Supreme Court of New Jersey
Disciplinary Review Board
Docket Nos. DRB 22-216 and 22-231
District Docket Nos. XIV-2020-0111E and
XIV-2022-0020E

In the Matter of	:
Nabil Nadim Kassem	:
An Attorney at Law	:

Decision

Decided: May 10, 2023

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

These matters were consolidated for our review. DRB 22-216 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 1.5(a) (unreasonable fee); RPC 1.15(d) (failure to

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

DRB 22-231 also was before us on a certification of the record filed by the OAE. The formal ethics complaint charged respondent with having violated RPC 8.1(b) (two instances)[2] and RPC 8.4(d) (conduct prejudicial to the administration of justice).

For the reasons set forth below, we determined that a censure is the appropriate quantum of discipline for the totality of respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1994 and to the New York bar in 1995. At all relevant times, he maintained a practice of law in Clifton, New Jersey.

On March 19, 2008, the Court censured respondent for having violated RPC 8.4(b) (commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), following his conviction for possession of cocaine, a controlled dangerous substance (CDS),

[1] Due to respondent's failure to file an answer to the formal ethics complaint, and on notice to respondent, the OAE amended the complaint to include the RPC 8.1(b) charge.

[2] Again, due to respondent's failure to file an answer to the formal ethics complaint, and on notice to respondent, the OAE amended the complaint to include the second RPC 8.1(b) charge.

and his successful completion of a pretrial intervention program. In re Kassem, 194 N.J. 182 (2008) (Kassem I).

On December 9, 2021, the Court suspended respondent for three months, retroactive to February 7, 2020, following his conviction for possession of CDS In New York. In re Kassem, 249 N.J. 97, 97–98 (2021) (Kassem II). The Court also required respondent to provide proof of fitness to practice law prior to his reinstatement. Ibid.

Effective February 7, 2020, the Court declared respondent administratively ineligible to practice law in New Jersey for failing to pay his annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection.

Effective September 13, 2022, the Court further declared respondent administratively ineligible to practice law in New Jersey for failing to file his Interest on Lawyers Trust Accounts registration statement.

To date, respondent remains suspended pursuant to his disciplinary suspension and remains ineligible for the bases set forth above.

DRB 22-216

In DRB 22-216, service of process was proper. On October 7, 2022, the OAE sent a copy of the formal ethics complaint, by certified and regular mail,

to respondent's home address of record. The OAE also sent respondent a copy of the complaint via e-mail. On October 8, 2022, the OAE received a read receipt from the destination server. Although the certified mail return receipt was never signed, the United States Postal Service (the USPS) tracking system indicates that, on October 13, 2022, the certified mail was delivered. The regular mail was not returned to the OAE.

On November 3, 2022, the OAE sent a letter, by regular mail, to respondent's home address of record, informing him that, unless he filed a verified answer within five days of receipt of the letter, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to charge a willful violation of RPC 8.1(b). The OAE also sent the letter via e-mail. The regular mail was not returned to the OAE, and the e-mail delivery was completed, as evidenced by the delivery notification sent by the destination server.

As of November 18, 2022, respondent had not filed an answer to the complaint and the time within which he was required to do so had expired. Accordingly, the OAE certified this matter to us as a default.

On December 19, 2022, Acting Chief Counsel to the Board sent a letter to respondent's home address of record, by certified and regular mail, informing

him that the matter was scheduled before us on February 16, 2023, and that any motion to vacate must be filed by January 17, 2023. According to USPS tracking, the certified mail is unclaimed. The regular mail was not returned to the Office of Board Counsel (OBC).

Moreover, on December 26, 2022, the OBC published a notice in the New Jersey Law Journal, stating that we would review this matter on February 16, 2023. The notice informed respondent that, unless he filed a successful motion to vacate the default by January 17, 2023, his failure to answer would remain deemed an admission of the allegations of the complaint. Respondent did not file a motion to vacate default.

On January 25, 2023, Acting Chief Counsel to the Board sent a letter to respondent's home address of record, by certified and regular mail, informing him that we had adjourned the matter to March 16, 2023.

We now turn to the allegations of the complaint.

