Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 23-024
District Docket Nos. XIV-2019-0105E
and VB-2021-0903E

In the Matter of	:
Giovanni De Pierro	:
An Attorney at Law	:

Decision

Argued: March 16, 2023

Decided: July 6, 2023

Amanda W. Figland appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a reprimand filed by the District VB Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 1.8(a) (improper business transaction with a client); RPC 1.15(a) (two instances – negligent

misappropriation of client funds and commingling); RPC 1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6); RPC 5.5(a)(1) (unauthorized practice of law – failure to maintain liability insurance while practicing as a limited liability company, as R. 1:21-1B(a)(4) requires); and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

For the reasons set forth below, we unanimously determine that respondent violated the Rules of Professional Conduct. However, we are unable to reach a consensus on the appropriate quantum of discipline. As set forth below, three Members voted to impose a reprimand with conditions, and three Members voted to impose a censure with the same conditions.

Respondent earned admission to the New Jersey bar in 2001. During the relevant time, he was the managing partner of De Pierro Radding, LLC, located in Bloomfield, New Jersey.

On January 24, 2022, respondent received an admonition for his misconduct, across five client matters, which were consolidated for an ethics hearing. In the Matter of Giovanni De Pierro, DRB 21-190 (January 24, 2022) (De Pierro I). In that matter, we determined that respondent violated RPC 1.4(b) (failure to communicate); RPC 1.5(c) (failure to provide a written fee agreement in a contingent fee case); RPC 1.5(c) (failure to provide a written statement showing the remittance of recovery to the client and the method of its

determination); RPC 1.16(d) (failure to protect the client's interests upon termination of the representation); and RPC 8.1(b). In imposing only an admonition, we considered respondent's unblemished career in his twenty years at the bar and the passage of time since the misconduct had occurred. Id. at 5. We also recognized that respondent had been required to participate in two ethics hearings, through no fault of his own. Id. at 5-6.

On July 12, 2022, prior to the commencement of an ethics hearing in this matter, the parties entered into a stipulation of facts, adopting most, but not all, of the facts alleged in the OAE's three-count complaint. Respondent also admitted that his conduct violated RPC 1.15(a); RPC 1.15(d); RPC 5.5(a)(1); and RPC 8.1(b). Respondent denied, however, having violated RPC 1.8(a). On July 19, 2022, a hearing focused on the disputed facts and mitigation occurred.

We now turn to the facts of this matter.

Failure to Maintain Liability Insurance

Since September 2012, respondent has operated his law practice as "De Pierro Radding, LLC," a limited liability company. Pursuant to R. 1:21-1B(a)(4), he was required to maintain professional liability insurance while operating as a limited liability company. Further, respondent was obligated, within thirty days of the formation of the company, to file a copy of the

certificate of insurance with the Clerk of the Court. R. 1:21-1B(b). Thereafter, upon renewal or amendment to the policy, respondent was required to file such renewal or amendment with the Clerk within thirty days of the effective date. R. 1:21-1B(b).

On August 10, 2018, the former Clerk informed respondent that the Court had no record of having received respondent's certificates of insurance for the years 2013 through 2017 and, thus, directed respondent to provide copies of his insurance certificates for those years. In his letter, the former Clerk reminded respondent of his law firm's obligation, as a limited liability company, to maintain professional liability insurance and to file a copy of the certificate of insurance with the Clerk's office within thirty days of initiating the practice and within thirty days of policy renewal or amendment. Further, the former Clerk stated:

> To date, this office has no record of receiving the required documentation from your firm for the years 2013-2014, 2014-2015, 2015-2016 and 2016-2017. Failure to submit this documentation within fourteen (14) days of the date of this letter will result in notification of such non-compliance to the Office of Attorney Ethics.
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> [Ex1.][1]

[1] "Stip." refers to the parties July 12, 2022 stipulation of facts, admitted to evidence as J-1;
"T" refers to the transcript of the formal ethics hearing held on July 19, 2022;
"Ex" refers to the OAE's exhibits admitted into evidence during the ethics hearing;
"RS" refers to respondent's September 26, 2022 summation brief;

(footnote cont'd on next page)

On August 23, 2018, in response to the former Clerk's letter, respondent provided the Clerk with a certificate of insurance for the coverage period October 12, 2017 to October 12, 2018.

On September 25, 2018, the former Clerk sent respondent a follow-up letter, again requesting a copy of his certificate of insurance for the years previously requested. Again, respondent was reminded that, if he failed to comply, the Clerk would notify the OAE of his non-compliance. On October 1, 2018, respondent informed the Clerk that he had failed to maintain professional liability insurance "from a part of 2013 to a part of 2017" due to "very serious health challenges beyond [his] control." Respondent assured the Clerk, however, that his firm had put into place procedures to ensure the lapse in coverage did not occur again.

On October 5, 2018, the Clerk referred this matter to the OAE.

On December 4, 2018, the OAE notified respondent of the Clerk's referral and directed him to submit to the OAE a written response, along with any relevant documentation, no later than December 18, 2018. On December 14, 2018, respondent informed the OAE that he had failed to maintain liability insurance "for the period in question" due to various health issues that began in

"OAES" refers to the OAE's October 21, 2022 summation brief;
"HPR" refers to the January 9, 2023 hearing panel report; and
"OAEb" refers to the OAE's March 1, 2023 letter brief to the Board.

2012 and continued until 2017, when he returned to the office on a limited basis. Respondent insisted, however, that his failure to maintain the required coverage was "inadvertent and unintentional" and that he had since obtained liability insurance for the firm.

Subsequently, on January 28, 2019, the OAE directed respondent to provide documentation regarding the medical conditions referenced in his December 4, 2018 letter. Respondent failed to reply and, thus, on March 13, 2019, the OAE again directed respondent to produce proof of his medical condition. On April 29, 2019, respondent produced to the OAE redacted medical records and stated he was hospitalized for two days in May 2015 and was thereafter under the care of medical providers until December 2015.

Based upon the foregoing facts, the OAE charged respondent with having violated RPC 5.5(a).

Respondent stipulated that his misconduct detailed above violated RPC 5.5(a). Respondent denied, however, that his failure to obtain the required liability insurance was intentional or knowing, and the OAE acknowledged it lacked clear and convincing evidence that respondent acted knowingly.

The Totaro Matter

Respondent and Angelo Totaro, the grievant, had been friends since 2005. On April 11, 2013, respondent borrowed $10,000 from Totaro, memorialized in a one sentence letter.[2] The letter was signed by respondent and stated, "Angelo Totaro this day loaned me Ten Thousand Dollars ($10,000)." The document did not contain any terms or conditions of repayment, including whether interest would be charged.

At the time he borrowed the money from Totaro, respondent admittedly did not advise Totaro that he should consider seeking independent counsel; did not inform Totaro that the loan transaction could represent a conflict of interest; and did not ask Totaro to sign a written conflict waiver documenting his informed consent to the business transaction.

Subsequently, the parties' relationship broke down[3] and, on April 13, 2015, Totaro requested, in writing, that respondent repay the loan:

> Dear Giovanni,
>
> To begin with, I wanted to let you know that I considered you a great friend of mine and I always trusted you. With that being said I wanted to remind you that on April 11, 2013 you asked me for a $10,000

[2] At oral argument, when asked why he had borrowed this money, respondent explained that it was in connection with a private matter.

[3] Respondent did not explain to us why the parties' relationship had ended, other than stating it was a private matter. They did not speak to each other after their April 2015 breakdown until sometime after respondent's January 11, 2019 letter to Totaro.

> loan with the agreement that you would pay me back within 2 weeks. It has been 2 years and you still have not paid the loan back, you haven't even mentioned or talked about it since the day I loaned you the money. If you cannot pay me back the full amount at once you may set up installment payments, I need this money back as soon as possible. I have enclosed the signed note that you promised me you were going to repay me.
>
> [Stip.¶31;Ex11.]

Respondent asserted that he did not recall receiving Totaro's April 13, 2015 letter, stating that he was ill during this period of time. Respondent testified during the ethics hearing that, by April 13, 2015, he was "already in trouble physically" and "ended up in the hospital within weeks from that point." Respondent also denied having agreed to repay the loan within two weeks.

More than three years later, on June 5, 2018, Ciro A. Mederos, Esq., sent an e-mail to respondent on Totaro's behalf, stating:

> Dear Mr. De Pierro:
>
> Yesterday I meet [sic] with Angelo Totaro who advised me that he was your client and a good friend. Mr. Totaro provided me a copy of a document supposedly executed by you as evidence of a $10,000 loan he extended to you back in 2013. Mr. Totaro has retained me to present a grievance against you, and/or file a lawsuit. As a courtesy to a fellow attorney, I told him that I would not be part of any ethical complaint, but I will be filing a [lawsuit]. Can you please review the attachments and contact me as soon as possible to see if this matter can be resolve [sic] without the need for litigation?
>
> [Stip.¶34;Ex12.]

