline no greater than a reprimand was required for his misconduct. In

[4] Although not addressed in his post-hearing submission, respondent also had alleged in his December 6, 2019 prehearing memorandum that, pursuant to R. 1:19A-2, the OAE lacked prosecutorial authority to charge respondent with having violated RPC 7.5(e). The previously assigned hearing panel chair disagreed and, in a December 20, 2019 case management order, concluded that "the OAE does have jurisdiction relating to the respondent's alleged advertising violations involving the respondent and will permit testimony and evidence concerning same to be offered at the hearing." Subsequently, the ethics hearing was postponed as a result of the COVID pandemic and, in the interim, a new hearing panel chair was appointed. On November 18, 2020, respondent submitted his second amended verified answer, continuing to assert the OAE's lack of jurisdiction as an affirmative defense. An amended case management order was entered on December 18, 2020. The amended order did not expressly address the jurisdictional issue, stating only that the prior order was "incorporated herein by reference but also superseded by this Order to the extent it is in conflict" with anything herein.

mitigation, respondent emphasized (1) his unblemished ethics history; (2) his cooperation with the OAE's audit and ensuing investigation; (3) his inexperience at the time of the misconduct; (4) his expectation that J.S. would join the law firm; (5) his remorse; and (6) his efforts to make his clients whole (RSp16). These substantial mitigating factors, according to respondent, justify imposition of an admonition.

The OAE, on the other hand, asserted that the R. 1:21-6(c)(1) charge was proper, and did not amount to "piling on" because respondent not only failed to maintain, but also failed to retain, the records required by the Rule.

> Simply stated, because he never created the required recordkeeping records of his (4) journals, complete client ledgers, and monthly three-way reconciliation reports, respondent failed to maintain those records for the years he was engaged in the private practice of law prior to the random audit. In other words, the maximum number of years an attorney must retain records is seven years, and respondent failed to retain the previously noted records for at least 1 to 4 years, after which he was selected for a random audit.
>
> [OAESp4.]

The OAE also pointed out that, despite respondent's criticism of its complaint, he was put on notice during the random audit that, among the recordkeeping deficiencies noted was his failure to keep his law firm records for seven years.

Respondent violated RPC 7.5(e), the OAE asserted, by admittedly practicing law as a solo practitioner under the firm name Weiner Legal Group, from 2013 until late 2015 or early 2016, when he hired D.J., a New Jersey attorney. The OAE also pointed out that respondent failed to mention having hired this attorney during his November 27, 2018 demand interview. The OAE urged that "Weiner Legal Group" is misleading because "group denotes more than one person." The OAE cited, by analogy, In the Matter of Lamiaa Elfar, DRB 20-265 (January 26, 2021), where we determined that the attorney violated RPC 7.1(a)(1) and RPC 7.5(e) for use of "Elfar & Associates, PC" despite not having employed an associate in more than three years.

Citing disciplinary precedent discussed below, the OAE asserted that a reprimand was the proper quantum of discipline for respondent's misconduct. The OAE emphasized the fact that, as of January 12, 2021, respondent still had not disbursed $13,471.06 that remained in his ATA. Accordingly, the OAE urged us to direct respondent to disburse any remaining ATA funds to the appropriate clients or, in the event the clients cannot be located, to the Superior Court Trust Fund Unit.

On January 12, 2021, the DEC conducted a disciplinary hearing and, on August 29, 2022, it issued its hearing panel report. As a preliminary matter, the DEC stated that, although it accepted as true and incorporated into its report all

facts contained in the parties' stipulation of facts, it did not incorporate any assertions that "purport to answer the question as to whether there was a violation of any Rule of Professional Conduct."

The DEC found, by clear and convincing evidence, that respondent violated RPC 1.5(a); RPC 1.15(a); and RPC 1.15(d).

The DEC determined, however, that respondent did not separately violate RPC 1.15(d) by failing to retain records for seven years, since his law firm had not operated for seven years. Further, although the DEC concluded respondent had violated RPC 1.5(a) by his admitted practice of charging his contingent fee clients in excess of that permitted by the Rules, it declined to conclude that a violation of R. 1:21-7(d), in and of itself, amounted to an ethics violation. The DEC also concluded that it lacked jurisdiction to resolve the RPC 7.5(e) charge and, instead, determined that R. 1:19A-4(a) required it to refer the allegation to the Secretary of the Advertising Committee for review and action.