Respondent maintained an attorney trust account (ATA) and an attorney business account (ABA) with Valley National Bank. On July 31 and September 12, 2018, the OAE conducted a random audit of respondent's financial books and records, for the period between July 1, 2016 and August 31, 2018.

On January 25, 2019, the OAE sent respondent a letter memorializing the following deficiencies, which were discovered and discussed with respondent

during the audit:

1. Improper ABA designation;

2. Failure to maintain ABA receipts journal;

3. Failure to maintain ATA disbursements journal;

4. Failure to maintain ABA disbursements journal;

5. Failure to maintain schedule of client ledger accounts or conduct monthly three-way reconciliations of ATA;

6. Deposit slips lacking sufficient detail to identify each item of deposit;

7. Failure to maintain fully descriptive ATA receipts journal;

8. Failure to issue ATA checks in numerical order;

9. Failure to comply with R. 1:21-7(g);[3]

10. Improper deduction of law firm overhead

[3] That provision states:

> Where the amount of the contingent fee is limited by the provisions of paragraph (c) of this rule, the contingent fee arrangement shall be in writing, signed both by the attorney and the client, and a signed duplicate shall be given to the client. Upon conclusion of the matter resulting in a recovery, the attorney shall prepare and furnish the client with a signed closing statement.

expenses, such as "xeroxing, telephone calls, attorney transportation expenses, etc." prior to calculating contingent fees; and

11. Images of ABA checks displayed in excess of two per page.

The OAE directed respondent to (1) confirm, in writing, within "45 days of the date of this letter" that the above-mentioned deficiencies had been corrected, and (2) within the same timeframe, complete a certification identifying "the open balances reflected in the clients' trust ledger and reconciled to the trust account bank statement."

On June 18, 2019, following several extensions, respondent provided his initial response to the deficiencies the OAE had identified during the audit. Respondent represented that he had resolved the improper account designation and had created new protocols to address the remaining recordkeeping deficiencies. He also indicated that he had retained a new accounting firm and hired a new bookkeeper.

With respect to his failure to maintain fully-executed, written fee agreements and settlement statements in his contingent fee cases, contrary to R. 1:21-7(g), respondent stated:

> To address this item, which we have created and maintain a new P&P[4] and consistent with R. 1:21-7(g) the retainer agreement and closing statements have been modified and signed by both the attorney and the client. Both documents have always been provided to the clients and the firm continues to do so to maintain compliance.
>
> [C1Ex2p4.][5]

Regarding his deduction of copying and similar expenses in calculating contingent fees, respondent stated that such expenses were specified in the relevant retainer agreements, and that his clients had consented to their deduction. Respondent argued that it was permissible to deduct such expenses, pursuant to In re Estate of Reisen, 313 N.J. Super. 623, 636 (Ch. Div. 1998), and American Bar Association Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379.[6] Nonetheless, respondent stated that he had recalculated his fees without the deductions and issues reimbursements to clients. Respondent also pointed out that his firm routinely had negotiated to reduce client's "debts, such as those owed to medical providers," without charging for the negotiations.

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[4] Respondent's submission does not define this term.

[5] "C1" refers to the October 6, 2022 complaint in DRB 22-216.
"C1Ex" refers to exhibits attached to the October 6, 2022 complaint in DRB 22-216.
"C2Ex" refers to the exhibits attached to the October 24, 2022 complaint in DRB 22-231.

[6] Respondent's reliance on these precedents is addressed below.

In addition to the above, respondent outlined several difficult circumstances in his life, including the temporary disability and resignation of his long-term office manager; his poor health; his mother's terminal cancer diagnosis; and his role as her sole caretaker.

On November 22, 2019, respondent sent to the OAE a second letter in which he detailed additional difficulties, including the fact that some of his staff had suddenly resigned, while others had been terminated for misappropriating his firm's property. Further, he explained that his mother's cancer had become more severe, and that he "genuinely return[ed] to the office in the evenings staying until early morning to organize and finalize the workload." Because of these difficulties, respondent asked the OAE to "accept [his] sincere apology for [his] delays as they were in no way intentional nor avoidable."[7]

In the remainder of his correspondence, respondent addressed the alleged violation of R. 1:21-7(g) via his deduction of overhead expenses in contingent fee cases. He reiterated that his clients had agreed to all deductions and summarized his understanding of the OAE's criticism and his response as follows:

> Notwithstanding the foregoing, those categories of charges pertaining to these clients were contested due

[7] It is not immediately clear why respondent referenced "delays." The record does not indicate whether the OAE imposed additional deadlines following his initial submission.

