SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 23-241
District Docket No. XIV-2020-0470E

In the Matter of Timothy Joseph McIlwain
An Attorney at Law

Argued
January 18, 2024

Decided
April 1, 2024

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

Robert E. Ramsey appeared on behalf of respondent.

Table of Contents

Introduction 1
Facts 4
Recordkeeping Violations 4
Commingling Funds 12
Failure to Maintain Professional Liability Insurance 14
The Parties' Arguments Before the Board 16
Analysis and Discipline 18
Violations of the Rules of Professional Conduct 18
Quantum of Discipline 22
Conclusion 26

Introduction

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

This matter was before us on a disciplinary stipulation between the Office of Attorney Ethics (the OAE) and respondent. Respondent stipulated to having violated RPC 1.15(a) (commingling client and personal funds), RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6), and RPC 5.5(a)(1) (engaging in the unauthorized practice of law – failing to maintain liability insurance while practicing law via a limited liability company, as R. 1:21-1B(a)(4) requires).

For the reasons set forth below, we determine that a reprimand, with a condition, is the appropriate quantum of discipline for respondent's misconduct.

Respondent earned admission to the New Jersey bar in 1996 and to the New York bar in 2019. During the relevant timeframe, he maintained a practice of law in Linwood, New Jersey.

Effective August 18, 2023, the Court suspended respondent for one month in connection with his misconduct underlying a child custody dispute with his former partner. In re McIlwain, 254 N.J. 432 (2023) (McIlwain I).

In that matter, in February 2019, respondent removed his daughter from her Kentucky residence and brought her to New Jersey, without his former partner's permission, and then filed a custody application in the Superior Court of New Jersey. In the Matter of Timothy Joseph McIlwain, DRB 22-178 (March 6, 2023) at 4. However, in March 2019, the Superior Court dismissed respondent's application and relinquished jurisdiction of the custody dispute to Kentucky, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, N.J.S.A. 2A:24-53 to -95. Id. at 11-13. Three weeks later, rather than abide by the Superior Court's jurisdictional ruling, respondent filed an amended complaint, under the dismissed docket number, alleging tort and contract claims against his former partner. Id. at 16-17. Additionally, respondent simultaneously issued subpoenas to his former partner's employers and to the property management company for her apartment, seeking information regarding her income, travel schedules, and apartment leases. Id. at 18-19. Respondent issued those subpoenas under the caption of the New Jersey custody matter that the Superior Court had dismissed. Id. at 18.

We determined that, given the Superior Court's clear jurisdictional ruling, respondent's amended complaint and subpoenas lacked a colorable basis in law and fact and resulted in a waste of judicial resources, in violation of RPC 3.1

(engaging in frivolous litigation) and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice), respectively. Id. at 40-44.

We also found that respondent had engaged in multiple acts of deception in connection with his frivolous submissions, given that he not only failed to serve his former partner with either his complaint or his subpoenas, but also carefully crafted his subpoenas to conceal the fact that the New Jersey custody matter under which the subpoenas were captioned already had been dismissed, in violation of RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Id. at 44.

Further, we determined that respondent violated RPC 8.4(d) by executing a January 2020 mediation agreement requiring his former partner to withdraw her New York and New Jersey ethics grievances within forty-eight hours. Id. at 45. Finally, we found that respondent again violated RPC 8.4(d) by failing to withdraw his appeal of the Superior Court's jurisdictional orders following his execution of the mediation agreement, which expressly provided that Kentucky had "sole jurisdiction" to adjudicate the custody dispute. Id. at 45-46.

In determining that a three-month suspension was the appropriate quantum of discipline, we weighed respondent's multiple frivolous submissions and his refusal to accept responsibility for his misconduct against his then lack

of prior discipline in his twenty-seven-year career at the bar. Id. at 56. Following its review, the Court imposed a one-month suspension.

On November 15, 2023, the Court reinstated respondent to the practice of law. In re McIlwain, 81 N.J. 3 (2023).

Facts

We now turn to the facts of this matter.

Recordkeeping Violations

On February 27, 2020, the OAE conducted a random compliance audit of respondent's attorney financial records. At the time of the audit, he maintained an attorney trust account and an attorney business account at Parke Bank (Parke ATA and Parke ABA, respectively). As discussed herein, respondent maintained both accounts until June 2020.