In mitigation, the DEC opined that respondent's misconduct was due to his negligence and was "in no way malicious." The DEC weighed respondent's inexperience, stating he was "a young inexperienced attorney managing a solo practice," who had no prior discipline. Further, it emphasized that this matter originated with a random audit, not a grievance, and that respondent cooperated with the audit. Although the DEC acknowledged that respondent still held over

$13,000 in his ATA, it was persuaded by respondent's explanation that he had held onto the funds until the conclusion of the disciplinary matter.

In view of this substantial mitigation, the DEC recommended that respondent be admonished for his misconduct.

On October 20, 2022, the OAE filed its letter brief with us, noting several exceptions to the DEC's report. First, the OAE urged that the DEC erroneously had concluded that respondent's admissions to having violated the charged RPCs, as contained in his verified answer and the parties' stipulation of facts, were not proof of the alleged violations. Rather, the OAE maintained that respondent's admissions constitute clear and convincing evidence of both the admitted facts and the admitted violations.

Second, the OAE claimed that the DEC wrongly concluded that respondent had not violated R. 1:21-7(d), as it relates to RPC 1.5(a).

Third, the OAE asserted that the DEC incorrectly determined it lacked jurisdiction to resolve the RPC 7.5(e) allegation. In this respect, the OAE pointed out that the prior hearing panel chair had already rejected this argument, following briefing and argument, as expressly memorialized in the December 20, 2019 case management order. Further, the OAE argued that the evidence clearly and convincingly established that respondent practiced law as a solo practitioner, for several years, under the firm name "Weiner Legal Group" and

violated RPC 7.5(e) by doing so.

Finally, the OAE disagreed with the weight accorded by the DEC to respondent's explanation for having not yet disbursed the client funds that remained in his ATA:

> Per the OAE's hearing exhibits, respondent was directed to correct all deficiencies in his attorney trust account, including correcting shortages and correcting one-third contingent fees from the net recoveries, and then to disburse those funds to clients or to the Superior Court Trust Fund if clients could not be found. He was advised of his duties initially in the random audit, then in correspondence from the OAE, and during his audit of November 27, 2018. Indeed, he was requested to provide proof of those disbursements and closure of his attorney trust account. Respondent provided documents showing additional disbursements in December 2018. But, he never provided proof that he had zeroed out his attorney trust account and closed the same.
>
> Thus, in January 2020, the OAE issued an updated subpoena to confirm his attorney trust account had been closed. Respondent's records showed, however, that he was carrying a balance of $13,471.06 from May 31, 2019, to December 31, 2019 (the end date of the subpoena). And, from his testimony at the hearing, he had taken no other actions on the balance in his attorney trust account at the time of the hearing, January 12, 2021. The OAE submits that failure is not inadvertent or unintentional, but knowingly done in the face of a disciplinary investigation and disciplinary hearing.
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> [OAEb4.]

For these reasons, the OAE asserted respondent had violated all the charged RPCs and should be reprimanded for his misconduct.

In his January 26, 2023 brief to us and during oral argument, respondent, through his attorney, urged us to remand the RPC 7.5(e) charge to the DEC for a determination on the merits or, alternatively, to dismiss that charge. Respondent also urged the Board to affirm the DEC's dismissal of the alleged violation of R. 1:21-6(c)(1), stemming from his failure retain records for seven years. For the totality of his misconduct and in view of significant mitigation, respondent maintained that an admonition was the appropriate quantum of discipline.

With respect to the funds remaining in his ATA, respondent stated that, on March 1, 2022, he mailed an affidavit to the Superior Court Trust Fund, in accordance with R. 1:21-6(j), attesting to his due diligence to return the unclaimed funds remaining in his ATA, along with a check. In his letter to us, respondent stated that the Trust Fund had not yet deposited his ATA check for reasons that were unknown; however, during oral argument, respondent informed us he had confirmed with the Superior Court that it had received the check and the funds had been deposited.[5] Respondent stated, however, that he intended to follow up to confirm his ATA had zeroed out.