> to, without limitation, the matters being contingent fee personal injury cases. As such, you indicated that while the category of charges for postage, travel etc. should be removed entirely, your determination was that the file storage fee would be acceptable at $50. . . . I agreed to make the requested payments . . . with the understanding that the same would not constitute any admission of any deviation, violation and/or the like of any rule, law, statute and/or otherwise. Similarly, I agreed that on a going forward basis all personal injury client's recovery would be calculated consistent with your recommendation . . . .
>
> [C1Ex3p2.]

Respondent then detailed the OAE's demands and his response in connection with fourteen client matters. In some of these matters, respondent stated that he had refunded the allegedly overcharged amount to clients. Regarding other matters,[8] respondent argued that a refund was not justified because he had done

[8] It is difficult to determine with precision the number of clients who received a refund from respondent, as his letter is, in part, conflicting and contradictory. For instance, he claimed to have already remitted a $500 refund to Jose Alcantara but concluded by stating that he would send Alcantara a refund in that amount if the OAE deemed appropriate. Later on, he stated:

> With respect to Mr. Aaron Airey a review of the closing statement demonstrates that the matter was settled for $7,000.00 . . . . There is a contested $850.00 in charges for various expenses of $550.00 and the file storage fee of $300.00 was contested although only $150.00 was charged . . . . In recalculating Mr. Alcantara's closing statement with your figures results in a payment of $4,785.00 while Mr.

(footnote cont'd on next page)

additional work for the client, or because he had successfully negotiated a significant reduction in the client's medical debt, without charging for the negotiations. Respondent referenced several attachments not included in the record.

On December 30, 2019, the OAE sent respondent a letter, indicating that it had reviewed his "very lengthy submission of documentation" and discovered two "issues . . . per the most recent trust bank reconciliation as of August 31, 2019:"

> (1) Old unresolved, outstanding checks as dating back to 2012, including funds for a returned check on that listing; these same checks appeared on the June 30, 2018 reconciliation prepared at the September 12, 2018 field audit;
>
> (2) Two ledger balances on [respondent's] August 31, 2019 submission had debit balances: Cuadrado

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> Alcantara was paid $4,285.00. Therefore this firm issued check number 7736 in the amount of $500.00 to Mr. Alcantara . . . .
>
> With respect to Mr. Aeron Airey a review of the closing statement demonstrates that the matter was settled for $5,500.00 . . . . There is a contested $750.00 in charges for various expenses and $300.00 for the file storage fee . . . In recalculating Mr. Airey's closing statement with the contested charges results in a payment of 2,815.37 while Mr. Alcantara was paid $2,148.70. Therefore, this firm issued check number 980371 in that amount to Mr. Alcantara.
>
> [C1Ex4.]

> ($273.00) and Minaya ($500.15) plus an additional ($2000.00) for Collazo; ledgers for these 3 clients must be remitted.
>
> [C1Ex4p1.]

The OAE directed respondent to resolve "the debit balances as well as the outstanding checks that ha[d] been unresolved for so many years."[9] The OAE also advised respondent that the issue of whether he charged excessive fees had been referred to "the legal staff," who would determine whether he needed to issue additional refunds. The OAE did not deny advising respondent that he was entitled to charge a storage fee of $50.

The record does not reveal whether additional communication took place between the OAE and respondent. However, at some point, respondent rectified all recordkeeping deficiencies and brought his financial books and records into compliance with R. 1:21-6.

On October 6, 2022, the OAE filed an ethics complaint against respondent, alleging that he had committed recordkeeping violations, contrary to RPC 1.15(d), and had improperly calculated contingent fees, contrary to RPC 1.5(a). The OAE set forth the same inadequacies it had identified in the deficiency letter of January 25, 2019, except that it did not include any reference

[9] The OAE did not impose a specific deadline by which these deficiencies had to be resolved.

to respondent's violation of R. 1:21-7(g). Additionally, it stated that respondent's submissions of June 18 and November 22, 2019 did not address all inadequacies, even though he ultimately brought his records into compliance.