Following the audit, the OAE determined that respondent had failed to (1) conduct proper three-way reconciliations of his Parke ATA, as R. 1:21-6(c)(1)(H) requires; (2) maintain client ledger cards, as R. 1:21-6(c)(1)(B) requires; (3) maintain an accurate Parke ABA receipts journal, as R. 1:21-6(c)(1)(A) requires; (4) identify client funds held in his Parke ATA as of January

31, 2020, as RPC 1.15(a) (failing to safeguard client funds) requires; (5) properly apportion interest earned on his interest-bearing Parke ATA to the clients for whom trust funds were held on deposit, as A.C.P.E. Opinion 326, 99 N.J.L.J. 298 (1976) requires; (6) maintain adequately detailed Parke ATA deposit slips, as R. 1:21-6(c)(1)(A) requires; (7) maintain professional liability insurance for his law firm, which he operated as a limited liability company, as R. 1:21-1B(a)(4) requires; and (8) maintain proper Parke ATA and ABA image-processed checks, as R. 1:21-6(b) requires.

On March 9, 2020, the OAE sent respondent a letter enumerating those recordkeeping deficiencies and directing that he produce, among other financial records, three-way monthly Parke ATA reconciliations, client ledger cards, and bank statements from January 2018 through February 2020. The OAE required that respondent produce these records by April 6, 2020.

On April 6, 2020, respondent sent the OAE a reply letter producing some, but not all, of the requested documents. Specifically, respondent provided only four monthly Parke ATA bank statements and failed to provide either his Parke ATA reconciliations or his client ledger cards. Consequently, on May 14 and July 7, 2020, the OAE sent respondent follow-up letters directing that he produce all outstanding financial records. Respondent, however, failed to

produce his complete Parke ATA records.[1] Thereafter, although the OAE had obtained respondent's bank records, via subpoena, it was unable to reconstruct those records because he frequently had disbursed, via wire transfer, funds from his Parke ATA to his Parke ABA.

On December 1, 2020, the OAE sent respondent another letter stating that it had identified additional recordkeeping infractions associated with his attorney accounts. Specifically, the OAE discovered that respondent had (1) commingled personal funds and funds unrelated to the practice of law in his Parke ATA; (2) failed to maintain fully descriptive Parke ATA and ABA disbursements journals, as R. 1:21-6(c)(1)(a) requires; (3) failed to maintain trust ledger sheets for each client and for law firm funds held for bank charges, as R. 1:21-6(c)(1)(B) and R. 1:21-6(d) require; (4) conducted improper electronic transfers from his Parke ATA to his Parke ABA, as R. 1:21-6(c)(1)(A) prohibits; (5) failed to maintain a running cash balance in his Parke ATA checkbook, as R. 1:21-6(c)(1)(G) requires; (6) maintained an improper Parke ABA designation, as R. 1:21-6(a)(2) prohibits; (7) failed to maintain proper Parke ATA and ABA image-processed checks, as R. 1:21-6(b) requires; and (8) failed to maintain Parke ATA records for seven years, as R. 1:21-6(c)(1)

[1] Respondent's reply letters are not included in the record before us.

requires. Accordingly, the OAE directed respondent to submit a full written reply to its letter and to provide proof that he had corrected the enumerated deficiencies by December 14, 2020.

On December 29, 2020, respondent, through newly-retained counsel, sent the OAE a letter indicating that he planned to retain an accountant to assist him in correcting his recordkeeping deficiencies.

Seven months later, on July 29, 2021, respondent's accountant sent to the OAE his monthly three-way Parke ATA reconciliations and client ledgers for the period January 2014 through December 2020.

On April 29, 2022, following its review of the accountant's submissions, the OAE directed respondent to provide additional financial records and to appear for a May 24, 2022 demand interview. Specifically, the OAE instructed respondent to provide, by May 18, 2022, proper three-way reconciliations from January 2019 to March 2022 for both his Parke ATA and his First National Bank of Absecon ATA (FNBA ATA).[2] The OAE also directed respondent to produce his receipts and disbursements journals from January 2019 to March 2022 for his Parke ATA; Parke ABA; FNBA ATA; and First National Bank of Absecon

[2] Respondent maintained his FNBA ATA from April 2020 through February 2021.