Respondent asserted that he always had intended to deposit the funds with

[5] Respondent did not attach a copy of his ATA check to the Superior Court Trust Fund to his brief.

the Superior Court, following the conclusion of the ethics proceeding, but had not anticipated that it would take the DEC until August 29, 2022 to issue its decision, nineteen months after the hearing had concluded.

Respondent conceded that the DEC had jurisdiction to determine the advertising violation concerning his use of "Weiner Legal Group, LLC." However, having been deprived of the benefit of the DEC's fact-finding in this respect, respondent urged the Board to remand the RPC 7.5(e) charge to the DEC for a determination on the merits.

Alternatively, respondent urged the Board to dismiss that violation on the basis that use of the term "Group" in his firm name was accurate and descriptive and not "misleading, comparative, or suggestive of the ability to retain results." According to respondent, the terms "Law Firm," "Law Office," or "Legal Group" are interchangeable and acceptable identifying language under the Rule.

Respondent acknowledged that, following the conclusion of his ethics hearing, the Board issued its decision in In the Matter of Moishie M. Klein, DRB 21-041 (July 20, 2021), determining that a solo practitioner's use of the identifying language "law group" in the law firm's name was violative of RPC 7.5(e). Respondent, however, asserted that Klein was distinguishable in the following four respects: (1) the attorney in Klein stipulated that his use of "law group" was violative of RPC 7.5(e) and RPC 7.1 (false or misleading

communication about a lawyer), whereas respondent disputed this allegation; (2) the Board's decision in Klein did not indicate whether that the attorney had employed a person with a juris doctorate degree, like respondent had, or that the attorney had employed secretaries and paralegals, like respondent had; (3) the OAE did not charge respondent with having violated RPC 7.1, as the attorney in Klein had been charged;[6] and (4) unlike respondent, who used his surname "Weiner," the attorney in Klein used his initials "MMK Law Group, Inc." Respondent continued:

> Since Respondent was not operating his law practice as the proverbial "one man band[,]"[] as the attorney in Klein presumably was, describing his "firm" as a "group" was not deceptive or misleading within the meaning of RPC 7.5(e) or a "material misrepresentation" in violation of RPC 7.1 – which the OAE's Complaint failed to cite.
>
> [Rb6-7.]

Respondent urged the Board to adopt the DEC's conclusion that he had selected the named based upon his intention, at the time he selected the name, that there would be more than one attorney associated with his law practice.

Next, respondent urged the Board to adopt the DEC's determination that respondent had not violated the seven-year record retention rule "because his firm did not operate for 7 years." Respondent emphasized to us, during oral

[6] Notably, the attorney in Klein was not separately charged with having violated RPC 7.1.

argument, that he currently maintains his former client files and banking records at his home. However, the OAE's audit focused on his financial records, and, with respect to his failure to maintain disbursement and receipts journals, ledger books, trust ledger cards, and three-way monthly trust reconciliation reports, he stipulated to that misconduct.

For his admitted misconduct, respondent urged imposition of an admonition, emphasizing the following eleven factors in mitigation: (1) no prior discipline; (2) his misconduct was the result of inexperience and sloppiness, rather than nefarious motive; (3) his reasonable, albeit erroneous, belief he was properly calculating his legal fees in contingent fee cases; (4) he was credible; (5) he was remorseful; (6) cooperation with the OAE's investigation; (7) he refunded $22,245.12 to his former clients; (8) he has filed the appropriate affidavit with the Superior Court Trust Fund; (9) he poses no threat of misconduct because he is currently employed with a law firm; (10) he stipulated to the majority of his misconduct, thereby streamlining the ethics proceeding; and (11) his misconduct was not motivated by financial gain.