Although he received the e-mail, respondent admittedly did not reply to Mederos and did not attempt to resolve the loan. Respondent testified that, in addition to being seriously ill for an extended period of time, he did not make an effort to repay the loan because he was "disgusted" with how Totaro had treated him after having "stuck his neck out" to help Totaro with two business matters (discussed below), and the fact that Totaro never attempted to contact him after respondent had become severely ill, in 2015.

On July 6, 2018, Totaro filed an ethics grievance against respondent, in which he stated that he had loaned $10,000 to respondent and, despite his promise to repay the loan in two weeks,[4] respondent had failed to repay the loan for more than five years.[5] On March 13, 2019, the OAE directed respondent to submit a reply to the grievance. In response, on April 8, 2019, respondent informed the OAE that "this was a personal loan exclusive of me being an attorney, as Mr. Totaro was a dear friend of mine."

Respondent also provided the OAE with a copy of his January 11, 2019 letter to Totaro, c/o Antichi Sapori,[6] in which respondent admitted he owed

[4] Although respondent acknowledged the loan, he disputed Totaro's claim that he had promised to repay the loan in two weeks.

[5] Notably, Totaro answered "No" to the question "[i]s the specific lawyer complained about your lawyer?"

[6] As discussed herein, Totaro owned Antichi Sapori, a distributor of imported Italian

(footnote cont'd on next page)

Totaro the $10,000 loan, minus what Totaro owed him for computers respondent had purchased for him:

> Turning to the money I owe you, yes the amount would be $10,000, however from said amount you must deduct the money never paid for the two computers and two large monitors I paid for and delivered to you. The cost for said computers and monitors was $1,810.00. Therefore, I owe you $8,190.00 which I will pay you $4,095.00 by January 31, 2019 and the remaining $4,095.00 by February 28, 2019.
>
> [Ex13.]

Respondent also explained to Totaro that he had not repaid the loan because of his health issues that began in the spring of 2015 and that he had not returned to work until 2017.

As promised, respondent paid Totaro $8,190, via two cashier's checks, dated January 31 and March 1, 2019. Respondent also provided proof to the OAE that he had purchased the computers and monitors for Totaro, in November 2013, justifying the offset to his loan payment.

Respondent vehemently denied that Totaro, his longtime friend, was ever his client. Respondent admittedly, however, had assisted Totaro in connection with two business-related matters, prior to the April 11, 2013 loan transaction.

specialty products. Respondent testified that he sent this letter to Totaro's business address, rather than his home address, to avoid putting him in "harms way with his wife." Respondent stated that he never represented Antichi Sapori, Totaro, or any of Totaro's business interests.

The first matter commenced in 2011 or 2012,[7] when Totaro told respondent about difficulties he had encountered with his business, Antichi Sapori, a distributor of imported Italian specialty products. Totaro's business was related to a business with the same name located in Italy that had been set up and operated by Totaro's brother-in-law. When Totaro's brother-in-law sold the Italy-based business, the new owners notified Totaro that he could no longer operate his New Jersey-based business under the same name.

Respondent explained that, when Totaro informed him of the situation, he asked Totaro whether his company was incorporated or trademarked. He also reached out to a "couple of colleagues over in Europe that I had done human rights work with over the years," who helped respondent check the European Union Office of Trademark. Through this effort, respondent learned that the new owners had only trademarked the name "Antichi Sapori" in Europe, and not in the United States.[8]

[7] Respondent could not recall the precise timeframe. He told the OAE that he assumed "it probably was maybe '12, '11, '12, something like that" and '13 at the latest, at the most." He testified, however, that he believed it happened prior to April 11, 2013, when he borrowed money from Totaro.

[8] Respondent explained that he had lived in Italy for many years prior to attending law school and had developed contacts in the country. After becoming a lawyer, respondent stated that he returned to Italy to participate "in certain causes" and developed connections with people in "law enforcement, professionals of all kinds, politicians, elected officials, journalists of all kinds."

Respondent communicated this information to Totaro and told him he should obtain a trademark in the United States for Antichi Sapori. Respondent referred Totaro to a law firm in Washington, D.C. that specialized in trademark matters, with which respondent had become familiar while employed with a different law firm. Respondent explained that he made the referral because he was not a trademark attorney, nor a lawyer licensed in Italy or Europe.

Respondent also testified that he spoke to someone purporting to represent Antichi Sapori in Italy. During his demand interview with the OAE, respondent explained that "there was some lawyer that the – I don't know if it was his brother-in-law's lawyer that I may have spoken to on a couple of occasions in Italy, because, you know, they were throwing smoke up in the air, and I – you know, and that's basically it." During the ethics hearing, the OAE questioned respondent regarding his reference to having communicated with a lawyer in Italy on Totaro's behalf, and respondent clarified:

> Well, I wanted to be nice there. I think he was a so-called lawyer. I think he was a – he was – he was a gangster, too, and basically they were telling [Totaro] at the time, who wanted to go to Italy to his home town to visit family, that – that maybe it wasn't good for him to go. So I called this – this so-called lawyer up and basically said that, -- you know, someone should stop with this nonsense, because you know, there is – there is – there is the police, there is the carabinieri, there is the keenance (phonetic) in Italy and alls it takes is a phone call on these clowns and – and maybe they'll have other – other problems than to go bother a man

> who's just trying to make a living for his family here in the United States.
>
> [T56.]

Respondent explained further:

> [W]hen I spoke with that person who said he was a lawyer, but I don't think he was anything, I – quite frankly, I think he was a piece of garbage, because I have no respect for – for that element.
>
> Quite frankly, and 'cause Mr. Totaro said he couldn't – he wanted to go to Italy to go visit his sister and – and aunt and whatever, and cousins and – and that there was threats. That he wanted to go there with his – with his son, who I was very fond of, very fond of the young man.
>
> And so I told that character, you know that this threatening and this garbage has gotta end because, you know – you know, there are – there is law enforcement in Italy . . . .
>
> [T61.]

Respondent denied that any of his discussions with this purported attorney involved legal matters. Respondent also stated that, after he spoke with the purported attorney for the Italian company, and threatened to report the attorney to the authorities, "that was the end of that." Respondent described the actions he had taken on behalf of Totaro as "what every good citizen would do and I contacted the people I needed to contact and – and put a wrench in that. So that's what I did. A friend, not – not as legal counsel."

Respondent testified that Totaro did, in fact, retain trademark lawyers and successfully obtained a trademark for his business. Respondent denied being compensated for the help he provided Totaro.

In his January 11, 2019 letter to Totaro, respondent reiterated his deep fondness of him, pledging that "if you or your family called needing my assistance or anything, I would drop everything and do whatever I could to help." He then reminded Totaro of the assistance he had provided Totaro in connection with the Italian "gangsters," stating:

> You will recall, when those gangsters wanted to destroy you and take away your business and livelihood, I took them on and defeated them and saved the business you created and worked very hard to build. I also intervened and advised you in many other matters. All was always done for friendship and nothing else. You also were always very gracious and good to me. I truly hope, putting aside and resolved these mere material issues, we can return to where we were.
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> [Ex13.]

Respondent testified that, although he had helped Totaro save his business, it was "as a human being, as a friend," and "[n]ot as a lawyer," reiterating that he "didn't do anything legally."

In a second matter, respondent admittedly was involved in a business transaction with Totaro involving a deli located in Lyndhurst.

Specifically, Totaro wanted to purchase a deli and offered respondent a share in the business venture, although the terms of the business arrangement were never memorialized in writing. In furtherance of that business venture, in 2011 and 2012,[9] respondent accompanied Totaro to a meeting with the owner, a former client and personal contact of Totaro's. Initially, the owner was asking $190,000 for the business, and Totaro and respondent abandoned their effort to purchase the business.

Subsequently, Totaro negotiated the price to $90,000, which he was willing to pay. Respondent, however, stepped in, "negotiated hard" with the attorney for the owner, and persuaded the owner to sell the business for "zero."[10] Respondent also negotiated with the landlord to extend the lease for the deli with three options. Respondent described the result of the lease negotiations as "very favorable terms and with options which would obviously add greater value to the business." Respondent acknowledged that Totaro was "very pleased" with the "incredibly favorable terms" for the lease.

[9] Again, respondent did not remember the precise dates of this transaction. He stated during his OAE interview that "it has to be '11, '12, it has to be that time frame," "maybe '13," but that he didn't "remember the exact timeline."

[10] At oral argument, when asked how he had convinced the seller to reduce her asking price from $190,000 to zero, respondent explained that he viewed himself as a skilled negotiator and, also, the seller was motivated for various reasons.