The OAE further elaborated on respondent's calculation of contingent fees, as follows. Respondent failed to calculate his fees "on the net sum recovered after deducted disbursements" and had improperly "charge[d] clients . . . overhead fees in contingency matters contrary to R. 1:21-7(c)." The "overhead" charges affected fourteen client matters. In five of these matters, respondent refunded to clients the overcharged amounts. The amounts ranged from $33.33 to $2,000 and totaled $3,666.60. In two other matters, the "overhead" deductions resulted in an overcharge of $1,450, consisting of $500 in one matter and $950 in the other. Respondent did not refund these amounts, arguing that he had voluntarily given the clients courtesy discounts that exceeded the alleged overcharge. However, respondent "did not receive the affected client's consent to retain the improperly charged overhead and storage charges." In the remaining seven matters, the overcharged amounts ranged from $650 to $2,400, and totaled $8123.50. Respondent did not refund these amounts, claiming that he had successfully negotiated significant reductions in medical debts for the affected clients. Additionally, respondent

> argued relying on Magrip[]lis v. Mr. Bar-B-Que, 196 N.J. Super[.] 238 (Law Div. 1984), that the reduction in

> medical liens could be added to the net recovery and thereafter when R. 1:21-7(c) calculations are applied to the increased net recovery, the overcharge was less than the increase to the affected clients.
>
> [C1¶21.]

However, the OAE pointed out that respondent did not rely on Magriplis when he originally calculated the clients' recovery. Additionally, he "did not receive the affected client's [sic] consent to retain the improperly charged overhead and storage charges." The OAE concluded that respondent violated RPC 1.5(a) "in that [he] charged an unreasonable fee in the above-outlined matters when he improperly charged his clients with overhead and storage fees."

Attached to the OAE's complaint were eight closing statements relating to six of respondent's prior client matters: the Sara Zavaleta; Aaron Airey; Jose Alcantara; Roy Faber; Robelyn Minaya; and Lee Trifari matters. Two statements each were included for the Airey and Alcantara matters: one showing respondent's original calculation and one showing the revised calculation following the elimination of the charges for "file storage fee," postage, copies, faxes, phone, travel, parking, Lexus, and "Misc." One statement each was included for the remaining matters. Of these, the statement in the Zavaleta matter reflected respondent's original calculation, while the other four reflected a revised calculation. All eight statements demonstrate that respondent calculated his fees based on the net settlement amount, following the deduction

of expenses. Additionally, they showed that respondent did not deduct the "overhead" charges from clients' share of proceeds. Rather, he deducted these charges from the gross proceeds before calculating the clients' share.

The statements in the Zavaleta; Faber; Airey; and Faber matters contain an acknowledgement that the client was satisfied with the calculation of fees and expenses. However, only the original statement in the Airey matter was signed by the client. The original statement in the Alcantara matter also was signed, but it did not contain an acknowledgment. The statement in the Zavaleta matter contained the acknowledgment, but it is not clear if it was signed as the last page is not included in the record.

DRB 22-231

In DRB 22-231, service of process was proper. On November 7, 2022, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's home address of record. The OAE also sent respondent a copy of the complaint via e-mail. Although no signed return receipt is included in the record, the USPS tracking system indicates that, on November 19, 2022, the certified mail was delivered. The regular mail was not returned to the OAE. The OAE did not receive a delivery notification for the e-mail.

On December 9, 2022, the OAE sent a letter, by regular mail, to respondent's home address of record, informing him that unless he filed a verified answer within five days of receipt of the letter, the allegations of the complaint would be deemed admitted, the record would be certified to us for the imposition of discipline, and the complaint would be deemed amended to charge a willful violation of RPC 8.1(b). The OAE also sent the letter via e-mail. The regular mail was not returned to the OAE, and the e-mail delivery was completed, as evidenced by the delivery notification sent by the destination server.

As of December 19, 2022, respondent had not filed an answer to the complaint and the time within which he was required to do so had expired. Accordingly, the OAE certified this matter to us as a default.