As a preliminary matter, we determine that the DEC incorrectly concluded that it lacked jurisdiction to adjudicate the OAE's charge that respondent violated RPC 7.5(e). R. 1:19A-4(h) expressly permits a DEC to take jurisdiction of dual grievances related to advertising and other violations of the Rules of

Professional Conduct. That Rule states, in relevant part:

> When the ethical issues presented in a grievance involve both aspects of advertising and other related communications within the jurisdiction of the Advertising Committee and also other ethical issues not ordinarily within its jurisdiction, the Advertising Committee shall take jurisdiction of the entire matter if the grievance is predominantly related to advertising and other related communications within its jurisdiction. In all other cases of dual grievances, the Advertising Committee may accept such grievances. If it accepts such grievances the Advertising Committee shall, to the extent necessary to conclude all aspects of the grievance, exercise all the jurisdiction and functions of a District Ethics Committee. Otherwise, the Advertising Committee may decline jurisdiction in writing and refer its entire file in the matter to the appropriate District Ethics Committee. A District Ethics Committee to whom a dual ethics grievance has been referred in accordance with this section shall take jurisdiction over the entire matter and proceed in accordance with Rule 1:20-3(g). To the extent necessary to conclude all aspects of the grievance so referred, a District Ethics Committee shall exercise all the jurisdiction and functions of the Advertising Committee.
>
> [R. 1:19A-4(h) (emphasis added).]

Where, as here, the allegations of misconduct primarily pertain to respondent's recordkeeping practices, and not the name of his law firm, the OAE properly charged respondent with the advertising violation, pursuant to RPC 7.5(e). The entire matter was not "predominantly related to advertising" and,

thus, the DEC should have exercised the jurisdiction expressly afforded by R. 1:19A-4(h) to resolve all the allegations of misconduct.[7]

Turning to our de novo review of the record, we are satisfied that the DEC's determination that respondent violated RPC 1.5(a), RPC 1.15(a), and RPC 1.15(d) is supported by clear and convincing evidence. We also conclude that the evidence clearly and convincingly establishes respondent's violation of RPC 7.5(e).

Respondent's miscalculation of his attorney fees constituted a per se violation RPC 1.5(a), which prohibits an attorney from charging an unreasonable fee. See, e.g., In re Coleman, 250 N.J. 120 (2022) (censure for attorney, in a default matter, who erroneously calculated his legal fee based upon the gross, rather than net, settlement amount in five instances; other RPC violations found; significant disciplinary history considered in aggravation); In re Weston-Rivera, 194 N.J. (2008) (admonition for attorney who negligently took a contingent fee greater than that to which she was entitled; the excess fee

[7] As the OAE correctly observed in its submission to us, the jurisdictional issue already had been resolved by the prior hearing panel chair and memorialized in the December 20, 2019 case management order. The DEC's hearing panel report does not state why it deviated from the previous case management order in this respect, nor does the amended case management order address this issue. However, in view of respondent's second amended verified answer, it appears likely that the September 2020 amendment to RPC 7.5(e), which resulted in respondent's filing of his November 2020 second amended verified answer, likely contributed to the DEC's determination to revisit the issue, following the hearing.

occurred as a result of her failure to calculate the fee in compliance with R. 1:21-7(d); the attorney also violated RPC 1.15(a) and RPC 1.15(d)); In the Matter of Robert S. Ellenport, DRB 96-386 (June 11, 1997) (admonition for attorney who, with his client's consent, received $500 in excess of the contingent fee permitted by the Court Rules).

Pursuant to R. 1:20-7(d), respondent was obligated to calculate his contingent fee based upon the "net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim . . . ." Had respondent "dishonestly" miscalculated his fee, his conduct may have been found to have been intentional, and subject to a claim of knowing misappropriation. See In re Noonan, 102 N.J. 157, 160 (1986) (stating that, under Wilson, knowing misappropriation of client funds "is the mere act of taking your client's money knowing that you have no authority to do so"). Nonetheless, as Coleman, Weston-Rivera, and Ellenport demonstrate, the improper calculation of a legal fee has been viewed as a mistake or a technical violation of the Court Rules, rather than misappropriation.