Although the terms of their business venture were not memorialized in writing, respondent claimed that Totaro had promised to share profits with respondent once he had reimbursed himself for his financial investment in the deli. Respondent explained that Totaro did not want the agreement memorialized because he did not want his family to know he had agreed to give respondent an interest in the business. Although Totaro sold the deli business a few years later, he did not inform respondent of the sale or share any profits or proceeds of the sale.

In his January 11, 2019 letter to Totaro, respondent reminded Totaro of his involvement with regard to the Lyndhurst deli and described it as follows:

> You will recall that we pursued the purchase of that Deli together. In fact, you will recall that the previous owner first wanted $150,000 to $200,000 for said business. I negotiated hard and got it for ZERO. You will recall you were willing to pay $60,000 to $90,000 for said business. I was able to get it for us for ZERO. Also, you will recall I negotiated with the landlord and was able to obtain for us a new lease at very favorable terms and with options which would obviously add greater value to the business. Further, you will recall just prior to the purchase you said and I trustingly agreed, that you did not want Giulia and her mother to know I was your partner in the Deli. Therefore, all was done in accordance with your suggestion.
>
> [Ex13.]

Respondent denied providing legal representation to Totaro in connection with either transaction, or any matter, at any time. Respondent emphasized that

he did not track the time he spent working on the deli transaction because he was not representing Totaro; rather, at the time of the negotiations, he presumed he "was gonna be a partner." Further, respondent confirmed, and the OAE acknowledged, the lack of any written documentation evidencing an attorney-client relationship.

Recordkeeping Deficiencies and Negligent Misappropriation

During the relevant period, respondent maintained his attorney trust account (ATA) and attorney business account (ABA) at Bank of America.

On March 13, 2019, in connection with its investigation of the foregoing grievances, the OAE directed respondent to produce the following financial records for the time period January 1, 2014 to March 13, 2019:

- Monthly three-way reconciliations for his ATA;
- Client ledger cards;
- Check book registers for his ATA;
- Receipts and disbursements journals for his ATA

and ABA; and

- ABA and ATA bank statements.

The OAE also required respondent to appear, on April 30, 2019, for a demand audit.

Respondent, along with his former counsel, Mark Tallmadge, Esq., appeared for the audit. Respondent produced some, but not all, of the requested financial records and, thus, on May 8, 2019, the OAE notified respondent, through counsel, of the following recordkeeping deficiencies:

1. Failure to conduct three-way reconciliations of his ATA (R. 1:21-6(c)(1)(H);
2. Incomplete client ledger cards (R. 1:21-6(c)(1)(A));
3. ATA checks not prenumbered (R. 1:21-6(C)(1)(G));
4. Improper ABA designations (R. 1:21-6(a)(2)); and
5. Improper image-processed ABA and ATA checks (R. 1:21-6(b)).

The OAE directed respondent to correct the aforementioned deficiencies and produce to the OAE, by June 24, 2019, the following information: (1) monthly three-way reconciliations with accompanying monthly bank statements; (2) client ledger sheets with running balances; and (3) the names of the clients whose money comprised his January 1, 2014 ATA balance, totaling $56,491.59.

On July 22, 2019, after the OAE had granted two extensions, respondent produced his three-way reconciliations, client ledger cards, and additional documents to the OAE; however, the production remained deficient. In its September 27, 2019 letter, the OAE delineated the deficiencies as follows:

1. Incorrect client balances on monthly ATA three-way reconciliations;
2. No client ledger cards for attorney funds held in his ATA, including funds used to pay bank service fees;
3. No client ledger cards for the Spellman, Post, or Astacio matters;
4. Inactive client balance of $1,000 in the Astacio matter from January 2014 to April 1, 2019;
5. Unidentified funds totaling $9,990.08 in his ATA;
6. Failure to use preprinted ATA checks; and
7. Failure to produce image-processed ABA checks.

The OAE also notified respondent that the client ledger card for the Mychkine matter reflected negative balances and, thus, directed respondent to provide an explanation for an over-disbursement, as well as a copy of the Mychkine client file, by October 19, 2019.

In response, on October 16 and 18, 2019, respondent, through counsel, requested an extension to produce the requested information, which the OAE granted to November 12, 2019. The OAE also directed respondent to appear, on November 19, 2019, for a continuation of the audit. Although respondent produced some of the requested information and appeared for the continuation of the OAE's audit, his records remained deficient.

Consequently, on November 25, 2019, the OAE instructed respondent to address the following deficiencies, no later than December 20, 2019:

1. Respondent's three-way reconciliations remained incorrect;

2. Respondent's client ledger card for "service fees" failed to identify the source of the funds;

3. In the Astacio matter, respondent failed to provide documentation to support his previous statement to the OAE that he believed the $1,000 ATA balance constituted fees paid to him as a retainer;

4. Produce all ATA and ABA checks for past three months to demonstrate compliance with R. 1:21-6(b);

5. In the Mychkine matter, respondent's ATA ledger erroneously reflected a debit of $34.51 as of February 9, 2018;

6. In the Mychkine matter, respondent's client ledger card failed to identify the payee or reason for payment for each disbursement between February 20, 2014 to December 31, 2016;

7. For each disbursement in the Mychkine matter, excluding disbursements to the client, respondent was directed to produce supporting documentation and proof that the client authorized the payment of each expense; and

8. For each representation of Mychkine, respondent was directed to identify the type of representation; the dates of representation; fee agreements (written and verbal); and, if applicable, all settlement agreements.

On December 31, 2019, respondent again produced documents and a written response to the OAE's November 25 letter; however, the production remained deficient, and the client ledger cards and bank records still did not reconcile.

Thus, the OAE reconstructed respondent's client ledgers for 2014 through 2020.

On July 13, 2020, the OAE informed respondent, through his counsel, that his records remained deficient and that the OAE wanted to schedule another interview, via telephone, the purpose of which was "primarily for the OAE to identify and explain the outstanding concerns."

On July 17, 2020, respondent's counsel informed the OAE that he had difficulty reaching respondent because respondent was out of work "due to a recent flare-up of a preexisting illness (the illness disclosed in his prior submissions to the OAE)," and that respondent anticipated being unable to work for four weeks. Respondent's counsel suggested that the demand audit be rescheduled for the week of August 24, 2019.

On July 22, 2020, the OAE denied respondent's five-week adjournment request unless respondent submitted proof of his medical condition and a note from his physician. By separate letter on the same date, the OAE notified respondent of the following outstanding deficiencies:

1. Unidentified ATA funds totaling $1,852.40;
2. Unidentified source for the payment of bank fees totaling $947.85;

3. Commingled legal fees totaling $2,275 in his ATA since 2014;

4. In the Boyle matter, a $5,163.76 shortage persisted from October 20, 2017 to January 31, 2019, thereby impacting other client funds;

5. In the Mychkine matter, a $484.53 shortage persisted from February 9, 2018 to January 31, 2019, thereby impacting other client funds; and

6. Unidentified online transfer in the amount of $1,500 on May 17, 2018.

The OAE directed respondent to provide, no later than August 21, 2020, any additional information to address these deficiencies. Respondent also was directed to produce his three-way reconciliations and client ledger cards from January 1 to June 30, 2020.

On July 28, 2020, respondent and his counsel participated in a telephonic interview, during which the OAE again explained the concerns identified in its deficiency letter and encouraged respondent to retain an accountant. Respondent informed the OAE that he understood the concerns addressed in the OAE's July 22, 2020 letter.

On August 28, 2020, respondent provided additional documents to the OAE; however, his production remained deficient.

Indeed, between March 13, 2019, when the OAE first requested respondent's financial records, and July 28, 2020, when the OAE conducted its last telephonic interview, respondent failed to produce all the requested records and failed to correct many of the noted deficiencies, including his failure to reconcile his book balance, bank balance, and client trust ledger balance for his ATA.

Further, respondent failed to produce updated client ledgers or a firm ledger card, reflecting the source of the funds respondent used to pay bank fees. Instead, he produced a ledger of "service fees" charged by the bank to his ATA. However, his "service fees" ledger also was inaccurate because it did not account for all the bank fees charged to the ATA. Although respondent had represented to the OAE that bank fees were offset by his earned legal fees received by his firm when his prior law firm dissolved, he failed to create a ledger of firm funds that would have reflected deductions for fees charged by the bank.

Respondent also failed to provide updated client ledger cards for the Boyle and Mychkine matters.

The OAE's review and reconstruction of respondent's financial records revealed that respondent had over-disbursed client funds in three client matters, resulting in the invasion of other clients' funds.

Specifically, in the Mychkine matter, respondent over-disbursed payments from his ATA to his client on four occasions, resulting in the negligent misappropriation of other client funds, as follows:

- On November 3, 2015, respondent over-disbursed $15,837.93 to Mychkine, thereby invading funds belonging to six other clients, and $3,904.40 of earned legal fees held in his ATA. The negative balance persisted for two days until, on November 5, 2015, respondent received a $72,000 monthly installment settlement payment on Mychkine's behalf.
- On December 15, 2015, respondent over-disbursed $21,687.93 to Mychkine, thereby invading funds belonging to eight other clients, as well as earned legal fees held in his ATA. The negative balance persisted for a month when, on January 16, 2016, respondent received a $72,000 deposit on Mychkine's behalf.