On December 27, 2022, Acting Chief Counsel to the Board sent a letter to respondent's home address of record, by certified and regular mail, informing him that the matter was scheduled before us on February 16, 2023, and that any motion to vacate must be filed by January 17, 2023. According to USPS tracking, on December 30, 2022 the certified mail was delivered. The regular mail was not returned to the OBC.

Moreover, on January 2, 2029, the OBC published a notice in the New Jersey Law Journal, stating that we would review this matter on February 16,

2023. The notice informed respondent that, unless he filed a successful motion to vacate the default by January 17, 2023, his failure to answer would remain deemed an admission of the allegations of the complaint. Respondent did not file a motion to vacate default.

On January 25, 2023, Acting Chief Counsel to the Board sent a letter to respondent's home address of record, by certified and regular mail, informing him that we had adjourned the matter to March 16, 2023.

We now turn to the allegations of the complaint.

As detailed above, on December 9, 2021, the Court suspended respondent following his conviction for possession of CDS in New York. (Kassem II). To date, respondent has not applied to the Court for reinstatement and, thus, remains suspended.

In its December 9, 2021 Order, the Court required respondent to comply with R. 1:20-20, which imposes upon suspended attorneys the obligation to, "within 30 days after the date of the order of suspension (regardless of the effective date thereof) file with the Director the original of a detailed affidavit specifying by correlatively numbered paragraphs how the disciplined attorney has complied with each of the provisions of this rule and the Supreme Court's order." On February 3, 2022, the OAE sent respondent's then counsel, Jack Arseneault, Esq., a letter, advising that respondent had not filed his R. 1:20-20

affidavit and directing that respondent do so by February 17, 2022. On February 14, 2022, Arseneault responded to the OAE's letter, stating that respondent had drafted a R. 1:20-20 affidavit on his own behalf and submitted it on January 11, 2022. Arseneault further explained that the affidavit was submitted "one day late" due to a courier's error, and that, on February 26, 2022, respondent had supplemented his affidavit to include proof of insurance and the "required bank check."[10]

The record includes a letter purportedly signed by a courier named Thomas Matthew, in which Matthew stated that he could not deliver respondent's package on January 10, 2022 because he could not locate the destination facility. The letter was printed on respondent's law firm's letterhead, and it contained the following passage:

> Due to the ongoing pandemic, many of the employees at our firm have been out sick; resulting in a shortage of staff. For this reason, we have attained [sic] the services of Mr. Matthews to deliver the attached package.
>
> We do apologize for the inconvenience this may cause you and would like to thank you for your anticipated courtesy in regards to this matter.
>
> [C2Ex4.]

[10] The record sheds no light on Arseneault's reference to the "required bank check."

The OAE "had no record of receiving [r]espondent's January 11, 2022 submission." However, on February 16, 2022, the OAE "obtained a copy of [r]espondent's January 11, 2022 . . . [a]ffidavit." The record does not reveal how the OAE obtained this copy.

In his January 11, 2022 affidavit, respondent stated that he had suffered from two accidents that left him partially disabled for nearly a year. Following respondent's injuries, the Superior Court of New Jersey, Law Division, Passaic County (the Superior Court) appointed a temporary trustee for respondent's law firm and prohibited respondent from practicing law. Because the Superior Court's order was not vacated until December 8, 2020, respondent did not practice law for a period of over ten months, although he did appear at his office, at the trustee's request, to assist the trustee with administrative issues. The affidavit did not address whether respondent practiced law after December 8, 2020, raising the possibility that he continued to practice despite the Court's December 9, 2021 Order. No notifications to clients regarding respondent's suspension were attached.

On July 25, 2020, the OAE sent Arseneault a letter, stating that respondent's January 11, 2022 affidavit was deficient because it (1) failed to indicate whether respondent practiced law after December 8, 2020, or after the Court's December 9, 2021 Order, and (2) did not include letters to clients

indicating that an attorney-trustee was appointed for respondent's law practice, or that respondent had been suspended. The OAE further stated that "R. 1:20-20 require[d] [respondent] to submit an [a]ffidavit for *each* period of time in which he was disciplined or transferred to disability-inactive status." (emphasis in original). The OAE directed respondent to file an amended affidavit by August 15, 2022.