Here, nothing in the record suggests that respondent's calculation of his fees was due to anything other than a mistake. The OAE fully considered, but did not charge, knowing misappropriation. Respondent explained that he had mistakenly believed that the fee agreement template he had been following,

which contemplated a fee calculation based upon the gross recovery, was consistent with the Court Rules. Further, the fact that the improper calculations were openly reflected on the clients' original settlement sheets does not tend to support a theory of dishonesty. Rather, it simply reflects the method by which respondent had calculated his fee, albeit incorrectly, in contravention of R. 1:20-7(d). Thus, the charge that respondent violated RPC 1.5(a) is supported by clear and convincing evidence.

RPC 1.15(d) requires all New Jersey attorneys to comply with the provisions of R. 1:21-6, which imposes specific recordkeeping obligations on members of our bar. It is well-settled that R. 1:21-6 requires an attorney to both maintain and retain their financial books and records, or face discipline for either failure. The intent of R. 1:21-6 is to allow the Court, through the OAE, to monitor the financial conduct of New Jersey attorneys through the inspection of these required financial records. Repeatedly, we have emphasized the importance of the attorney's adherence to these recordkeeping Rules, which are non-delegable. In the Matter of Lawrence S. Berger, DRB 20-225 (June 8, 2021) at 61; In the Matter of Thomas Andrew Clark, DRB 16-111 (January 11, 2017) at 58. Indeed, an attorney's adherence to their recordkeeping obligations is of paramount importance to ensure that the purposes of the Rule are achieved, including: (1) the protection of the attorney when their conduct is called into

question; (2) the protection of the public, including the client; and (3) the uniform regulation and oversight of attorneys by the Court and disciplinary authorities.

In furtherance of these goals, R. 1:21-6(c)(1)(A) through (I) identify with specificity the bookkeeping records that the attorney is obligated to both "maintain in a current status" pursuant to generally accepted accounting principles and to, thereafter, "retain for a period of seven years." R. 1:21-6(c)(1). In fact, we have held that the Rule presumes the obligation to create and maintain the records in the first place, so that they are available for inspection by the Court, through disciplinary authorities. In the Matter of Stephen H. Skoller, DRB 11-041 (July 28, 2011), so ordered, 208 N.J. 201 (2011). In addition, the Rule separately imposes the obligation that the attorney retain the delineated records for a period of at least seven years following the transactions and interactions that they memorialize. Otherwise, the intent of the Rule could be compromised by an attorney's retirement, movement to a new firm, or countless other factors.

Here, respondent admitted to having committed numerous recordkeeping deficiencies, in violation of RPC 1.15(d), and the record supports these violations, which include his failure to maintain separate, descriptive client ledger cards; failure to conduct monthly, three-way ATA reconciliations; failure

to maintain ATA or ABA receipts or disbursements journals; unauthorized electronic ATA transfers; improper ATA and ABA designations; and failure to maintain a ledger for bank charges. Thus, respondent violated RPC 1.15(d).

We conclude, however, that respondent did not separately violate RPC 1.15(d) by failing to retain certain records for a period of seven years, as the OAE charged. To be clear, we wholeheartedly agree with the OAE that the duty to retain records for seven years is not obviated when a law firm operates for less than seven years, as the DEC's determination would suggest. Rather, the obligation to retain records is ongoing and continues, regardless of an attorney's unique circumstances, until seven years have lapsed. Thus, a law firm that operates for three years, like respondent's law firm, is obligated to retain the records described in R. 1:21-6(c)(1)(A) through (I) for a period of seven years subsequent to the creation of the relevant records. Indeed, a law firm that operates for just one day is obligated to retain the records enumerated by R. 1:21-6(c), for seven years.

Undoubtedly, attorneys have separate recordkeeping obligations to ***maintain*** records and to ***retain*** those records, as the Rule requires. These distinct obligations serve different, albeit equally important, purposes; namely, by insuring the creation and proper maintenance of required trust and business

account books and records and, separately, the retention of those records for the required period.

However, on the unique facts before us, we cannot find respondent noncompliant with the Rule's retention requirement with respect to documents that he admittedly never prepared in the first place: namely, his three-way reconciliation reports; ABA receipts or disbursements journals; ATA receipts or disbursements journals; and client ledger cards. Rather, the appropriate charge, and to which respondent readily admitted to having violated, was his failure to maintain, or create in the first place, his reconciliations, journals, and separate client ledger.