- On March 1, 2016, respondent again over-disbursed $21,687.93 to Mychkine, thereby invading funds belonging to seven other clients, as well as earned legal fees held in his ATA. This shortage persisted until Mach 10, 2016, when respondent deposited $72,000 in his ATA on Mychkine's behalf.
- On January 26, 2018, respondent over-disbursed $514.53 to Mychkine, thereby invading funds belonging to four other clients, as well as earned legal fees held in his ATA. This shortage persisted until February 8, 2018, when respondent deposited $1,648 in his ATA on Mychkine's behalf.
- On February 9, 2018, respondent over-disbursed $454.53 to Mychkine, thereby invading funds belonging to four other clients, as well as earned legal fees held in his ATA. This shortage persisted for more than two years, until at least August 28, 2020.

In the Barnwell matter, respondent over-disbursed a payment from his ATA to his client on December 2, 2015, resulting in the negligent misappropriation of other client funds. Specifically, respondent over-disbursed

$3,433.43, thereby invading funds belonging to eight other clients, as well as earned legal fees held in his ATA. This shortage persisted until December 28, 2015, when respondent deposited $4,000 on Barnwell's behalf.

In the Boyle matter, respondent over-disbursed a payment from his ATA to his client on October 20, 2017, resulting in the negligent misappropriation of other client funds. Specifically, respondent over-disbursed $5,163.76, thereby invading funds belonging to five other clients, as well as earned legal fees held in his ATA. This shortage persisted for nearly three years, until at least August 28, 2020.

Respondent failed to discover the October 20, 2017 misappropriation in the Boyle matter or the January 26, 2018 misappropriation in the Mychkine matter, resulting in a combined shortage of $5,678.29, until the OAE commenced its investigation in March 2019. Respondent admittedly was unable to determine the cause of the shortage.

On August 28, 2020, respondent transferred $3,176.62 from his ABA to his ATA to partially correct the shortage. Respondent also had commingled earned legal fees in his ATA, totaling $2,701.32, which he applied to correct the shortage. Respondent's predecessor law firm had paid legal fees to the firm, which had remained in respondent's ATA since at least 2014. By using commingled earned legal fees held in his ATA to cover bank service fees, and

by deducting the amount of bank fees from the commingled legal fee balance each year, respondent held commingled funds ranging from $4,062.40, as of December 31, 2014, to $2,701.32, as of August 28, 2020.

Despite having admitted the majority of his misconduct, respondent urged the DEC to dismiss the charges or, alternatively, to impose no discipline.[11]

In support of no discipline, respondent asserted that no client was harmed by his recordkeeping deficiencies that resulted in the negligent misappropriation of client funds.[12] Further, once he was made aware of his obligation to maintain three-way reconciliations, he implemented this requirement into his law practice. Specifically, respondent stated:

> Notwithstanding that for a time, only because unaware of said requirement, my firm was not utilizing the three-way reconciliation procedure, the review and reconciliation of the attorney trust account pursuant to said three-way reconciliation confirmed that all clients received all their funds and that their funds were never mishandled or misused for any other reason or purpose than for distributions to the respective clients. At the end of that endeavor, the only money in question were fees, frankly, overlooked and forgotten, earned from matters during the timeframe when the predecessor firm was being phased out and the successor firm came into existence and continued working on said matters. Lastly, to ensure that there are never any further issues of any kind whatsoever, I hired a seasoned accountant to reconcile the firm's attorney trust account.

[11] Although respondent was represented by counsel during the OAE's investigation, he appeared pro se at the ethics hearing.

[RSpp2-3.]

Likewise, respondent claimed that no client was harmed as a result of his failure to maintain liability insurance. As he explained during the ethics hearing, respondent mistakenly believed that the insurance payments that were being made included payments for the firm's professional liability insurance. As soon as he became aware of the lapse in coverage, he immediately corrected this mistake by obtaining the required coverage. Respondent also explained that this occurred during a period when he had become seriously ill and was out of the office. Respondent asserted that he has since implemented "a system where such responsibilities and oversight were delegated and co-shared with others to ensure such a situation would never happen again."

Concerning the $10,000 loan from Totaro, respondent fervently denied that Totaro ever was his client. Rather, he insisted the two were longtime friends. Respondent emphasized that he intervened in the Italy matter "as a friend," he was "not engaged for any legal representation," and he merely assisted by "contacting persons in my network in Italy from law enforcement, professionals, elected officials, media, etc. and ascertained the information needed to put a wrench in those characters' endeavors." Respondent continued, stating "[n]othing I did was legal work. All I did were the actions of a friend for a dear friend who risked losing his livelihood and everything else."

Likewise, respondent denied representing Totaro in connection with the "gourmet deli affair," claiming he had, instead, stepped into negotiations only when Totaro's efforts at negotiating a sale price had fallen short. Although their business relationship was never memorialized, respondent asserted that he was a partner in the transaction, and "did not act as Mr. Totaro's attorney."

> As for the gourmet deli affair, I was a partner or at least that is what was discussed and agreed. I was not and did not act as Mr. Totaro's attorney. Succinctly, after Mr. Totaro, in his negotiating efforts, was only able to get a certain reduction in the proposed sale price from said deli owner and little to nothing from the owner of the premises regarding the lease, I stepped in and took over said negotiations. After negotiating with both the deli's owner and landlord, I obtained the deli for zero and a very favorable lease with three automatic renewal options. Mr. Totaro hired the employees, managed and operated the business through said employees and managed all financial affairs.
>
> [RSp5.]

When Totaro sold the deli business a few years later, respondent "never received a penny."

Based upon the asserted lack of harm to any client, the corrective steps he took to remedy the deficiencies identified by the OAE, and the fact the misconduct occurred while he was seriously ill, respondent urged the DEC to "dismiss this Complaint or recommend no discipline."

The OAE, for its part, asserted in its October 21, 2022 summation brief that respondent had violated all the charged RPCs.

Specifically, respondent admitted that he failed to maintain the required professional liability insurance, in violation of RPC 5.5(a). The OAE acknowledged, however, that there was no clear and convincing evidence that respondent knowingly failed to maintain such coverage. Respondent also admitted, and the evidence clearly and convincingly established, that he had negligently misappropriated client funds in three client matters (the Mychkine, Boyle, and Barnwell matters) and had commingled earned legal fees in his ATA from 2014 to 2020, in violation of RPC 1.15(a). Further, respondent admitted to having committed a number of recordkeeping infractions, in violation of RPC 1.15(d), and to having failed to fully cooperate with the OAE's investigation in this respect, in violation of RPC 8.1(b).

The OAE emphasized that, during the ethics hearing, respondent submitted a June 30, 2022 three-way reconciliation to support his argument that he had brought his recordkeeping into compliance with the Rules. However, respondent did not provide supporting financial records for his reconciliation and, thus, the OAE asserted that it was unable to verify whether his records fully complied with R. 1:21-6.

With respect to the $10,000 loan from Totaro, the OAE asserted that respondent had an attorney-client relationship with Totaro and, as such, was obligated to follow the protections afforded by RPC 1.8(a)(1)-(3). The OAE acknowledged the absence of a formal agreement with regard to either the Antichi Sapori or Lyndhurst deli transaction, but asserted an attorney client relationship could be inferred, citing In re Palmieri, 76 N.J. 51 (1978). Specifically, the OAE urged:

> Here, Respondent gave legal advise [sic] to Totaro regarding his business, Antichi Sapori. Specifically, Respondent was able to find out through business contacts he had in Italy, that the Italian company had not trademarked the Antichi Sapori name outside of Europe. Respondent told Totaro that he should trademark the name of his business in the United States. Respondent referred Totaro to a law firm in D.C., who could assist him with a trademark. Respondent additionally held himself out as Totaro's attorney and confronted and warned the lawyer who threatened Totaro that Respondent would report the lawyer to Italian authorities if he continued to threaten Totaro both personally and professionally. Totaro relied on and followed Respondent's valuable advice by trademarking the name of his business. … There is no question that Respondent provided valuable legal advice and legal services to Totaro, although Totaro did not pay Respondent for those services.
>
> [OAESp9.]

Next, the OAE stated that respondent provided legal services to Totaro in connection with the deli business "by negotiating with the seller of the

Lyndhurst Deli and by negotiating with the landlord who owned the space where the deli operated." The OAE asserted that this arrangement constituted a "barter arrangement," whereby respondent performed legal services for Totaro in exchange for receiving an interest from Totaro in the deli business.