On August 3, 2022, at Arseneault's request, the OAE extended the deadline for the amended affidavit from August 15 to August 22, 2022. On August 23, 2022, the OAE notified Arseneault that respondent's affidavit was overdue. Arseneault responded the same day, stating that he no longer represented respondent.

On August 30, 2022, the OAE sent respondent a letter, by certified mail and regular mail, to his home address of record, enclosing the July 25, 2022 correspondence and instructing respondent to file a conforming affidavit by September 13, 2022. The OAE also sent a copy of the letter to respondent via e-mail. As of October 24, 2022, the date of the complaint, the certified mail had not been successfully delivered. The regular mail and e-mail were not returned to the OAE.

Respondent did not reply to the OAE's August 30, 2022 letter. On October 12, 2022, the OAE sent another letter, by certified mail and regular mail, to

respondent's home address of record, enclosing the August 30, 2022 correspondence and instructing respondent to file a conforming affidavit by October 17, 2022. The OAE also sent a copy of the letter to respondent via e-mail. Although no signed return receipt is included in the record, the USPS tracking system indicates that, on October 17, 2022, the certified mail was delivered. The regular mail was not returned to the OAE, and the e-mail delivery was completed, as evidenced by the delivery notification sent by the destination server. Respondent did not reply to the OAE's October 12, 2022 letter.

On October 24, 2022, the OAE filed a formal ethics complaint, alleging that respondent had failed to file a R. 1:20-20 affidavit, in violation of RPC 8.1(b) and RPC 8.4(d).

Following our review of the record, we find that the facts recited in the complaints support all but one of the allegations that respondent committed unethical conduct. Respondent's failure to file an answer to the complaints is deemed an admission that the allegations of the complaints are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). Notwithstanding that Rule, each charge in the complaints must be supported by sufficient facts for us to determine that unethical conduct has occurred.

With respect to DRB 22-216, respondent violated RPC 1.15(d) by (1) allowing his ABA to be improperly designated; (2) failing to properly maintain

receipts and disbursements journals; (3) failing to prepare a client ledger schedule and to perform monthly reconciliations; (4) failing to prepare proper deposit slips; (5) issuing ATA checks out of order; and (6) failing to properly preserve images of ABA checks.

He also violated RPC 8.1(b) by failing to file an answer to the complaint. However, in our view, the record does not clearly and convincingly demonstrate that respondent improperly calculated contingent fees, in violation of RPC 1.5(a).

The allegations in the complaint implicate two theories under which respondent could be charged with a violation of RPC 1.5(a): (1) he failed to calculate his fees based on "the net sum recovered after deducted disbursements," and (2) he improperly charged clients "overhead" expenses in contingent fee matters. The first theory is not consistent with the record; neither is the second theory, to the extent that it suggests respondent deducted the "overhead" expenses from his clients' shares of proceeds. The only remaining question is whether respondent acted properly in deducting the allegedly improper expenses from gross proceeds.

The calculation of contingent fees is governed by R. 1:21-7(c) and (d). R. 1:21-7(c) sets the attorney's percentage of recovery. R. 1:21-7(d) states:

> The permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting

> disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal, and any interest included in a judgment pursuant to R. 4:42-11(b); but no deduction need be made for post-judgment interest or for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal. When joint representation is undertaken in both the direct and derivative action, or when a claim for wrongful death is joined with a claim on behalf of a decedent, the contingent fee shall be calculated on the aggregate sum of the recovery.

Pursuant to the express language of R. 1:21-7(d), any expense that qualifies as a "disbursement[] in connection with the institution and prosecution of the claim" may be deducted from gross proceeds, prior to calculating the client's share. Although the Rule identifies some permissible expenses, such as investigation and expert expenses, the list is not exhaustive. Accordingly, the relevant question in this case is whether the term "disbursements" encompasses the charges deducted by respondent.

Here, respondent deducted "file storage fee;" postage; copies; facsimile and telephone charges; travel; parking; Lexis charges; and "Misc" from the gross proceeds before calculating the client's recovery. Depending on the circumstances, these deductions may or may not have been proper. For instance,

if he deducted "file storage fees" for storing files in his office, the deduction would have been improper because respondent would have had to pay for the office even if he did not serve this particular client. Thus, the deduction would not have been a disbursement "in connection with the institution and prosecution of the claim." See R. 1:21-7(d). On the other hand, if he was required to rent additional storage space specifically for the client's files, the deduction could have been proper as it was incurred in connection with the claim. Because the record provides virtually no details regarding these allegedly improper deductions, we decline to find them to be per se improper. Stated different, no evidence has been proffered to show that these allegedly improper charges did not "reasonably reflect[] the [respondent's] actual cost," as Formal Op. 93-372 requires.