Furthermore, it is undisputed that, as a result of his inept recordkeeping practices, respondent created a $15,946.44 shortage of client funds in his ATA. Respondent, thus, failed to safeguard funds he was entrusted to hold, inviolate, in violation of RPC 1.15(a). Respondent's shortage resulted from negative balances in in the Martinez and Hernandez client matters, and respondent's failure to properly account for his electronic transfers of fees and costs from the ATA. Respondent's ATA shortage, and resulting invasion of unrelated client trust funds, persisted for more than three years until the OAE directed respondent to correct the shortage.

Next, RPC 7.5(e), governing trade names, permits a law firm to include additional identifying language in its name, such as "& Associates," but "only when such language is accurate and descriptive of the firm." Further, RPC 7.5(e) requires that the trade name not be "misleading, comparative, or suggestive of the ability to obtain results."[8]

Here, we conclude that respondent violated this Rule by identifying his law firm as the "Weiner Legal Group," despite his status as a solo practitioner. The term "group" necessarily conveys more than one attorney. In fact, the Merriam-Webster dictionary defines "group" as "two or more figures forming a complete unit in a composition." See https://www.merriam-webster.com. Thus, identifying his law firm as a "legal group," while he was the firm's only practicing attorney, had the capacity to mislead others into believing the firm was staffed by more than one attorney. Pursuant to precedent, respondent's intent, at the time he selected the firm name, to have another lawyer join his firm is not determinative of whether his firm name was misleading and violative of the Rule.

[8] RPC 7.5(e) was amended, effective September 9, 2020, to remove a prior requirement that any trade name include the name of the lawyer in the firm. The amended Rule also removed language that expressly required that the trade name use terms that "are accurate, descriptive, and informative." Importantly, however, the Rule still requires "accurate and descriptive" language, and language that is "not misleading, comparative, or suggestive of the ability to obtain results." Cf. RPC 7.5(e) (2019).

Specifically, we have found use of "Law Group" by a solo practitioner to violate this Rule of Professional Conduct. See In the Matter of Andrew Giles Freda, DRB 21-052 (September 24, 2021) at 12 (we determined the attorney had violated RPC 7.5(e) by identifying his law firm as the "Freda Law Group, L.L.C.," despite his status as a solo practitioner); In the Matter of Moishie M. Klein, DRB 21-041 (July 20, 2021) at 14 (we determined the attorney had violated RPC 7.5(e) by naming his firm "MMK Law Group Inc.," despite his status as a solo practitioner); In the Matter of Lamiaa E. Elfar, DRB 20-265 (January 26, 2021) (the attorney identified her law firm "Elfar & Associates, P.C.," despite not having employed an associate in more than three years, in violation of RPC 7.1(a)(1) and RPC 7.5(e)).

In sum, we find that respondent violated RPC 1.5(a); RPC 1.15(a); RPC 1.15(d); and RPC 7.5(e). There remains for determination the appropriate quantum of discipline for respondent's misconduct.

Admonitions are typically imposed for the mistaken miscalculation of a contingent fee. See e.g., In the Matter of Jerry Genaro Crapis, DRB 22-008 (March 18, 2022); In re Weston-Rivera, 194 N.J. 511 (2008); In the Matter of Robert S. Ellenport, DRB 96-386 (June 11, 1997).

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 in connection with real estate transactions, in violation of RPC 1.15(a); 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 more than $40,000 in 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); In re Weinberg, 198 N.J. 380 (2009) (the attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account, because he failed to regularly reconcile his trust account records; his mistake when undetected until an overdraft occurred; no prior discipline).[9]

[9] The additional cases cited by the OAE in its summation brief to the DEC are in accord. See In re Winkler, 175 N.J. 438 (2003) (reprimand for attorney who commingled personal and trust funds, negligently invaded client funds, and did not comply with the recordkeeping rules); In re Blazsek, 154 N.J. 137 (1998) (reprimand for attorney's negligent misappropriation of $31,000 in client funds and failure to comply with the recordkeeping rules); In re Goldstein, 147 N.J. 286 (1997) (reprimand for attorney's negligent misappropriation of client's funds and failure to maintain proper trust and business account