The OAE analogized respondent's attorney-client relationship with Totaro to the relationships found to exist in Milo Fields Trust v. Britz, 378 N.J. Super. 137 (App. Div. 2005) (attorney-client relationship existed when an attorney performed legal services for a client without charge and, in exchange for his services, received an interest in the client's business entities), and In re Futterweit, 217 N.J. 362 (2014) (the attorney agreed, in lieu of legal fees, to share in the profits of his client's business and, thus, violated RPC 1.8(a); the attorney also violated RPC 1.5(b) by failing to provide the client with a writing setting forth the basis or rate of his fee).

The OAE maintained that, because respondent had an attorney-client relationship with Totaro, he was obligated to adhere to the protections of RPC 1.8(a) before entering into the loan transaction. Respondent admitted that he had not advised Totaro in writing to seek independent legal advice and never obtained his informed consent. Moreover, according to the OAE, the loan was unfair and unreasonable because there was no formal deadline for repayment and no interest was charged.

Citing disciplinary precedent discussed below, the OAE asserted that the baseline discipline for respondent's separate violations of RPC 1.8(a) and RPC 5.5(a) was an admonition, and that the baseline for respondent's combined violations of RPC 1.15(a), RPC 1.5(d), and RPC 8.1(b) was a reprimand.

In mitigation, the OAE acknowledged respondent's serious health issues; however, the OAE pointed out that this factor should not be accorded significant weight because respondent failed to offer his medical records into evidence and the records he previously had produced to the OAE were redacted. The OAE also disagreed that respondent's cooperation with the OAE should be accorded any weight because, despite the OAE's repeated efforts to instruct him on proper recordkeeping practices, his financial records remained noncompliant with R. 1:21-6.

> Moreover, although Respondent advised the OAE that he hired an accountant, that accountant did not reach out to the OAE and there is no evidence that an accountant has begun assisting Respondent with his recordkeeping. Respondent produced a three-way reconciliation summary for June 30, 2022 (R-1) but did not produce the requisite back up documentation to establish that Respondent is now properly performing his recordkeeping. At present, Respondent's financial records still do not comply with R. 1:21-6.
>
> [OAESp15.]

In aggravation, the OAE noted that respondent received an admonition, in 2022, in De Pierro I, albeit for dissimilar misconduct. Further, the OAE urged

that respondent's "inability to conform his conduct in respect of his recordkeeping responsibilities" should be considered in aggravation. See In the Matter of Raymond Charles Osterbye, DRB 20-057 (July 30, 2020) at 3, so ordered, 243 N.J. 340 (2020).

In sum, the OAE recommended that respondent be reprimanded for the totality of his misconduct. The OAE also recommended, as a condition to the discipline, that respondent be required to (1) submit to the OAE for at least one year, on a quarterly basis, his monthly ATA reconciliations, and (2) attend the New Jersey Institute Continuing Legal Education course titled "New Jersey Trust and Business Accounting" or an OAE-approved equivalent.

The DEC found, by clear and convincing evidence, that respondent violated RPC 1.15(a); RPC 1.15(d); RPC 5.5(a); and RPC 8.1(b). Specifically, the DEC determined that since respondent had stipulated to this misconduct in respect of these Rules, it was "not necessary for the Panel to analyze these Counts in terms of the legal requirements."

The DEC determined, however, that the OAE had failed to prove, by clear and convincing evidence, that respondent violated RPC 1.8(a). In particular, the DEC noted that the OAE had failed to produce Totaro as a witness and that respondent, who the DEC found credible, had denied the OAE's allegations. The DEC stated, in respect of RPC 1.8(a):

> The Respondent in his testimony appeared genuinely credible with regard to his version of the facts although somewhat confused as to the difference between friendship and attorney-client relationship. Based upon the lack of contradictory testimony, the Panel felt that the Office of Attorney Ethics did not meet the standard of proof by clear and convincing evidence that the Respondent's conduct constituted an ethical [sic] conduct or a violation of RPC 1.8(a).
>
> …
>
> Without the testimony of Totaro to refute the Respondent's perception of the matter, the Panel was left with a belief that the Office of Attorney Ethics had not met the standard of proof as indicated above.
>
> [HPR¶¶25,27.]

The DEC acknowledged that the baseline discipline for respondent's failure to maintain liability insurance was an admonition, and that his negligent misappropriation of client funds based upon his recordkeeping deficiencies required a reprimand. In aggravation, however, the DEC weighed respondent's prior admonition and concluded that a reprimand was the proper quantum of discipline for the totality of respondent's misconduct. Further, as a condition to his discipline, the DEC recommended that respondent (1) be required to submit his monthly three-way reconciliations to the OAE, on a quarterly basis, for at least six months, and (2) that he attend the CLE course recommend by the OAE in its summation brief.

At oral argument and in his March 2, 2023[13] submission to us, respondent stated that he agreed with the DEC's determination to dismiss the RPC 1.8(a) charge. He disagreed, however, with the DEC's recommendation that he be reprimanded for his admitted violations of RPC 1.15(a); RPC 1.15(d); RPC 5.5(a); and RPC 8.1(b), instead urging us to dismiss those charges or, alternatively, to impose an admonition.

Respondent emphasized at oral argument his position that no client had been harmed by his misconduct. Specifically, his failure to maintain liability insurance caused no harm to his clients and he took immediate corrective action to obtain the required insurance coverage. Likewise, in his view, the recordkeeping deficiencies, and his failure to conduct three-way reconciliations in particular, caused no client harm. Further, respondent asserted "there is no grievant because there never was a grievant. That is, never did a client receive a penny less than what was theirs and no check from the attorney trust account ever bounced." Moreover, he asserted that he hired a "seasoned accountant" to reconcile his firm's ATA and expressed his apology for his unintentional and unknowing error.

[13] Although his letter is dated March 2, 2023, respondent submitted his letter brief to us, via e-mail, on March 3, 2023 at 10:33 p.m. Despite respondent's submission being late, we considered it.

Respondent asserted that an admonition was supportable, citing disciplinary precedent where attorneys' misconduct had impacted client funds. Unlike the attorneys in those matters, who received an admonition or reprimand, respondent asserted that, by contrast, "no client ever received a penny less than what was due them" and "neither I nor any attorney or staff member ever took any client's money," thereby justifying an admonition.

For instance, respondent referred to In the Matter of Edward Kenny Hamill, DRB 20-217 (November 24, 2020), where we admonished an attorney who had disbursed settlement proceeds before securing the authorization of a third party that held an interest (RPC 1.15(b)), and who failed to segregate funds in which both the attorney and the third party held an interest (RPC 1.15(c)). In imposing only an admonition, we weighed the attorney's unblemished forty-year career at the bar. Similarly, respondent cited the following cases where we imposed admonitions: In re Bardis, 210 N.J. 253 (2012) (admonition for attorney who failed to supervise a nonlawyer, resulting in the theft of $142,000 in client funds; no prior discipline);[14] In re Mariconda, 195 N.J. 11 (2008) (admonition for attorney who delegated his recordkeeping responsibilities to his brother, a nonlawyer, who forged the attorney's signature on trust account checks and stole

[14] We recommended a reprimand. In the Matter of Constantine Bardis, DRB 11-370 (March 27, 2012. The Court imposed an admonition.

$272,000 in client funds; violations of RPC 1.15(a), RPC 1.15(d) and RPC 5.3(a) and (b); in mitigation, the attorney was unaware of his brother's unlawful activities and acknowledged his misplaced trust; no prior discipline in thirty years at the bar);[15] In the Matter of Lionel A. Kaplan, DRB 02-259 (November 18, 2002) (admonition for attorney who allowed law firm funds to remain in his trust account for fourteen years; the attorney also failed to supervise his bookkeeper, resulting in recordkeeping deficiencies; violations of RPC 1.15(a); RPC 1.15(d); and RPC 5.3; significant mitigation, including his unblemished thirty-year career).

Reprimands were imposed in the following matters: In re Murray, 185 N.J. 340 (2005) (reprimand for attorney who failed to supervise her staff resulting in the negligent misappropriation of client funds; in aggravation, we considered that the attorney twice had been admonished for the same misconduct); In re Bergman, 165 N.J. 560 (2000), and In re Barrett, 165 N.J. 562 (2000) (in companion cases, reprimands for attorneys who failed to comply with recordkeeping obligations and failed to supervise employees, resulting in the embezzlement of $360,000 in firm and client funds; in mitigation, we weighed

[15] We recommended a reprimand. In the Matter of Alan J. Mariconda, DRB 07-390 (April 17, 2008). The Court imposed an admonition.

the attorneys' unblemished careers and the corrective steps taken upon discovering the theft).

Respondent agreed with the DEC's determination to dismiss the RPC 1.8(a) charge. Respondent reiterated that Totaro was his friend and never his client. With respect to his involvement with the Antichi Sapori matter, he stated that he made a few telephone calls to stop "certain characters from Italy" who "endeavored to take away Mr. Totaro's livelihood." He emphasized that he never initiated legal action, but rather "intervened through contacting persons in my network in Italy" to "ascertain[] the information needed to put a wrench in those characters' intended malicious endeavors."