There remains the question of whether respondent properly advised the clients from the outset of the case that these expenses would be deducted from gross recovery. He should have disclosed all identifiable costs, and his failure to do so would constitute a violation of RPC 1.5(a). However, the OAE has failed to establish any such failure on respondent's part.

Although no retainer agreement is included in the record, respondent stated in his letter to the OAE that all charges were mentioned in his retainers. The OAE did not contest this statement in its response. In the complaint, the

OAE stated that respondent "did not refund the overcharge amount . . . . However, [he] did not receive the affected client's consent to retain the improperly charged overhead and storage charges." This statement, while presumed true, is too ambiguous to support the OAE's position. The statement has two potential meanings: (1) respondent's clients did not consent to the allegedly improper charges from the outset or during the course of representation, or (2) after the OAE instructed respondent to issue refunds, respondent failed to issue a refund without asking the clients whether he could retain the overcharged amount. If the intended meaning is the first, then respondent violated RPC 1.5(a). But if it is the second, he did not commit any misconduct as long as he disclosed the charges to his clients at the outset.

As the standard of proof is clear and convincing evidence, the OAE cannot meet its burden on this record. Additionally, the record disfavors the first meaning, as it contains a closing statement in which Airey acknowledged he was satisfied with respondent's disbursements. Thus, we determine to dismiss the charge that respondent violated RPC 1.5(a).

Turning to the allegations of DRB 22-231, R. 1:20-20(b)(15) requires a suspended attorney, within thirty days of the Order of suspension, to "file with the Director [of the OAE] the original of a detailed affidavit specifying by correlatively numbered paragraphs how the disciplined attorney has complied

with each of the provisions of this rule and the Supreme Court's [O]rder."

As the Appellate Division has noted, "the provisions of R. 1:20-20(b)(1) to (14) are designed to protect clients of the [suspended or] disbarred attorney, as well as any other individuals who might unknowingly seek to retain that attorney during the period of his suspension." Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 596 (App. Div. 2008). Non-compliance with R. 1:20-20 therefore obstructs one of the primary purposes of the disciplinary system, "to protect the public from an untrustworthy lawyer." In re Rigolosi, 107 N.J. 192, 206 (1987) ("The purpose of a disciplinary proceeding, as distinguished from a criminal prosecution, is not so much to punish a wrongdoer as it is to protect the public from an untrustworthy lawyer.") (citing In re Pennica, 36 N.J. 401, 418-19 (1962)). It may also cause "confusion among . . . clients and an administrative burden for the courts." In re Kramer, 172 N.J. 609, 626 (2002).

For those reasons, and by operation of Rule, in the absence of an extension by the Director of the OAE, failure to file an affidavit of compliance pursuant to R. 1:20-20(b)(15) within the time prescribed "constitute[s] a violation of RPC 8.1(b) . . . and RPC 8.4(d)." R. 1:20-20(c).

Here, respondent violated both RPC 8.1(b) and RPC 8.4(d) by failing to file a conforming R. 1:20-20 affidavit. He violated RPC 8.1(b) yet again by

failing to file an answer to the complaint.

In sum, in DRB 22-231, we find that respondent violated RPC 1.15(d) and RPC 8.1(b), but dismiss the charge that respondent violated RPC 1.5(a) for lack of sufficient evidence. In DRB 22-231, we find that respondent violated RPC 8.1(b) (two instances) and RPC 8.4(d). The sole issue left for determination is the appropriate quantum of discipline for the totality of respondent's misconduct.