(footnote cont'd on next page)

If compelling mitigating factors are present, however, the reprimand may be reduced to an admonition. See In the Matter of Jerry Genaro Crapis, DRB 22-008 (admonition; a random audit revealed a multitude of recordkeeping deficiencies in violation of RPC 1.15(d) and R. 1:21-6, as well as the negligent misappropriation of client funds (RPC 1.15(a)); in two client matters, the attorney also miscalculated his contingent fee based upon the gross, rather than the net, settlement amount (RPC 1.5(a)); we considered, in mitigation, the attorney's unblemished thirty-year career; he stipulated to the misconduct; and the absence of any aggravation); In the Matter of Daniel E. Serata, DRB 20-083 (May 26, 2020) (admonition; a random audit revealed eleven recordkeeping deficiencies, in violation of RPC 1.15(d) and R. 1:21-6; the audit also uncovered negligent misappropriation of client funds in two real estate matters, in violation of RPC 1.15(a); the attorney also maintained more than $26,000 in an unidentified trust account; in mitigation, we considered the attorney's lack of disciplinary history, admission of wrongdoing, and absence of motive for personal gain); In the Matter of Harold J. Poltrock, DRB 13-325 (January 23, 2014) (admonition; a random audit revealed an $11,406.27 shortage in his attorney trust account, a violation of RPC 1.15(a); the shortage went undetected

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records).

because of the attorney's failure to conduct monthly three-way reconciliations and his failure to maintain proper ledger cards for clients and for bank charges; several other recordkeeping deficiencies were uncovered, in violation of R. 1:21-6 and RPC 1.15(d); we considered that the attorney had no discipline since his 1980 admission to the bar, that he had acknowledged his wrongdoing by entering into a stipulation with the OAE, that, once he had become aware of the trust shortage, he promptly reimbursed all missing funds, and that his misconduct did not cause harm to his clients).[10]

Finally, the use of false or misleading communications about the lawyer ordinarily results in an admonition. See, e.g., In the Matter of Lamiaa E. Elfar, DRB 20-265 (the attorney identified her law firm "Elfar & Associates, P.C.," despite not having employed an associate in more than three years, in violation of RPC 7.1(a)(1) and RPC 7.5(e); the attorney also practiced law while ineligible (RPC 5.5(a)(1)) and committed recordkeeping violations; significant mitigation

[10] The following cases cited by respondent are in accord. In re Bardis, 210 N.J. 253 (2012) (admonition; as a result of the attorney's failure to review and reconcile his attorney records, his bookkeeper was able to steal $142,000 from his trust account, causing a shortage of $94,000; mitigating factors were the attorney's deposit of personal funds to replenish the account; numerous other corrective actions; his acceptance of responsibility for his misconduct; his deep remorse and humiliation for not having personally handled his own financial affairs; and his lack of a disciplinary record; we recommended a reprimand); In re Mariconda, 195 N.J. 11 (2008) (admonition; attorney delegated his recordkeeping responsibilities to his brother, a paralegal, who forged the attorney's signature on trust account checks and stole $272,000 in client funds; violations of RPC 1.15(a); RPC 1.15(d); and RPC 5.3(a) and (b); significant mitigation; we recommended a reprimand).

including no prior discipline, the attorney stipulated to the misconduct, and she rectified her mistakes); In the Matter of Raymond A. Oliver, DRB 09-368 (May 24, 2010) (the attorney used letterhead that identified three attorneys as "of counsel," despite his having no professional relationship with them, a violation of RPC 7.1(a); attorney also violated RPC 8.4(d) because two of those attorneys were sitting judges, which easily could have created a perception that he had improper influence with the judiciary; we noted other improprieties); In the Matter of Paul L. Abramo, DRB 08-209 (October 20, 2008) (the attorney continued to use firm letterhead that contained the name of an attorney no longer associated with the firm, a violation of RPC 7.5(c) and N.J. Advisory Committee on Professional Ethics Opinion 215, 94 N.J.L.J. 600 (1971); no prior discipline). But see In the Matter of Raymond Charles Osterbye, DRB 20-057 (July 30, 2020) (reprimand for an attorney who failed to cooperate with the OAE's investigation into his alleged misconduct; attorney admitted to more than twenty separate recordkeeping deficiencies; the attorney's recordkeeping deficiencies resulted in a negligent misappropriation of client funds in four matters; the attorney signed a written fee agreement as "on behalf of Legal Service Center LLC," even though he was no affiliated or associated with a public, quasi-public, or charitable organization, a violation of RPC 7.5(e)).