Regarding the deli transaction, respondent reiterated his understanding that "I was a partner, or at least that is what was discussed and agreed." Respondent stated that he did not act as Totaro's attorney.

Respondent distinguished Petit-Clair v. Nelson, 344 N.J. Super. 538 (App. Div. 2001), cited by the OAE, stating that he had never acted as Totaro's attorney in any capacity, whereas the attorney in Petit-Clair represented the corporation owned by the very individuals with whom he entered into a business transaction. Likewise, respondent asserted that Milo Fields Trust was distinguishable because, unlike in that matter, here "there was no allegation of

any request, offer or receipt of anything in exchange, nor could there be, for my actions as a friend or as a business partner."

In mitigation, respondent reiterated the lack of harm to any client; his "immediate and total cooperation with the OAE during its investigation;" his corrective action to ensure compliance with the Rules of Professional Conduct; his hiring of an accountant; and his serious health issues. In view of the significant mitigation, respondent urged us to dismiss the complaint and impose no discipline or, at most, to impose an admonition.

In its March 1, 2023 submission us, and during oral argument, the OAE stated that it agreed with the DEC's report and recommendation in all but one respect. Specifically, the OAE disagreed with the DEC's conclusion that the RPC 1.8(a) charge was not supported by clear and convincing evidence.

The OAE asserted that, contrary to the DEC's finding, Totaro's testimony was unnecessary "to establish that Respondent had provided legal services to Totaro between 2011-2012 and that Respondent violated RPC 1.8(a)-(c) by borrowing funds from Totaro in April 2013." The OAE claimed that respondent's admissions in his January 11, 2019 letter to Totaro and statements he made to the OAE during his April 30, 2019 demand interview clearly and convincingly supported the violation. Thus, according to the OAE, the "primary issue to be resolved at the hearing was whether Respondent was Totaro's

"attorney" as a matter of law, prior to when Respondent borrowed $10,000 from Totaro on April 11, 2013." In fact, respondent admitted nearly all the underlying factual allegations asserted by the OAE and only disputed the OAE's conclusion that he had an attorney-client relationship with Totaro; thus, according to the OAE, respondent's credibility, upon which the DEC relied, was not a critical factor in deciding whether he had violated RPC 1.8(a).

The OAE described the undisputed facts pertaining to the Antichi Sapori transaction as follows:

> Respondent spoke to Totaro about this and recommended to Totaro that he should trademark the name of his business. (T53:11 to 16; P-41, p. 130, lines 18-19) Respondent contacted colleagues he knew in Europe, who checked with the European Union Office of Trademark and found out that the name "Antichi Sapori" had not been trademarked in the United States. (P-41, p. 130, lines 1-5) Respondent referred Totaro to a law firm in Washington D.C. which handled trademark matters. (T54:1 to 55:4; P-41, p. 128) Finally, Respondent admitted that he directly contacted an attorney for the Italian business owners after the Italian business owners threatened Totaro and warned him that he should not travel to Italy to visit his extended family. Respondent admitted that he told the attorney for the Italian company that he was familiar with the police and law enforcement in Italy and that he would contact the Italian authorities if the Italian business owners continued to threaten Totaro. (T56:3 to 18; T61:13 to 19). After Respondent spoke to the Italian attorney, "that was the end of that." (T61:20 to 24). Respondent claimed to Totaro in a January 11, 2019 letter that he "took [those gangsters on] and

> defeated them and saved the business you created and worked very hard to build."
>
> [OAEbp5.]

The OAE agreed that an attorney-client relationship would not have formed if respondent's involvement was limited to making a referral to a trademark lawyer; however, respondent became directly involved in the dispute between Totaro and the Italian owners of Antichi Sapori by contacting the attorney for the Italian company and telling that attorney he would get the Italian authorities involved if his clients did not cease making threats to Totaro. The OAE argued that, "[o]nce Respondent held himself out as a representative of Totaro and spoke directly to the attorney for Totaro's business competitors, he was providing legal services for Totaro."

Regarding the Lyndhurst deli transaction, the OAE relied upon the following facts to support the existence of an attorney-client relationship:

> Respondent also admitted that he performed legal services for a deli business solely owned by Totaro between 2011 and 2012. Respondent said that he "negotiated hard" with the attorney for the owner and persuaded the owner to sell the business to Totaro for "zero." (P-41, p. 132; P-13) Respondent admitted that it "took some time" to bring the owner down to zero for the deli business. (P-41, p. 136, line 5-17) Respondent also admitted that he negotiated with the landlord on behalf of Totaro and got an extension of the lease for the deli with three options. (J-1, para. 48; P-41, p. 132, lines17-19; T35:1-14) Respondent said that he got this lease at "very favorable terms and with options which

> would obviously add greater value to the business." (P-13; P-41, p. 132) Respondent admitted that he handled the negotiations on his own, both with the owner's attorney and the landlord. (T78:4-24; P-41, p. 135, lines 11-24) Respondent would tell Totaro about the efforts he was making to acquire the deli. (T80:4-7) Totaro was "very pleased" that Respondent got the deli for "zero" and Respondent got "incredibly favorable terms" for the lease. (T80:16 to 18)
>
> [OAEbp6.]

The OAE asserted that, because respondent was "planning to go into business with Totaro, he was providing legal services both for himself and his business partner, Totaro." Citing Petit-Clair, 344 N.J. Super. 538, the OAE claimed that, because Totaro was respondent's business partner at all times relevant to the deli transaction, "there is no question that Respondent had an attorney-client relationship with Totaro" when he negotiated the sale and lease terms.

Although the OAE acknowledged the absence of a formal professional engagement, it urged that an attorney-client relationship had arisen by inference, citing In re Palmieri, 76 N.J. 51, and Milo Fields Trust v. Britz, 378 N.J. Super. 137. As such, the OAE asserted that respondent was obligated to comply with RPC 1.8(a)(1)-(3), which he admittedly failed to do.

At oral argument, when asked whether a previous attorney-client relationship meant that the attorney was forever limited by RPC 1.8(a) with

respect to that particular client, the OAE replied that the answer was fact sensitive. In the instant matter, the OAE asserted that the deli business was still ongoing at the time respondent borrowed money from Totaro. In response to our questioning, however, the OAE acknowledged that respondent was not providing any legal services with respect to the deli at the time of the loan transaction.

Unanimous Findings of Misconduct

Following our de novo review of the record, we unanimously find that the DEC's determination that respondent violated RPC 1.15(a) (two instances); RPC 1.15(d); RPC 5.5(a); and RPC 8.1(b) is supported by clear and convincing evidence. We also determine that the DEC correctly concluded that the evidence did not clearly and convincingly establish respondent's violation of RPC 1.8(a).

Specifically, the record demonstrates that, as the result of his recordkeeping deficiencies, respondent negligently misappropriated and, thus, failed to safeguard client funds, in violation of RPC 1.15(a). The OAE's investigation revealed, and respondent admitted, that he repeatedly over-disbursed funds from his ATA, resulting in the invasion of entrusted client funds that he was required to hold, inviolate.

Specifically, in the Mychkine matter, respondent over-disbursed $15,837.93 on November 3, 2015; $21,687.93 on December 15, 2015; $21,687.93 on March 1, 2016; $514.53 on January 26, 2018; and $454.53 on February 9, 2018. Although respondent corrected four of the five ATA shortages within thirty days or less, one misappropriation persisted for more than a year.

In the Boyle matter, on October 20, 2017, respondent over-disbursed and negligently misappropriated $5,163.76, thereby invading funds belonging to other clients that he was required to hold inviolate. This shortage persisted for nearly seventeen months, until March 2019, when he replenished the funds.

In the Barnwell matter, respondent over-disbursed $3,433.43 on December 2, 2015, thereby invading funds belonging to other clients. This shortage persisted until December 28, 2015, when respondent replenished his account. Respondent, thus, violated RPC 1.15(a) via his negligent misappropriation of client funds.

Respondent separately violated RPC 1.15(a) by admittedly commingling earned legal fees in his ATA from at least 2014 through August 28, 2020.

Next, respondent violated RPC 1.15(d), which requires an attorney to comply with the recordkeeping provisions of R. 1:21-6. The OAE's investigation revealed, and respondent admitted to having committed, multiple recordkeeping deficiencies, including: (1) failure to conduct three-way

reconciliations of his ATA; (2) failure to maintain fully descriptive client ledger cards; (3) failure to use prenumbered ATA checks; (4) improper ABA designation; and (5) improper image-processed ATA and ABA checks. Respondent's failure to comply with the recordkeeping requirements of R. 1:21-6 resulted in his inability to fully cooperate with the OAE's investigation; his inability to reconcile his trust account; and his negligent misappropriation of client funds. As of the date of the ethics hearing, respondent still had not brought his records into compliance to the satisfaction of the OAE. Respondent, thus, violated RPC 1.15(d).