ABA (FNBA ABA).[3] Finally, the OAE required that respondent provide (1) any other New Jersey ATA and ABA receipts and disbursements journals from January 2018 through March 2020; (2) client ledger sheets for all clients for whom he held funds from January 2019 through April 2022; (3) monthly ending balances for each client from January 2019 through March 2022; and (4) a list of ATA checks that he had issued but which remained unnegotiated.

Respondent, however, failed to reply by May 18, 2022 and, thereafter, failed to "full[y]" reply to the OAE's May 19 and June 14, 2022 follow-up requests for information. Meanwhile, the OAE was forced to reschedule its May 24, 2022 demand interview, on two separate occasions, due to respondent's failure to produce complete financial records.

On June 28, 2022, respondent's accountant provided the OAE with client ledger cards and three-way reconciliations from January 2019 through March 2022 for both his Parke and FNBA ATAs.

On July 12, 2022, respondent sent the OAE a letter containing his Parke, FNBA, and Fulton Bank ABA (Fulton ABA)[4] receipts and disbursements

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[3] Respondent maintained his FNBA ABA from June 2020 through February 2021.

[4] Since October 2020, respondent has maintained an ABA and an ATA with Fulton Bank.

journals from January 2018 through March 2022; client retainer agreements; bank records; and "other information" regarding his "client matters."

On August 1, 2022, respondent provided the OAE with client ledger cards and three-way Fulton ATA reconciliations for April and May 2022. The next day, on August 2, 2022, respondent and his attorney attended an OAE demand audit. Following the audit, on August 12, 2022, the OAE directed that respondent produce, among other documents, revised FNBA ATA reconciliations and receipts and disbursements journals for the timeframe spanning December 2020 to February 2021.

On September 2, 2022, the OAE sent respondent another letter directing that he submit, by September 16, the documents requested in its August 12 letter, along with proof that he had corrected his Fulton ATA and ABA account designations. On September 27, 2022, the OAE sent respondent an additional letter requiring that he submit, among other documents, revised reconciliations for his FNBA and Fulton ATAs from January 2020 through September 2022. One month later, on October 31, 2022, the OAE again directed respondent to submit, by November 10, the documents requested in its September 27 letter and proof that he had corrected his Fulton ATA and ABA account designations.

On December 8, 2022, respondent's accountant provided the OAE with revised ATA reconciliations from 2020 to 2022.[5] One week later, on December 15, 2022, the OAE sent respondent another letter directing that he (1) explain a $13,320 FNBA ATA deposit made on April 30, 2020, (2) identify the source of $110 in total funds previously held in his Parke ATA in connection with four client matters, and (3) provide proof that he had corrected his Fulton ATA and ABA account designations.

On December 22, 2022, respondent's attorney sent the OAE an e-mail claiming that the $13,320 deposit in respondent's FNBA ATA represented his fee from a client matter. Respondent's attorney also maintained that the $110 previously held in the Parke ATA was "not client money." Finally, respondent's attorney produced a copy of a correctly designated Fulton ABA check. On January 9, 2023, respondent provided the OAE a certification explaining that the $110 constituted his legal fees and costs that had remained in his Parke ATA "after settlement disbursements were sent out."

Based on the foregoing facts, respondent stipulated that he violated RPC 1.15(d) by (1) commingling personal funds in his ATA and placing funds unrelated to the practice of law in his ATA; (2) failing to maintain fully-

[5] The record does not reveal the specific ATA for which respondent's accountant had submitted the revised reconciliations.

descriptive ATA and ABA receipts journals; (3) failing to conduct monthly three-way ATA reconciliations; (4) failing to maintain ledgers for each client and for attorney funds held for bank charges; (5) failing to maintain sufficiently detailed ATA deposit slips; (6) engaging in improper electronic transfers from his ATA to his ABA; (7) failing to maintain a running cash balance in his ATA checkbook; (8); maintaining improper ATA and ABA account designations; (9) failing to maintain proper ATA and ABA image-processed checks; and (10) failing to maintain Parke ATA records for seven years.

Although respondent corrected "the majority" of his recordkeeping deficiencies, he failed to demonstrate that he had corrected his Fulton ABA and ATA account designations.[6] Moreover, respondent conceded that his "failure to timely cooperate" with the OAE "caused a substantial delay in the OAE['s] investigation."