Based upon the above precedent, the baseline discipline for respondent's negligent misappropriation of client funds, standing alone, is a reprimand. The attorneys in Crapis, Serata, and Poltrock received admonitions for their negligent misappropriation of client funds based upon significant mitigation including their unblemished longstanding careers, a factor we typically accord significant weight, and the absence of any aggravating factors. Respondent, on the other hand, had less than two years at the bar when the misconduct began; further, he committed additional misconduct.[11] Accordingly, the baseline discipline for respondent's violation of RPC 1.15(a) and RPC 1.15(d) remains a reprimand. See In the Matter of Craig R. Mitnick, DRB 17-310 (October 25, 2017) at 4 (where the Board reiterated that a reprimand was the baseline discipline for the attorney's negligent misappropriation of client funds caused by recordkeeping deficiencies misconduct), so ordered, 231 N.J. 133. However, to craft the appropriate discipline in this case, we also consider mitigating and aggravating factors.

In mitigation, respondent has no prior discipline. In re Convery, 166 N.J. 298, 308 (2001). Further, respondent was an inexperienced attorney at the time the misconduct began, having been admitted to the bar in New Jersey in 2012.

[11] Although the attorney in Crapis, like respondent, also violated RPC 1.5(a) by miscalculating his contingent fee, he did so in two client matters, whereas respondent miscalculated his contingent fee in forty-seven client matters.

In re Pena, 162 N.J. 15, 26 (1999). Also, as the DEC noted, he expressed sincere remorse and contrition.

In aggravation, respondent had not disbursed the over $13,000 in client funds that remained in his ATA until March 2022, notwithstanding the OAE's repeated directives, since 2018, that he do so. Further, in his January 26, 2023 written submission to us, he admitted that, despite having submitted a check to the Superior Court Trust Fund in March 2022, the funds still appeared to be in his trust account. During oral argument, respondent, through his counsel, reported that the Superior Court Trust Fund unit confirmed it had received and deposited the check; however, respondent's bank was "not recognizing the withdrawal" but that he would "follow up with his bank after we leave today."

Respondent claimed that he delayed distributing the funds because he was awaiting the conclusion of the disciplinary proceedings before making any final distributions; however, we find the delay inexcusable. As the OAE emphasized, as early as November 2018, it had directed respondent to correct all deficiencies in his ATA, including shortages, and to disburse those funds to his clients or to the Superior Court Trust Fund Unit if he was unable to locate his clients.

On balance, we determine that a reprimand is the appropriate quantum of discipline to protect the public and preserve confidence in the bar.

Further, as conditions to his discipline, we require respondent, within sixty days from the Court's issuance of the disciplinary Order in this matter, to submit proof to the OAE that he has (1) disbursed all funds remaining in his ATA to the Superior Court Trust Fund Unit, in accordance with R. 1:21-6(j), as he represented to us; and (2) closed all bank accounts, including his trust account, associated with his former law office, Weiner Legal Group, LLC.

Chair Gallipoli and Member Joseph voted to impose a censure, with the same conditions.

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: **/s/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Evan D. Weiner
Docket No. DRB 22-217

Argued: February 16, 2023

Decided: May 9, 2023

Disposition: Reprimand

Members	Reprimand	Censure
Gallipoli		X
Boyer	X	
Campelo	X	
Hoberman	X	
Joseph		X
Menaker	X	
Petrou	X	
Rivera	X	
Rodriquez	X	
Total:	7	2

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel