SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 23-267
District Docket No. XIV-2019-0423E

In the Matter of Andrew L. Monteleone
An Attorney at Law

Argued
March 21, 2024

Decided
May 15, 2024

Rachael L. Weeks appeared on behalf of the
Office of Attorney Ethics.

Kenneth M. Ralph appeared on behalf of respondent.

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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 personal funds with client funds); RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6); RPC 8.1(b) (failing to cooperate with disciplinary authorities); RPC 8.4(b) (committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer); and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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

Respondent earned admission to the New Jersey bar in 1980 and to the New York bar in 1976. He has no prior discipline in New Jersey. During the relevant period, he was employed as an associate by O'Connor & Mangan, P.C. (O&M), located in both New Rochelle, New York, and Hoboken, New Jersey. He also maintained his own practice of law in Hoboken.

Facts

Respondent was employed as an associate by O&M from 1977 through 2018. Between 2005 and 2013, he worked at O&M's main office in New Rochelle, New York. In 2013, respondent moved to O&M's Hoboken office, where he was the sole employee. While employed at O&M, respondent also maintained his own private practice of law, the Andrew L. Monteleone Law Firm, in Hoboken, New Jersey. In connection with his private practice, he maintained an attorney trust account (ATA) and attorney business account (ABA) with Wells Fargo Bank.

In 1982, a legal benefit fund (the Fund) was established to provide free legal services, as part of an employee benefit plan, to union members in Bronx County, New York. Since at least 1986, O&M was designated the sole provider of these legal services. During the relevant period, respondent and O&M partner, Kenneth O'Connor, Esq., provided legal services to plan participants. O'Connor also represented the union as an entity.

Pursuant to a Legal Services Agreement (the LSA) between the Fund and O&M, O&M received monthly payments for the legal services it provided to the union members. Since 2004, the LSA established a monthly retainer for 35 hours of service per month, at the firm's hourly rate of $145, with an additional sum to be paid for any work in excess of 35 hours, capped at $70,000 per year. If the

firm provided less than 35 hours of service to union members each month, the excess of the retainer would be credited against future work performed by the firm. In June 2014, the parties amended the LSA, increasing O&M's hourly rate to $175, the monthly retainer to $6,500, and the annual cap to $85,000.

Each month, respondent submitted his handwritten timekeeping records, via e-mail or facsimile, from his Hoboken office to O&M's secretary in the New Rochelle office. The records included information such as (1) a unique file number associated with each union member client; (2) the type of work performed; and (3) the amount of time spent. The secretary would enter this information into a software program and print monthly invoices. The monthly invoices included (1) the type of work performed; (2) the date the work was performed; (3) the initials of the attorney who performed the work; (4) the amount of time spent; (5) the attorney's hourly rate; and (6) the total amount to be billed to the Fund for the month. Respondent routinely was provided with the invoices for his review and approval. Once approved, the invoices were submitted to the Fund for payment.[1]

[1] The Fund was required to maintain these financial records pursuant to Title I of the Employee Retirement Income Security Act of 1974.

Although respondent stipulated to the foregoing facts, his statements during the OAE's interview about O&M's billing procedures varied significantly.

The Criminal Proceeding

On March 20, 2019, respondent was charged, via a federal criminal complaint issued out of the United States District Court for the Southern District of New York (the SDNY), with committing mail fraud, in violation of 18 U.S.C. § 1341; wire fraud, in violation of 18 U.S.C. § 1343; theft from an employee benefit plan, in violation of 18 U.S.C. § 664; and making false statements in records required by the Employee Retirement Income Security Act of 1974 (ERISA), in violation of 18 U.S.C. § 1027.

On July 11, 2019, the Office of Board Counsel (the OBC) was notified of respondent's criminal charges by Jeffrey R. Ragsdale, Principal Deputy Director of the DOJ's Office of Professional Responsibility. Deputy Director Ragsdale provided the OBC with a copy of the criminal complaint, which alleged that respondent's false statements included fraudulent billing statements submitted to the Fund for legal services that he never actually rendered. Specifically, the DOJ alleged that, between 2012 and 2016, O&M billed and received at least $28,400 for services that respondent did not provide, and identified twenty-two

union members who claimed that respondent did not perform the legal work for which he had billed.