[6] Despite providing proof that the checks associated with his Fulton ABA contained the correct account designation, respondent failed to demonstrate that his Fulton ABA bank statements were properly designated as an "Attorney Business Account" or an "Attorney Operating Account," as R. 1:21-6(a)(2) requires.

Commingling Funds

On October 7, 2019, respondent received a $42,500 "cash advance" from Thrivest Legal Funds, LLC, a "legal funding company," in connection with his prosecution of a class action lawsuit, in the United States District Court for the District of New Jersey (the DNJ), against Cape May County, New Jersey. In exchange for the $42,500 cash advance, respondent agreed to provide Thrivest a "security interest in the potential gross" recovery of his "legal claim."[7] Respondent arranged for Thrivest to disburse the $42,500, via wire transfer, to his Parke ATA. Respondent and the OAE stipulated that the $42,500 cash advance payment "could be used by respondent for any purpose."

Between October 7 and October 21, 2019, respondent disbursed, via wire transfer, $12,500 of the $42,500 in cash advance funds from his Parke ATA to his Parke ABA. Respondent took the $12,500 as his legal fee for the class action litigation.

[7] Although not set forth in the disciplinary record, publicly available court records reveal that, on July 8, 2019, the parties to the class action lawsuit reached a tentative settlement agreement and, on September 27, 2019, filed a motion for preliminary approval of the class action settlement, which the DNJ granted on April 30, 2020. Thereafter, in August 2020, respondent and other class counsel filed a motion for final approval of the settlement and a motion for the award of attorneys' fees totaling $150,000. Of that $150,000 sum, respondent sought $56,924.99 in counsel fees. In September 2020, the DNJ approved the settlement and granted the motion for counsel fees, awarding $150,000. Consequently, it appears that, in October 2019, respondent granted Thrivest a security interest in the amount of counsel fees that he personally expected to recover.

Meanwhile, between October 15, 2019 and January 1, 2020, respondent issued seven Parke ATA checks, made payable to himself, to cash, and to other entities, and totaling $12,389, to pay for his "personal expenses." Finally, on February 7, 2020, respondent transferred $311 from his Parke ATA to his Parke ABA to pay for fees underlying the class action litigation.

Additionally, respondent's ledger card for the class action litigation revealed that, between October 7, 2019 and February 7, 2020, respondent had disbursed, to other entities and law firms, all but $45 of the remaining $17,309 in cash advance funds. The disciplinary stipulation, however, did not set forth the purpose of those disbursements.

Based on the foregoing facts, respondent stipulated that he violated RPC 1.15(a) by commingling his personal funds with client funds in his Parke ATA between October 7, 2019 and February 7, 2020. During that timeframe, respondent stipulated that, of the $42,500 cash advancement that he had arranged for Thrivest to deposit in his Parke ATA, he had disbursed a total of $25,191 for his legal fees and personal expenses. Respondent, however, "could not explain" to the OAE why he had arranged for Thrivest to deposit the cash advance in his Parke ATA rather than in his Parke ABA.

Failure to Maintain Professional Liability Insurance

On February 1, 2013, respondent formed "McIlwain, LLC," a limited liability company that he operated as his law practice. Pursuant to R. 1:21-1B(a)(4), attorneys are required to maintain professional liability insurance if they practice law via a limited liability company.

In its March 9, 2020 letter, the OAE directed respondent to provide proof that he had obtained the required professional liability insurance for his law practice. In reply, respondent produced a March 2020 "professional liability quote" from an insurance company and an application for professional liability insurance requesting that such coverage commence on April 1, 2020.

Six months later, on October 14, 2020, respondent sent the OAE a letter stating that he had filed, with the Department of Treasury, a "certificate of cancellation" of McIlwain, LLC. Additionally, respondent advised the OAE that he had ceased practicing law via a limited liability company.

On December 1, 2020, in its letter detailing respondent's recordkeeping violations, the OAE directed that respondent clearly explain whether he had obtained professional liability insurance during or after the timeframe in which he had operated McIlwain, LLC. The OAE also required that respondent state the timeframe in which he may have possessed such insurance coverage.