Respondent also violated RPC 5.5(a)(1). Specifically, R. 1:21-1B(a)(4) requires a limited liability company to obtain and maintain in good standing one or more policies of lawyers' professional liability insurance. The Court Rule provides, in relevant part:

> The limited liability company shall obtain and maintain in good standing one or more policies of lawyers' professional liability insurance which shall insure the limited liability company against liability imposed upon it by law for damages resulting from any claim made against the limited liability company by its clients arising out of the performance of professional services by attorneys employed by the limited liability company in their capacities as attorneys.
>
> [R. 1:21-1B(a)(4).]

Further, R. 1:21-1B(b) requires a limited liability company formed to engage in the practice of law to file with the Clerk a certificate of insurance, within thirty days after filing its certificate of formation. The Court Rule also requires the limited liability company to file with the Clerk any amendments to or renewals of the certificate of insurance within thirty days of the effective date of the amendment or renewal. Ibid.

Here, respondent formed a limited liability company – De Pierro Radding, LLC – on September 10, 2012. Consequently, respondent was required, by Court Rule, to maintain professional liability insurance and to file certificates of insurance with the Clerk. Respondent admittedly did neither for four years, from 2013 to 2017 and, consequently, violated RPC 5.5(a)(1), which prohibits a lawyer from practicing "law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." Despite his arguments to the contrary, respondent's mens rea is irrelevant in connection with this express obligation.

Further, respondent failed to fully comply with the OAE's reasonable requests for documents, in violation of RPC 8.1(b), which requires an attorney to "respond to a lawful demand for information from . . . [a] disciplinary authority." Here, respondent admittedly violated this RPC by, over a period of approximately seventeen months, repeatedly and continuously failing to fully

comply with the OAE's numerous directives that he provide financial and other requested documentation, thereby delaying the OAE's investigation in this matter. Indeed, as of the filing of the OAE's complaint, respondent had not yet corrected all his recordkeeping deficiencies to the satisfaction of the OAE.

It is well-settled that cooperation short of the full cooperation required by the Rules has resulted in the finding that the attorney violated RPC 8.1(b). See, e.g., In the Matter of Christopher Roy Higgins, DRB 19-456 (November 19, 2020) at 18-19 (the attorney failed, for more than seventeen months, to comply with the OAE's numerous requests for information and written responses to the matters under investigation, necessitating his temporary suspension by the Court; although the attorney ultimately filed a reply to the ethics grievance, brought his recordkeeping deficiencies into compliance, and stipulated to his misconduct, we concluded the lengthy period of non-compliance constituted a failure to cooperate, violative of RPC 8.1(b)), so ordered, 247 N.J. 20 (2021); In the Matter of James H. Wolfe, III, DRB 18-107 (September 6, 2018) at 12 (we determined the attorney had violated RPC 8.1(b) by failing to cooperate with the OAE for more than three years and, even after the Court ordered him to comply, the attorney initially did so only in part, and later, not at all), so ordered, 236 N.J. 450 (2019); In the Matter of Marc Z. Palfy, DRB 15-193 (March 30, 2016) at 48 (the investigator had to coax the attorney's cooperation

with the investigation and then was only partially successful in obtaining from the attorney the information he needed and had requested; we viewed the attorney's partial "cooperation as no less disruptive and frustrating than a complete failure to cooperate[,]" noting that "partial cooperation can be more disruptive to a full and fair investigation, as it forces the investigator to proceed in a piecemeal and disjointed fashion"), so ordered, 225 N.J. 611 (2016).

The record does not, however, support the charge that respondent violated RPC 1.8(a), which prohibits a lawyer from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The OAE asserted that respondent violated RPC 1.8(a) by procuring a $10,000 loan from Totaro, a client, without complying with the required

safeguards enumerated in subsections (a)(1) through (a)(3). However, the protections afforded by RPC 1.8(a) are implicated if, and only if, an attorney-client relationship exists between the parties at the time of the business transaction; stated differently, in the absence of an attorney-client relationship, there can be no violation of RPC 1.8(a).

Here, the record lacks clear and convincing evidence that an attorney-client relationship existed between respondent and Totaro by virtue of respondent's limited involvement in the Antichi Sapori and Lyndhurst deli transactions. "At its most basic, [the attorney-client relationship] begins with the reliance by a non-lawyer on the professional skills of a lawyer who is conscious of that reliance and, in some fashion, manifests an acceptance of responsibility for it." Kevin H. Michels, New Jersey Attorney Ethics, § 13.1 at 177 (2023) (citing In re Palmieri, 76 N.J. at 58, 60). The relationship can begin absent an express agreement or a bill for services rendered. In re Palmieri, 76 N.J. at 58-59; see also In re Makowski, 73 N.J. 265 (1977) (the payment of a fee is not a necessary element of an attorney-client relationship).

In the absence of an express agreement, as the OAE observed, the attorney-client relationship may be inferred from the conduct of the attorney and "client," or by the surrounding circumstances. In re Palmieri, 76 N.J. at 58-59. It must, however, be "an aware, consensual relationship." Id. at 58. On the

attorney's side, there must be a sign that the attorney is "affirmatively accepting a professional responsibility." Id. at 58, 60. On the client's side, there must be evidence that the client was relying upon the attorney in a professional capacity. "Before a professional obligation is created, there must be some act, some word, some identifiable manifestation that the reliance on the attorney is in his professional capacity." Id. at 60.

The case law cited by the OAE is in accord. For instance, in Petit-Clair, 344 N.J. Super, 538, the attorney represented two corporations and, during that representation, accepted a mortgage from the individual owners of the corporations without adhering to the safeguards of RPC 1.8(a). The trial court invalidated the mortgage based upon the attorney's failure to adhere to the requirements of RPC 1.8(a). The Appellate Division affirmed, rejecting the attorney's argument that he represented the corporation, and not the individual owners. The Appellate Division, in reaching its conclusion, emphasized the individual owners' reliance upon his legal representation:

> All that is necessary is that the parties relate 'to each other generally as attorney and client.' It is also clear that it is the substance of the relationship, involving as it does a heightened aspect of reliance, that triggers the need for the rule's prescriptions of full disclosure and informed consent.'
>
> [Petit-Clair, 344 N.J. Super. at 543 (quoting In re Silverman, 113 N.J. 193, 214 (1988)).]

Likewise, in Milo Fields Trust, 378 N.J. Super. 137, at the client's suggestion, the attorney entered into a barter arrangement with his client in exchange for the opportunity to invest in his client's business. Subsequently, when the client's business sold, a dispute arose regarding the attorney's claim to the proceeds based upon the attorney's failure to comply with RPC 1.8(a). The Appellate Division disagreed. Although the court recognized the existence of an attorney-client relationship based upon the fact the client had repeatedly sought legal advice from the attorney, and that they "relate[d] to each other generally as attorney and client," it declined to invalidate the business transaction. Although the attorney failed to comply with RPC 1.8(a), the court determined the transaction was not unfair to the client, the primary purpose underpinning the Rule, in large part due to the sophistication of the client.

Here, we conclude that, based on the facts in this record, there is insufficient evidence that the parties "relate[d] to each other generally as attorney and client," as occurred in Petit-Clair and Milo Fields Trust. Although respondent admitted to his involvement with the Antichi Sapori and the Lyndhurst deli transactions, he denied representing Totaro in either transaction, or, for that matter, ever. With respect to Antichi Sapori, respondent testified that he made a few telephone calls to inquire about the trademark status, based upon connections he had established while living in Italy. Although he spoke to

someone purporting to be the attorney representing the Italian-based Antichi Sapori, there was no evidence that respondent held himself out as Totaro's attorney during this communication. In our view, the fact respondent told this individual to stop with the threats against Totaro, his longtime friend, or that he would contact the Italian law enforcement authorities, without more, does not amount to representation.

Indeed, respondent's unrefuted testimony was that he assisted Totaro based upon his familiarity with Italy and its business culture, having lived there himself; that he provided no legal services on Totaro's behalf; and that, at all times, he acted as a friend. Totaro did not testify and no other evidence was presented that enables us to clearly and convincingly conclude that Totaro had relied upon respondent, in his professional capacity, to resolve his trademark dispute. To the contrary, respondent referred Totaro to an attorney located in Washington D.C. because he, admittedly, had no experience with trademark matters.

Likewise, with respect to the Lyndhurst deli business transaction, the uncontroverted evidence revealed that Totaro and respondent entered into an unwritten business arrangement to purchase the Lyndhurst deli. Although respondent admittedly helped negotiate the sale price and lease terms for the Lyndhurst deli, there was no clear and convincing evidence that he did so as

Totaro's lawyer. Arguably, as a business partner in the transaction, it behooved him to negotiate the best sale price and lease terms. The record lacked any evidence that Totaro relied upon respondent, in his professional capacity as an attorney, to negotiate the sale and lease on Totaro's behalf. In the absence of clear and convincing evidence that Totaro had relied upon respondent in this respect, or that the parties related to one another as attorney and client, we cannot infer an attorney-client relationship from the circumstances.

Respondent's January 11, 2019 letter to Totaro, in which he boasts of the assistance he provided Totaro in both matters, does not alter this conclusion. Standing alone, the fact that respondent's assistance proved helpful or beneficial to Totaro is immaterial and does not elevate the parties' long-standing friendship to that of an attorney-client relationship. Indeed, in the absence of evidence that Totaro had, by act, word, or identifiable manifestation relied upon respondent in his professional capacity with respect to either business matter, we are unable to conclude that an attorney-client relationship had formed. As such, respondent was not obligated to comply with the safeguards delineated in RPC 1.8(a) prior to entering into the loan transaction with Totaro. Thus, we determine to dismiss the RPC 1.8(a) charge.

As a final point, even if we had determined that an attorney-client relationship was inferred on the facts presented, as Palmieri permits, the record

failed to establish that respondent's prior "representation" of Totaro coincided with, or occurred in close proximity to, the loan transaction. Rather, as the OAE acknowledged, respondent believed his involvement with the previous matters occurred in 2011 or 2012. The date of the loan was April 2013. Thus, according to the only evidence on this point, the loan transaction could have occurred two years after respondent's "representation" of Totaro had concluded. Thus, assuming arguendo that respondent had represented Totaro, there is no clear and convincing evidence that respondent's representation of Totaro was ongoing at the time of the loan transaction. To be clear, we have recognized that, in certain circumstances, an attorney who goes into business with a former client still may be required to comply with the RPC 1.8(a) safeguards. For instance, if the attorney is unable "to claim that he or she is only acting as a businessperson with respect to the transaction between them," the requirements of RPC 1.8(a) will attach. In the Matter of Joel Lee Schwartz, DRB 12-142 (November 1, 2012) at 20-21, so ordered, In re Schwartz, 216 N.J. 167 (2013). Here, however, the scant record demonstrates that, at best, respondent provided Toronto with limited legal representation (again, solely for arguments sake) in two discrete matters, possibly predating the loan by up to two years. Further, the parties had a long-established friendship that predated either of the "representations." In our view, this is not the type of attorney-client relationship that, upon its conclusion,

would preclude an attorney from subsequently entering into a business transaction with the former client, absent compliance with the safeguards enumerated by RPC 1.8(a).

In sum, we unanimously find that respondent violated RPC 1.15(a) (two instances); RPC 1.15(d); RPC 5.5(a); and RPC 8.1(b). We determine to dismiss the charge pursuant to RPC 1.8(a). The sole issue remaining for our determination is the appropriate quantum of discipline for respondent's misconduct.

Generally, a reprimand is imposed for recordkeeping deficiencies that result in the negligent misappropriation of client funds. See, e.g., In re Osterbye, 243 N.J. 340 (the attorney's poor recordkeeping practices caused a negligent invasion of, and failure to safeguard, funds owed to clients and others as a result of real estate transactions, in violation of RPC 1.15(a) and RPC 1.15(d); 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; no prior discipline); 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).

The baseline discipline for practicing law without maintaining the required professional liability insurance is an admonition. See In re Lindner, 239 N.J. 528 (2019) (default; for a three-year period, the attorney practiced law as a limited liability corporation without maintaining professional liability insurance; no prior discipline), and In the Matter of F. Gerald Fitzpatrick, DRB 99-046 (April 21, 1999) (for a six-year period, the attorney practiced law as a professional corporation without maintaining liability insurance).

If the misconduct is accompanied by other violations or aggravating factors, greater discipline may be warranted. See In re Killen, 245 N.J. 382 (2021) (reprimand for attorney who knowingly failed to maintain professional liability insurance for four years; the attorney, who was also a part-time municipal court judge, committed also additional misconduct violative of the Code of Judicial Conduct), and In re Coleman, 245 N.J. 264 (2019) (censure for attorney who, in two consolidated matters, failed to maintain liability insurance

while practicing as a professional corporation; the attorney also negligently misappropriated client funds (RPC 1.15(a)), violated the recordkeeping rules (RPC 1.15(d)), advertised as a professional corporation despite his corporate status having been revoked (RPC 7.1(a)), and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)); in aggravation, we weighed the default status of one matter and, in the second matter, the prolonged shortage in respondent's trust account; no prior discipline).

Similarly, when an attorney fails to cooperate with disciplinary authorities, and previously has been disciplined, but the attorney's ethics record is not serious, reprimands have been imposed. See In re Howard, 244 N.J. 411 (2020) (the attorney failed to respond to the DEC's four requests for a written reply to an ethics grievance, which alleged that the attorney had failed to prosecute his client's claim for social security disability benefits; the attorney had received a prior censure for similar misconduct in which he had failed to cooperate with disciplinary authorities; in mitigation, the attorney ultimately retained ethics counsel, cooperated with the DEC, and stipulated to some of his misconduct), and In re Larkins, 217 N.J. 20 (2014) (default; the attorney did not reply to the ethics investigator's attempts to obtain information about the grievance and failed to file an answer to the formal ethics complaint; although we noted that a single violation of RPC 8.1(b), in a default matter, does not

necessitate enhancement of the discipline from an admonition to a reprimand, a reprimand was imposed based on a prior admonition and, more significantly, a 2013 censure, also in a default matter, in which the attorney had failed to cooperate with an ethics investigation).

Respondent's misconduct is most similar to the attorney in Osterbye, who received a reprimand. Like respondent, Osterbye's poor recordkeeping practices resulted in the negligent misappropriation of other clients' funds, in violation of RPC 1.15(a) and (d). Also like respondent, Osterbye commingled his personal funds with client trust funds. Moreover, like respondent, Osterbye failed to fully cooperate with the OAE for more than a two-year period and displayed an inability to conform his conduct in respect of his recordkeeping responsibilities. Osterbye, like respondent, also committed additional, albeit dissimilar, misconduct – Osterbye used misleading language in his letterhead, in violation of RPC 7.1(a) and RPC 7.5(e), whereas respondent failed to maintain professional liability insurance, in violation of RPC 5.5(a). Importantly, however, both types of misconduct typically are met with admonitions. In the Matter of Raymond Charles Osterbye, DRB 20-057 at 3.

Thus, based upon the above disciplinary precedent, and Osterbye in particular, the totality of respondent's misconduct could be met with a

reprimand. To craft the appropriate discipline, however, we weigh both mitigating and aggravating factors. This is where we cannot reach a consensus.

Members Voting for a Reprimand

Vice-Chair Boyer and Members Petrou and Rodriguez voted for a reprimand. In mitigation, these three Members accorded some weight to the fact respondent stipulated to the majority of his misconduct. In aggravation, these three Members also considered respondent's prior admonition, albeit for dissimilar misconduct. On balance, these three Members determine that the aggravating and mitigating factors were in equipoise and, thus, found that a reprimand is the appropriate quantum of discipline for respondent's misconduct.

Members Voting for a Censure

Chair Gallipoli and Members Joseph and Rivera voted to impose a censure. In addition to respondent's prior discipline, these three Members weighed, in aggravation, respondent's continued refusal to accept full responsibility for his misconduct. During oral argument, respondent again urged us to dismiss the charges against him, repeatedly emphasizing the lack of client harm arising from misconduct. These Members found his dismissive attitude toward his ATA shortages, some of which persisted for lengthy periods of time, and his ongoing failure to bring his recordkeeping into compliance to the

satisfaction of the OAE, to be alarming. Absent indicia that respondent sincerely accepted responsibility for his misconduct, these three Members remain concerned that the misconduct will reoccur. Thus, because, in their view, the aggravating factors outweigh any mitigation, these three Members determine that a censure is the appropriate quantum of discipline to protect the public and preserve the public's confidence in the bar.

As conditions to his discipline, we unanimously agree that respondent should be required to (1) submit to the OAE, on a quarterly basis, his monthly ATA reconciliations and supporting financial records, for a period of two years, and (2) complete, within ninety days of the Court's Order in this matter, one OAE approved recordkeeping course.

Member Menaker was recused.

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 Matter of Giovanni De Piero
Docket No. DRB 23-024

Argued: March 16, 2023

Decided: July 6, 2023

Disposition: Other

Members	Reprimand	Censure	Recused	Absent
Gallipoli		X		
Boyer	X			
Campelo				X
Hoberman				X
Joseph		X		
Menaker			X	
Petrou	X			
Rivera		X		
Rodriquez	X			
Total:	3	3	1	2

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