On this record, there is no evidence of any misappropriation – negligent or otherwise – by respondent. Recordkeeping irregularities ordinarily are met with an admonition where they have not directly caused a negligent misappropriation of clients' funds. See, e.g., In the Matter of David Stuart Bressler, DRB 22-157 (November 21, 2022) (the attorney commingled and committed several recordkeeping violations, including failure to perform three-way reconciliations, improper account designation, and failure to preserve images of processed checks); In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (the attorney failed to maintain attorney trust or business account cash receipts and disbursements journals, proper monthly trust account three-way reconciliations, and proper trust and business account check images); In the Matter of Eric Salzman, DRB 15-064 (May 27, 2015) (following an overdraft in the attorney trust account, an OAE demand audit revealed that the

attorney (1) did not maintain trust or business receipts or disbursements journals, or client ledger cards; (2) made disbursements from the trust account against uncollected funds; (3) withdrew cash from the trust account; (4) did not properly designate the trust account; and (5) did not maintain an attorney business account, in violation of RPC 1.15(d) and R. 1:21-6).

The threshold measure of discipline imposed for an attorney's failure to file a R. 1:20-20 affidavit is a reprimand. In the Matter of Richard B. Girdler, DRB 03-278 (November 20, 2003), at 6, so ordered, 179 N.J. 227. However, the actual discipline imposed may be different if the record demonstrates mitigating or aggravating circumstances. Examples of aggravating factors warranting enhanced discipline include the attorney's failure to answer the complaint, the attorney's disciplinary history, and the attorney's failure to follow through on his or her commitment to the OAE that the affidavit would be forthcoming.

In Girdler, the attorney received a three-month suspension, in a default matter, for his failure to comply with R. 1:20-20. Specifically, after prodding by the OAE, Girdler failed to produce the affidavit of compliance in accordance with that Rule, even though he had agreed to do so. His disciplinary history consisted of a private reprimand (now an admonition), a reprimand, and a three-month suspension.

For nearly twenty years since Girdler, the discipline imposed on attorneys who have failed to comply with R. 1:20-20 and who have defaulted has ranged from a censure to a term of suspension, if they do not have an egregious ethics history. See, e.g., In re Vapnar, 249 N.J. 536 (2022) (censure for attorney who failed to file the required R. 1:20-20 affidavit after he had been suspended for his misconduct in four client matters and, subsequently, temporarily suspended for failing to comply with a fee arbitration determination; he also ignored the OAE's request that he do so); In re Rak, 214 N.J. 5 (2013) (three-month suspension; aggravating factors included three default matters against the attorney in three years (two of the defaults were consolidated and resulted in a three-month suspension, the third resulted in a reprimand) and the OAE personally left additional copies of its previous letters about the affidavit, as well as its contact information, with the attorney's office assistant, after which the attorney still did not comply); In re Rosanelli, 208 N.J. 359 (2011) (six-month suspension; the attorney failed to file the affidavit after a temporary suspension in 2009 and after a three-month suspension in 2010, which proceeded as a default; prior six-month suspension).

Pursuant to disciplinary precedent, the appropriate quantum of discipline for respondent's violation of RPC 1.15(d), standing alone, is an admonition. Respondent's remaining offenses merit no more than a censure. Pursuant to

Girdler and its progeny, a censure is the appropriate quantum of discipline for respondent's failure to file an R. 1:20-20 affidavit and failure to answer the complaint in DRB 22-231. In our view, respondent's additional default in DRB 22-216 is not sufficient to elevate the censure to a three-month suspension, as the complaints in the two matters were served within one month of each other, and in In the Matter of Frances Ann Hartman, a matter pending with the Court, we stated that "default matters occurring in close succession" should not result in doubly enhanced discipline. DRB 20-254 (March 2, 2021) at 29 ("We have previously recommended no further discipline in default matters occurring in close succession, and the Court has agreed.").

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

Chair Gallipoli voted to recommend to the Court that respondent be disbarred and wrote a separate dissent.

Members Rivera and Menaker voted to impose a three-month suspension.

Members Campelo and Hoberman were 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: **/s/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Nadim Nabil Kassem
Docket Nos. DRB 22-216 and 22-231

Decided: May 10, 2023

Disposition: Censure

Members	Censure	Three-month suspension	Disbar	Absent
Gallipoli			X	
Boyer	X			
Campelo				X
Hoberman				X
Joseph	X			
Menaker		X		
Petrou	X			
Rivera		X		
Rodriguez	X			
Total:	4	2	1	2

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