On December 29, 2020, respondent, through counsel, advised the OAE that, between February 1, 2013 and October 14, 2020, when respondent had operated McIlwain, LLC as his law firm, he never obtained the required professional liability insurance. Additionally, respondent's counsel maintained that, since October 14, 2020, respondent had practiced law "as a sole practitioner" and not via a limited liability company. Respondent's counsel further claimed that, during the timeframe in which respondent had operated McIlwain, LLC, he was not subject to any professional malpractice claims. Nevertheless, respondent's counsel stated that he had advised respondent to "immediately purchase" a professional liability insurance policy "to cover him as a solo practitioner" and to include a "tail for claims made" while he had operated McIlwain, LLC. However, on July 12, 2022, respondent informed the OAE, in writing, that he never obtained "tail" professional liability insurance coverage following the dissolution of McIlwain, LLC.

Based on the foregoing, respondent stipulated that he violated RPC 5.5(a) by failing to maintain professional liability insurance in connection with his February 2013 through October 2020 operation of McIlwain, LLC.

The Parties' Arguments Before the Board

The OAE recommended the imposition of a reprimand or a censure based primarily on respondent's failure to maintain professional liability insurance in connection with his operation of McIlwain, LLC, for more than seven-and-a-half years. In the OAE's view, respondent knowingly failed to maintain the required professional liability insurance because he never claimed to have been unaware of that obligation. Moreover, following the OAE's March 9, 2020 inquiry regarding whether respondent had obtained the required insurance, he merely produced a quote and an insurance application.[8]

Analogizing respondent's misconduct to that of the reprimanded attorney in In re Killen, 245 N.J. 381 (2021), who knowingly failed to maintain professional liability insurance for four years, the OAE maintained that the baseline level of discipline for respondent's violation of RPC 5.5(a) was a reprimand. However, the OAE urged, as aggravation, respondent's prior one-month suspension, in McIlwain I. Although McIlwain I involved dissimilar charges of unethical conduct, the OAE stated that its investigation of that matter commenced in July 2019. Consequently, at the time of the February 27, 2020 random audit underlying the instant matter, the OAE argued that respondent was

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[8] At oral argument before us, the OAE noted that it did not consider, as an act of deception, respondent's submission of his insurance application and quote for such coverage.

on notice of his obligation to promptly cooperate with the OAE. Nevertheless, the OAE stressed that respondent failed to resolve his recordkeeping deficiencies for more than two years, until December 2022. Moreover, the OAE emphasized that, although respondent had corrected the majority of his recordkeeping deficiencies, he failed to provide proof that he had corrected the account designations on his Fulton ATA and ABA. In mitigation, the OAE noted, respondent stipulated to his misconduct and, thus, conserved disciplinary resources.

Finally, the OAE recommended that we impose the condition that, within thirty days of the issuance of the Court's disciplinary Order in this matter, respondent provide proof to the OAE that he has corrected the account designations on his Fulton ATA and ABA.

At oral argument before us, respondent, through counsel, also urged the imposition of a reprimand or a censure. In support of his argument, respondent noted that, although he initially failed to promptly cooperate with the OAE, he subsequently retained an accountant to help him remediate his recordkeeping practices. Respondent also argued that his participation in the McIlwain I disciplinary proceeding diverted his focus from his recordkeeping obligations. Finally, respondent agreed with the OAE's recommended condition that he be

required to provide proof to the OAE that he has corrected the account designations on his Fulton ATA and ABA.

Analysis and Discipline

Violations of the Rules of Professional Conduct

Following a review of the record, we determine that the facts set forth in the stipulation clearly and convincingly support the finding that respondent committed all the charged unethical conduct.

Respondent admittedly violated RPC 1.15(d) by failing to comply with the recordkeeping requirements of R. 1:21-6. Specifically, respondent (1) improperly commingled funds unrelated to his practice of law in his ATA; (2) failed to maintain fully-descriptive ATA and ABA receipts journals; (3) failed to perform monthly three-way ATA reconciliations; (4) failed to maintain ledgers for each client and for attorney funds held for bank charges; (5) failed to maintain detailed ATA deposit slips; (6) engaged in improper electronic transfers from his ATA to his ABA; (7) failed to maintain a running cash balance in his ATA checkbook; (8) failed to maintain proper Fulton ATA and ABA account designations; (9) failed to maintain proper Parke ATA and ABA

image-processed checks; and (10) failed to maintain Parke ATA records for seven years.

By December 2022, respondent, with the assistance of an accountant, corrected most of the foregoing recordkeeping deficiencies. However, he admittedly failed to correct his Fulton ATA and ABA account designations.

Additionally, respondent violated RPC 1.15(a) by commingling his personal funds with client funds in his Parke ATA. Specifically, on October 7, 2019, respondent received a $42,500 cash advance from a legal funding company in exchange for a "security interest in the potential gross" recovery of his personal "legal claim."[9] As respondent and the OAE stipulated, respondent was entitled to utilize the $42,500 "for any purpose." Respondent, however, failed to promptly remove the funds that belonged to him from his ATA. Rather, for four months, between October 7, 2019 and February 7, 2020, respondent gradually disbursed all but $45 of the $42,500 cash advance to himself or to other entities to cover, among other unspecified expenses, his legal fees and personal expenses. During that timeframe, respondent stipulated that he commingled his personal funds with client funds in his Parke ATA.

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[9] As detailed above, it appears, based on publicly available court records, that respondent provided Thrivest a security interest in his expected $56,924.99 counsel fee award.

Finally, respondent violated RPC 5.5(a)(1) by failing to maintain, from February 2013 through October 2020, professional liability insurance in connection with his operation of McIlwain, LLC, as R. 1:21-1B(a)(4) requires. That Court Rule provides, in relevant part that:

> [t]he 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 of the Court a certificate of insurance, within thirty days of 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, on February 1, 2013, respondent formed McIlwain, LLC as his law practice and, thus, he was required, by Court Rule, to maintain professional liability insurance and to file certificates of insurance with the Clerk.

Respondent, however, failed to fulfill those obligations for more than seven-and-a-half years, until October 14, 2020, when he formally dissolved McIlwain, LLC. Moreover, although the OAE had notified respondent, on March 9, 2020, of his obligation to obtain professional liability insurance, respondent failed to do so and, instead, provided the OAE with a price quote and an application for such insurance. Consequently, it appears that, for at least seven months, between March 2020 and October 2020, respondent knowingly practiced law in violation of the regulations of the legal profession in New Jersey.

The record before us, however, contains insufficient evidence regarding whether respondent knowingly practiced law without the requisite insurance during the entire seven-and-a-half-year timeframe when he had operated McIlwain, LLC. Nevertheless, although an attorney's conscious decision not to obtain such insurance constitutes an aggravating factor in determining the appropriate quantum of discipline, an attorney's "mens rea is irrelevant" in establishing a violation of RPC 5.5(a). See In the Matter of Giovanni De Pierro, DRB 23-024 (July 6, 2023) at 48, and In the Matter of Guy W. Killen, DRB 19-124 (Dec. 5, 2019) at 10.

In sum, we find that respondent violated RPC 1.15(a), RPC 1.15(d), and RPC 5.5(a)(1). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Quantum of Discipline

Ordinarily, commingling personal funds with client funds will be met with an admonition, even where accompanied by certain recordkeeping infractions. See e.g., In the Matter of David Stuart Bressler, DRB 22-157 (November 21, 2022) (the attorney commingled personal funds in his ATA and committed recordkeeping infractions; due to his poor recordkeeping practices, the attorney failed, for two months, to remove his personal funds from his ATA; no prior discipline); In the Matter of Richard P. Rinaldo, DRB 18-189 (October 1, 2018) (the attorney commingled personal loan proceeds in his ATA and committed recordkeeping infractions; his commingling did not impact client funds, and he corrected his recordkeeping practices; prior 2015 censure for unrelated misconduct); In the Matter of Richard Mario DeLuca, DRB 14-402 (March 9, 2015) (the attorney had a $1,801.67 shortage in his ATA; because he maintained more than $10,000 of earned legal fees in his ATA, no client or escrow funds were invaded; the attorney commingled personal and trust funds and failed to

comply with recordkeeping requirements; no prior discipline).

Additionally, the baseline level of discipline for practicing law without maintaining the required professional liability insurance is an admonition. See In re Lindner, 239 N.J. 528 (2019) (default matter; for a three-year period, the attorney practiced law via a limited liability company 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 via a professional corporation without maintaining liability insurance).

However, if the misconduct is accompanied by other violations or aggravating factors, greater discipline may be warranted. See In re Killen, 245 N.J. 381 (2021) (reprimand for an attorney who knowingly failed to maintain professional liability insurance for four years; specifically, the attorney made a conscious decision to not renew his professional liability insurance policy based on financial considerations, demonstrating that his own pecuniary interests were more important than the interests of his clients; the attorney also violated RPC 8.1(b) (failing to cooperate with disciplinary authorities) by refusing to reply to the OAE's communications regarding his conduct and by failing to appear for a demand interview; no prior discipline in his more than thirty years at the bar),

and In re Coleman, 245 N.J. 264 (2019) (censure for an attorney who, in two consolidated matters, failed to maintain liability insurance while practicing law via a professional corporation; the attorney also negligently misappropriated client funds, violated the recordkeeping Rules, and, for nearly eight years, advertised as a professional corporation despite his corporate status having been revoked (RPC 7.1(a) and RPC 8.4(c)); in aggravation, we weighed the default status of one matter and, in the second matter, the prolonged shortage in the attorney's ATA; no prior discipline).

Here, respondent committed numerous recordkeeping infractions, commingled a $42,500 personal cash advance in his Parke ATA for a four-month period, and failed to maintain the required professional liability insurance throughout his entire seven-and-a-half-year operation of McIlwain, LLC. Based on applicable disciplinary precedent, each of respondent's ethics infractions, standing alone, could be met with an admonition. However, taken together, we conclude that a reprimand is the baseline discipline for the totality of respondent's misconduct. To craft the appropriate discipline, however, we also consider aggravating and mitigating factors.

In aggravation, like the reprimanded attorney in Killen, who refused to reply to the OAE's communications regarding his conduct, respondent

stipulated that his failure to "timely cooperate" with the OAE resulted in a "substantial delay" of its investigation. As the OAE observed, respondent was acutely aware of his obligation to cooperate with disciplinary authorities, given his participation in the investigation underlying McIlwain I, which began in July 2019. Nevertheless, between April 2020 and June 2022, respondent conceded that he failed to "fully" reply to several OAE letters requiring that he provide information regarding his firm's finances. It was not until December 2022 – nearly three years after the OAE had commenced its random audit – that respondent finally resolved most of his recordkeeping infractions. Moreover, respondent still has not provided proof to the OAE that he has corrected his Fulton ATA and ABA account designations, despite the applicable Rules and the OAE's multiple directives that he do so.

Additionally, respondent failed, for seven-and-a-half years, between February 2013 and October 2020, to maintain the required professional liability insurance in connection with his practice of law via a limited liability company. Indeed, even after the OAE had notified respondent, in March 2020, of his obligation to obtain such insurance, respondent failed to do so, despite having obtained a price quote from an insurance company, and continued to operate McIlwain, LLC, for an additional seven months, until October 2020. However,

unlike the attorney in Killen, who, for four years, made the conscious decision to continue operating his professional corporation without the required insurance due to personal financial considerations, there is no clear and convincing evidence that respondent willfully ignored his obligation to obtain the required insurance throughout the entire seven-and-a-half-year period during which he operated McIlwain, LLC. Finally, unlike Killen, who had an otherwise unblemished legal career of more than thirty years, respondent has a recent one-month suspension in McIlwain I, albeit for unrelated misconduct.

In mitigation, respondent stipulated to his misconduct underlying this matter.

Conclusion

On balance, we determine that, for the totality of respondent's misconduct, a reprimand is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar.

Further, given respondent's ongoing failure to demonstrate to the OAE whether he has corrected his Fulton ATA and ABA account designations, we recommend that the Court impose the condition that, within thirty days of the issuance of the Court's Order in this matter, respondent provide proof to the

OAE that he has corrected the account designations on his Fulton Bank attorney trust and business accounts.

Chair Gallipoli voted to recommend the imposition of a censure, with the same condition.

Member Rivera was absent.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Timothy Joseph McIlwain
Docket No. DRB 23-241

Argued: January 18, 2024

Decided: April 1, 2024

Disposition: Reprimand

Members	Reprimand	Censure	Absent
Gallipoli		X	
Boyer	X		
Campelo	X		
Hoberman	X		
Joseph	X		
Menaker	X		
Petrou	X		
Rivera			X
Rodriguez	X		
Total:	7	1	1

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