The next day, on July 12, 2019, the OBC forwarded the DOJ's letter to the OAE.

On September 4, 2019, respondent signed a deferred prosecution agreement (the DPA) with the DOJ. The DPA did not require a guilty plea or factual allocution from respondent. Rather, the DPA provided that, after a six-month term of supervision, the criminal charges against respondent would be dismissed, contingent upon respondent's compliance with the terms of the agreement, which included the payment of restitution to the Fund in the amount of $14,200, representing half of the amount the DOJ estimated the Fund had been overbilled.

On October 1, 2019, the OAE forwarded the DOJ's referral to respondent and directed him to submit a written explanation. In his October 31, 2019 reply to the OAE, respondent stated that he did take a position in response to the referral, noting that his deferred prosecution was still pending. On December 11, 2019, the OAE sent a letter to respondent's counsel, John J. Bruno, Jr., Esq.[2]

[2] Although these were not included in the record before us, the OAE and respondent had referred to the October letters during the first demand audit in May 2020, and Bruno referred to the December 2019 letter in his April 2, 2020 letter to the OAE.

On March 4, 2020, in accordance with the DPA, the SDNY dismissed the criminal charges against respondent. Accordingly, on April 2, 2020, respondent, through his counsel, sent a letter to the OAE, advising that the criminal matter had been resolved and that respondent had paid restitution to the Fund, in the amount of $14,200, as the DPA required.

The OAE's Audit and Investigation

On May 13, 2020, the OAE conducted its first demand audit, via telephone, with respondent and his attorneys, Bruno and Kenneth M. Ralph, Esq. Respondent informed the OAE that he did not have records to dispute the criminal charges other than explaining how cases were processed in O&M's office. In response to the OAE's questioning, respondent explained that he had agreed to pay restitution simply to resolve the criminal case and avoid prosecution. He admitted, however, that he "should have watched the billing more carefully," conceding that doing business "the way it was done" was problematic.

Respondent explained that he submitted timekeeping for Fund clients using categories, as O&M required, which was designed to protect confidential attorney-client information. According to respondent, the firm's computer program used to track billing was antiquated and, although he "made

adjustments" if the time was incorrect or input into the wrong file (by handwriting the correct numbers and sending them back to New Rochelle), the "draft[s] of the monthly time sheets were always inaccurate. And they were never changed." Since the adjustments were not reflected on the final billing statements submitted to the Fund, respondent acknowledged that the numbers that were submitted to the government were in "draft" form.

When the OAE asked respondent why he did not keep his own records if he suspected there were inaccuracies in O&M's timekeeping, respondent stated "I'm sorry. But I didn't. I never did that. I don't – you know, now I regret it, but I never did that." Respondent also clarified that the client files were not his property but, rather, the property of O&M, so he was not permitted to take them when he resigned.

The OAE also questioned respondent about recordkeeping for his own firm. This inquiry revealed that respondent held $750 of his own personal funds in his ATA – $500 more than permitted. The OAE informed respondent that it intended to conduct a second interview once it had an opportunity to review the criminal complaint and the DPA.

On May 19, 2020, the OAE sent a letter to respondent, through his counsel, directing him to (1) correct certain recordkeeping deficiencies, (2)

reduce personal funds in his ATA to $250 or less, and (3) produce the following information and documents, by June 2, 2020:

1. Complete the OAE's Account Disclosure Form;
2. Monthly three-way ATA reconciliations for the time spanning from May 2013 through April 2020;
3. ABA receipts and disbursement journals from May 2013 through April 2020;
4. Proof that he reduced personal funds in his ATA to $250 or less;
5. An explanation for monthly deposits from Perfect Retention Corporation;
6. A full and candid written response to the allegations in the federal criminal complaint; and
7. All billing records and client files associated with the Fund.

On June 2, 2020, respondent, through his counsel, produced some, but not all, of the requested records. Specifically, respondent produced his ATA and ABA account numbers, bank statements, and various handwritten notes; he did not, however, produce his monthly three-way reconciliations, billing records, or client files associated with the Fund. Respondent also asserted his Fifth Amendment privilege and declined to address the criminal allegations, asserting that, although the charges against him had been dismissed, he remained "exposed to jeopardy of prosecution in Federal or state court for the charges in

the original complaint or similar allegations." Respondent, through his counsel, reiterated that, although he had paid $14,200 in restitution, he never pled guilty, and the complaint was dismissed.

On October 9, 2020, the OAE asked O&M's counsel, Brendan M. White, Esq., for "all billing records" and "all client files" associated with the Fund which had been handled by respondent. Three days later, on October 12, 2020, White provided the Fund's billing records from 2012 through 2016 and case files for twenty clients.[3]

Subsequently, on November 20, 2020, the OAE directed respondent to provide, by December 18, 2020, "explanations and supporting documents" for fifteen of the clients identified by O&M. On December 18, 2020, respondent, through counsel, requested that the OAE provide him with copies of its records "for the referenced individuals," explaining:

> [respondent] does not possess or have access to any records, including monthly retainer statements and coverage confirmations, pertaining to any of [O&M's] clients from the Fund. It would be impossible for [respondent] to provide a fully informed response to the inquiry and directive from your office without first having the opportunity to review such records.
>
> [S¶57; S-Ex19 at 581.][4]

[3] Neither the billing records for 2012-2016, nor the case files for these twenty clients, were included in the record before us.

[4] "S" refers to the December 6, 2023 disciplinary stipulation.

(footnote cont'd on next page)

The OAE's Interviews with Clients

The OAE attempted to contact seven of the twenty-two individuals identified by the DOJ, but only four agreed to be interviewed. In January and February 2021, the OAE interviewed Timothy Donoghue, Joseph Jennings, Jerry Philips, and Phoenix Soulinin, whose statements supported the allegations that O&M billed the Fund a total of $10,337.15 for services that were not provided.

On January 6, 2021, the OAE interviewed Donoghue via telephone. He reported that respondent provided him legal services in 2001 in connection with a real estate closing, and in 2010 in connection with his divorce. He did not, however, receive legal services from respondent, or any other O&M attorney, between April 2014 and January 2016. Although Donoghue had contacted respondent at some point between 2012 and 2014 regarding his son's criminal matter, he claimed that respondent told him those services were not covered by the union's legal services. After this, neither Donoghue, nor anyone in his family, had any contact with respondent.

"S-Ex" refers to exhibits to the stipulation.
"2T" refers to the OAE's March 23, 2021 interview of respondent.

According to O&M's records, however, the firm billed the Fund a total of $6,608.30 for legal services purportedly provided by respondent to Donoghue from April 2014 through January 2016.

On January 13, 2021, the OAE interviewed Jennings via telephone. Jennings reported that he never met or spoke to respondent, and he was "certain that none of his family members" contacted respondent to request services. O&M's records revealed, however, that it had billed the Fund a total of $1,388.95 for legal services purportedly provided by respondent to Jennings between November 2012 and November 2016.

That same date, the OAE interviewed Philips, via telephone, in reference to the $868.55 that O&M had billed the Fund for services that respondent allegedly provided to him between November 2012 and January 2013. Philips stated that he contacted respondent one time, via a short telephone call prior to 2010, regarding his private business, which closed in or around 2010, but maintained that respondent had not provided any other services to him or any of his family members.

On January 29, 2021, the OAE sent respondent's counsel its interview memoranda and "limited and redacted discovery[5] pertaining to three individuals

[5] This discovery was not in the record before us.

(Donoghue, Jennings, and Philips) that allege misappropriations and other misconduct," and requested respondent's explanations and any supporting documentation no later than February 12, 2021.

On February 11, 2021, the OAE interviewed Soulinin, via telephone, who could not recall receiving any legal services from respondent between November 2012 and November 2016, and he was "certain that he never spoke to [r]espondent, never met [r]espondent, and none of his family members contacted [r]espondent requesting his legal services." Despite this, O&M billed the Fund a total of $1,471.35 for services that respondent allegedly provided to Soulinin during that timeframe.

Based on these interviews, the OAE concluded that at least $10,337.15 in O&M billings to the Fund were based on fraudulent records provided or approved by respondent.

Respondent's Explanations to the OAE

On February 16, 2021, respondent, through his counsel, sent a letter to the OAE, providing additional details regarding O&M's billing practices and information about the Donoghue, Jennings, and Philips client files. Specifically, respondent explained that the Fund paid O&M a flat-rate retainer each month, regardless of how much or how little work O&M performed. The Fund provided

O&M a form for reporting the total hours worked categorized by the types of matters handled and the total hours worked on each but did not specify for whom the legal work was performed or which attorney provided the services.

Respondent further explained, in his letter, that the firm's practice, as developed by the managing attorney, was to maintain Fund member's files for three years, and to send follow-up correspondence to clients to inquire about unresolved or new legal matters. Moreover, respondent informed the OAE that O&M partner, Kenneth O'Connor, Esq., frequented the members' workplace to consult with members personally and added his time to the files respondent was working on. Additionally, respondent explained that he did not prepare or sign the invoice printouts and did not directly fill the Fund. "The information that appeared on the invoice forms that was put in the firm's computer did not generate the Fund's monthly reporting form. The form was manually completed separately from the invoices."

Respondent maintained that the only way to confirm the time spent working on the Jennings, Philips, and Donoghue matters would be to review the monthly statement prepared by O&M, which the firm did not provide. More specifically, respondent pointed out that Philips' contact with the firm was confirmed by a letter in the file, indicating that, on April 29, 2009, Philips was eligible for legal services from the firm through the plan. Likewise, handwritten

notes in Donoghue's file confirmed that he had contacted respondent after his son was arrested and, although Donoghue had told the OAE that his matter was "not covered by the plan," Donoghue had other family members in the plan, and there was a letter in the file confirming coverage as of April 16, 2014.

Likewise, although Jennings told the OAE that he and respondent never met or spoke, respondent contended that, without speaking to someone at the firm, there is no way that the firm would have Mr. Jennings' personal and contact information, including his social security number, for their file. Similarly, respondent posits that Jennings' statement was contradicted by handwritten notes in the file and a letter dated May 15, 2013, from respondent to Jennings stating he was attempting to contact him by telephone. Respondent did not address the Soulinin client matter because those records were not provided to him by the OAE.

On February 23, 2021, the OAE notified respondent that his second demand audit would take place on March 23, 2021, via video conference. The OAE provided five billing summaries to assist with respondent's recollection of the relevant matters.

On March 23, 2021, the OAE conducted a second interview of respondent. Respondent explained that O&M provided the Fund, on a monthly basis, with the following three documents: (1) a retainer statement, (2) a retainer bill, and

(3) a "recap" summary, which included categories for time spent doing legal work and a separate list of union members' names, for whom the work was performed.

Respondent maintained that O&M's computer-generated billing invoice was not provided to the Fund because it was an initial draft of respondent's monthly timekeeping, which he did not correct. Respondent claimed he "never reviewed it" because the Fund only required the recap summary, and it was paid the "same amount every month . . . whether or not we did an hour's work or 400 hours of work." Respondent explained that the list of members' names was sent to the Fund every month because O&M needed to confirm that the members were still entitled to benefits, but "these billing statements . . . [were] not accurate," and he did not correct them, because "they were never provided to [the Fund]."

Respondent explained that he did not send out bills from the Hoboken office because O&M partner, Warren Mangan, Esq., who worked in the firm's New Rochelle office, was in charge of billing, and his secretary handled that responsibility. Respondent stated that he would provide the New Rochelle office with his monthly timesheets and that office prepared the bills. Further, respondent explained that the Fund paid a set retainer amount each month regardless of the amount of work completed. The procedure agreed upon by

O&M and the Fund did not identify what kind of legal work was done for which client, but simply categorized it as legal work, based on the parties' concern that providing more information would violate attorney-client privilege.

Respondent explained that the hours he submitted for the Fund's billing also included time that O'Connor spent with clients:

> he would contact me and say, add time for this person, add time for that person. He was heavily involved in the activities there. The printouts that you have from the computer don't reflect his input because it wasn't required . . . They didn't want to know which attorney did it . . . It was just a form that - - that required to know that the work was done by attorneys.
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> [2T14:24-2T15:11.]

The OAE presented respondent with 2016 billing summaries, including one for $7,304.50, which was $804.50 more than the retainer. Respondent claimed that O&M only received $6,500 that month, because that was the retainer amount. Respondent acknowledged that the billing summaries were not an accurate reflection of timekeeping and that "there were probably errors somewhere," but he did not correct them because O&M's internal billing records were never submitted to the Fund. Asked when he knew "there were inaccuracies on these types of statements," respondent confirmed that he "really didn't look at them because they weren't necessary." Nonetheless, respondent believed that the records he prepared by hand were accurate. Upon repeated questioning,

respondent claimed that he did not actually identify any inaccuracies until the OAE sent the files to him.

When the OAE presented another 2016 billing summary, which listed Donoghue's name and 1.83 hours, respondent confirmed that it, too, was an internal document that was not sent to the Fund. Respondent reiterated several times throughout the interview that O&M didn't want to see what matters were handled for clients because of concern about attorney-client privilege and confidentiality and he had no way of knowing if the notes were put into the right file.

Respondent explained that, in the past, a different law firm had monitored the billing, on behalf of the Fund, by sending a lawyer from their office to review files annually. Respondent stated that, at some point, that practice ceased. When questioned about the 1.83 hours of work done for Donoghue, respondent asserted, "[i]f the client was getting that printout," he would have "[sat] down, go[ne] through it, ma[d]e sure that it was correct," but "[t]his billing statement was not provided to anyone. It was left in a folder, and it was never reviewed by me." Respondent explained that he went through the files that the OAE had sent to him and found that file numbers switched between 2014 and 2015.

Respondent recounted that there were constant computer issues, and he could not answer the OAE's questions because he never reviewed the billing

summaries to make corrections. Asked again about Donoghue's file, respondent reasoned that "[i]t could have been for a different [Donoghue] or somebody else. I don't know. But, you know, that actual printout was never provided to anybody . . . And they were not corrected by me or sent to any client."

The OAE asked respondent why purported clients said they never spoke to him if O&M had documents stating that he did. Respondent again explained, "if anyone contacted us, we had to get the information from them to open the file. That information could not come from anybody else but them" so, if they had never contacted O&M, the firm would not have had their information. In the alternative, respondent explained that clients could have spoken to O'Connor instead of him or maybe they thought they were speaking to O'Connor when they were talking to respondent; the recap summaries would not have captured this information because neither O&M nor the Fund required respondent to indicate which attorney worked on what client matter.

Respondent repeatedly reiterated that he never corrected the information on the billing summaries because he believed it to be unnecessary and that he did not have control of the files. Respondent conceded, however, "We should have [checked the accuracy of records] . . . I didn't know they were even keeping this because it wasn't corrected or anything. I really don't know." Further, respondent admitted, "I'm sorry, but that's the way it was done . . . I did it the

best I could . . . that's the way it worked. I only complied with the rules set down by [the Fund], not by, you know, myself. I didn't make these rules." Then, "if it was wrong, it was wrong because that's the way they set it up, you know. And I followed the rules."

The OAE stressed that four individuals claimed that respondent did not perform the work he billed for and demanded an explanation, but he could not explain without having the records himself. Ultimately, respondent relented,

> all I can say is that I didn't review those printouts so that they could have been entered for the wrong person. I don't know . . . you're asking me to – to prove something that I can't prove because I don't have any of the documentation . . . and I'm trying to do the right thing and explain to you that this is what was required.
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> [2T82:15-24.]

When asked about the restitution he had paid in connection with the criminal proceeding, respondent insisted that, from his perspective, "it was a settlement." He explained that he paid the $14,000 restitution because, otherwise, he would have "had to pay [his] attorney $100,000 in order to continue" fighting the charges. Respondent also confirmed that, aside from restitution, there were no other requirements in connection with the dismissal of his criminal charges.

Recordkeeping Deficiencies

In addition to his employment with O&M, respondent maintained a private practice of law. Following its review of his financial records, the OAE uncovered the following recordkeeping deficiencies:

(1) Incorrect designation on ATA checks and deposits;

(2) No client identification on deposit tickets;

(3) No client identification on checks;

(4) Incorrect designation on ABA statements, checks and deposit slips.

In addition, respondent had commingled funds by holding $500 in personal funds in his ATA. As of December 6, 2023, when the parties submitted their stipulation, respondent had corrected these deficiencies to the OAE's satisfaction.

Based on the above facts, the parties stipulated that respondent violated the following Rules of Professional Conduct:

- RPC 1.15(a) by commingling $500 in personal funds in his ATA;
- RPC 1.15(d) by failing to comply with the recordkeeping requirements of R. 1:21-6;
- RPC 8.1(b) by failing to fully cooperate with the OAE's investigation;
- RPC 8.4(b) by committing a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer) by:

1. participating in a scheme to commit mail fraud (18 U.S.C. § 1341);

2. participating in a scheme to commit wire fraud in (18 U.S.C. § 1343); and

3. knowingly making false statements included in documents required to be maintained by the Fund pursuant to ERISA (18 U.S.C. § 1027).

- RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), by engaging in an overbilling scheme for unrendered legal services.

According to the stipulation, the OAE considered charging respondent with violating RPC 1.5(a), asserting that, because "the fees charged to the Fund were fraudulent," they were, thus, unreasonable. The OAE, however, declined to do so because his "unethical conduct was rooted in overbilling for work he did not personally perform, rather than directly billing the client."

The Parties' Positions Before the Board

In recommending a three-month suspension, the OAE emphasized that, although respondent's misconduct initially was uncovered by a federal prosecution for wire fraud, "his conduct [was] rooted in overbilling" and not theft of law firm funds. Specifically, the OAE stated that it:

> considered In re Siegel, 133 N.J. 162 (1993)[,] and its progeny in the context of the misconduct found herein. Respondent's misconduct was in overbilling of the client. The OAE's investigation did not reveal any

> evidence that respondent's overbilling resulted in him receiving any additional financial benefit from the firm as a result. Accordingly, as analyzed here, [r]espondent's conduct was in overbilling, not the theft of law firm funds.
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> [S at 13, n.8.]

The OAE analogized respondent's misconduct to attorneys who overbill clients for services not rendered, noting that such misconduct is often met with a short term of suspension when the misconduct does not include other, more egregious violations. See, e.g., In re Perkel, 227 N.J. 458 (2017) (three-month suspension for an attorney who overbilled a client for $49,752 for work never performed); In re Day, 217 N.J. 280 (2014) (attorney received a three-month suspension for submitting to the client false time entries indicating that he had attended depositions on fifty-one dates when he had attended only twenty depositions, overbilling the client by $123,050.49); In re Hecker, 109 N.J. 539 (1988) (six-month suspension for part-time municipal attorney who billed the township for work he did not complete).

When the misconduct is accompanied by other, more egregious violations or considerable aggravating factors, the OAE contended that the Court has disbarred the attorney. In re Denti, 204 N.J 566 (2011) (disbarment for an attorney who submitted considerable false time entries for numerous alleged clients, including $350,000 for one individual who was not a client at either of

his firms, billed his firm for dinners with women he was dating, and engaged in a sexual relationship with a divorce client); In re Ort, 134 N.J. 146 (1993) (disbarment for an attorney who mortgaged the residence of an estate without the widow's permission and used the loan to take excessive fees for unnecessary legal work).

In the OAE' view, respondent's conduct is most similar to that of the attorney in Perkel, because O&M billed the Fund for work that was never performed for clients, based on respondent's false billing. However, the OAE recognized that respondent had taken responsibility for his actions and paid $14,200 in restitution to the Fund. Like the attorney in Day, the OAE asserted that respondent did not fully understand the retainer agreement between O&M and the Fund, nor did he intend to overbill the client. Specifically, respondent believed that the Fund paid O&M the same amount, on a monthly basis, regardless of the number of hours worked. Respondent acknowledged that his unethical conduct in submitting inaccurate bills resulted in O&M being paid for work that was not performed. Finally, like the attorney in Hecker, respondent had been practicing law for more than forty years with no prior discipline, and the misconduct occurred between seven and eleven years ago.

Citing disciplinary precedent discussed below, the OAE recognized that admonitions are typically imposed for respondent's additional misconduct,

including his failure to cooperate with disciplinary authorities and recordkeeping irregularities.

In mitigation, the OAE recognized respondent's unblemished career in his forty years at the bar. Further, he has "shown contrition through restitution and his willingness to accept responsibility in the criminal matter and this disciplinary proceeding." In re Convery, 166 N.J. 298, 308 (2001). According to the OAE, because respondent no longer worked at O&M, there is "little likelihood of repeat offenses." In re Farr, 115 N.J. 231 (1989). The OAE also recognized that respondent "addressed the allegations of his wrongdoing by entering into a deferred prosecution agreement and made full payment of restitution as a condition of that agreement, then consenting to discipline in this ethics proceeding." In re Alum, 162 N.J. 313, 315 (2000). Finally, the OAE concluded that there was "no indication" that respondent financially benefitted from the overbilling, "as all funds went directly to the firm." In re Litwin, 104 N.J. 362 (1986).

The OAE acknowledged the absence of any aggravating factors.

In his brief, and during oral argument before us, respondent emphasized, through his counsel, that he readily accepted responsibility for his misconduct related to client overbilling while employed at O&M, as well as the various issues with his attorney accounts. He stressed, however, that none of his

misconduct involved theft or misappropriation of client funds. In urging that we impose discipline less than a term of suspension, respondent highlighted several additional mitigating factors.

First, respondent noted his excellent character and reputation in the legal community, evidenced by the character letters he attached to his brief for our consideration. Further, he has accepted responsibility for his misconduct and noted the lapse of time since the misconduct had occurred. Respondent also pointed out his unblemished career in over forty-years at the bar, describing the instant misconduct as "aberrational."

Furthermore, respondent emphasized that he never pled guilty to any crime and did not receive a financial benefit related to the overbilling. After he paid $14,200 in restitution, the criminal charges were dismissed. Likewise, he did not intend to obstruct or ignore the OAE's investigation but, rather, he was concerned that his statements could "breathe renewed life into the criminal case that was dismissed." Moreover, respondent asserted that he cooperated as well as he could considering he did not have access to the client files in O&M's possession. In addition, he promptly rectified all recordkeeping deficiencies associated with his own firm's bank accounts and records.

In response to our questioning, respondent confirmed that he was a salaried employee while employed by O&M and that his pay did not fluctuate

based upon billing to the Fund. Further, he explained that, although he had stipulated to knowingly making a false statement for which he had been criminally charged, he had not intended to admit that the charge could have been proven beyond a reasonable doubt.

Respondent also submitted a personal statement for our consideration. He affirmed that "[a]s a solo practitioner," he "never overcharged anyone or inflated [his] billing," but he admitted that, "[w]hile at [O&M], [he] should have been more responsible in [his] role with the billing practices," which he now recognized was "[his] responsibility." Additionally, he readily agreed to pay restitution "even though the funds at issue were paid to the firm and not to him directly." Respondent argued that his case was distinguishable from those cited in the stipulation because he did not intentionally engage in misconduct for his personal financial benefit.

The OAE did not submit a brief for our consideration.

Analysis and Discipline

Violations of the Rules of Professional Conduct

Following a review of the record, we determine that the stipulated facts in this matter clearly and convincingly establish some, but not all, of the charged violations of the Rules of Professional Conduct.

Specifically, respondent improperly commingled personal funds with client funds, in violation of RPC 1.15(a). He admittedly held $500 of his own personal funds in his ATA, thereby commingling personal funds with client funds.

Next, respondent admittedly violated RPC 1.15(d), which requires attorneys to comply with the recordkeeping requirements of R. 1:21-6, by failing to (1) correctly designate his ATA checks and deposit slips; (2) correctly identify clients on all checks; and (3) correctly designate his ABA statements, checks, and deposit slips. Although respondent subsequently corrected these deficiencies, these facts establish, by clear and convincing evidence, that he violated RPC 1.15(d).

However, on the record before us, we are unable to conclude that respondent violated RPC 8.1(b), RPC 8.4(b), and RPC 8.4(c) and, thus, determine to dismiss those charges based on the lack of clear and convincing evidence.

Respondent stipulated to having violated RPC 8.1(b) based on his failure to fully cooperate with the OAE's investigation, including his initial refusal to answer questions pertaining to the criminal allegations, and his subsequent incomplete submission of financial documents, client files, and billing records.

Further, according to the stipulation, respondent evaded answering the OAE's questions and provided contradictory or inaccurate information.

However, when the OAE first contacted respondent in October 2019, his criminal charges were still pending. Accordingly, respondent's assertion of his Fifth Amendment right against self-incrimination was not only reasonable but, arguably, the prudent course of action. It is well established that an attorney may claim a Fifth Amendment privilege during ethics proceedings. Spevack v. Klein, 385 U.S. 511, 514 (1967) (the United States Supreme Court held in its plurality opinion that the privilege "should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."); State v. Stroger, 97 N.J. 391 (1984) ("it is quite clear that the fifth amendment applies to lawyers"). Still, R. 1:20-3(g) imposes a duty to cooperate on attorneys being investigated for misconduct. Accord, In re Okoniewksi, 118 N.J. 468 (1990).

Respondent did not ignore the OAE but simply took no position on the allegations pending resolution of the DPA. After respondent's criminal charges were dismissed, in March 2020, his counsel promptly notified the OAE so that it could continue its investigation. Respondent also advised the OAE that he had paid restitution in the amount of $14,200 to the Fund, as a condition of the dismissal. In our view, these actions showed a good faith effort to cooperate.

Further, although respondent could not answer specific questions about the allegations during the first demand audit in May 2020, he already had explained that he did not have any of the client files requested by the OAE, because those records were in O&M's possession. Further, the record before us does not support the OAE's argument that its repeated requests for client records went unanswered. Instead, respondent repeatedly informed the OAE that he was not in possession of the requested records. The OAE ultimately secured the records it was seeking, three days after requesting them from O&M, directly.

The OAE also made concerted efforts to get respondent to admit wrongdoing by asking repeatedly about the restitution he paid; however, respondent would only concede that he "should have watched the billing more carefully." Notably, respondent said that he would adjust his timekeeping records if they were submitted incorrectly or put in the wrong file, but they were never updated by the secretary. Respondent believed this may have been misleading; if the timekeeping did not reflect the changes he had made to billing statements, essentially what the government saw were "the numbers" in "draft" form. When questioned by the OAE about clients whose files he did not have, and whom he had not talked to for many years, respondent offered plausible reasons why clients may not have remembered him, or even known they were

speaking to him, or why they may not have wanted to admit they had called him (such as concerns over immigration status or other private matters).

After the first demand audit, the OAE directed respondent to correct recordkeeping deficiencies, reduce his personal funds in his ATA to $250, and provide financial documents for his private practice of law. Respondent cooperated with that request in a timely manner, and provided the majority of the records, but he declined to respond to the criminal allegations against him because he did not want to be exposed to further prosecution. He reminded the OAE that he had paid $14,200 in restitution, "pled not guilty," and that the criminal complaint had been dismissed. Respondent emphasized, during oral argument before us, that the charges were dismissed "without prejudice" so he remained susceptible to further prosecution.

Further, respondent provided the OAE with detailed information about O&M's billing procedures in his February 2021 letter and during both demand audits. Although his timekeeping practices were less than prudent, respondent's explanations were consistent. As respondent claimed, the billing summaries were most likely the "only way to know how many hours that [O&M] reported to the Fund for the hours worked." Unfortunately, however, these summaries are not in the record before us.

Based on the foregoing, we are unable to conclude that respondent failed to cooperate with the OAE's investigation and, therefore, decline to find that he violated RPC 8.1(b).

Next, we determine to dismiss the charge that respondent violated RPC 8.4(b), which was based on the federal criminal charges against him. That Rule prohibits an attorney from committing "a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer." Although a violation of this Rule may be found even in the absence of a criminal conviction, the evidence must nonetheless establish, clearly and convincingly, that respondent's misconduct constituted a criminal offense. See In re Gallo, 178 N.J. 115, 121 (2003) (the scope of disciplinary review is not restricted, even though the attorney was neither charged with nor convicted of a crime); In re McEnroe, 172 N.J. 324 (2002) (the attorney was found to have violated RPC 8.4(b), for failing to file tax returns for seven years and pay nearly $70,000 in taxes, despite not having been charged or found guilty of a criminal offense).

The OAE asserted that respondent committed three out of four crimes charged in federal criminal complaint, including mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and making a false statement (18 U.S.C. § 1027).

Mail fraud is defined, pursuant to 18 U.S.C. § 1341, as a person

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property

> by means of false or fraudulent pretenses . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . .

Wire fraud is similarly defined, under 18 U.S.C. § 1343, as

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice . . .

Under 18 U.S.C. § 1027, it is a crime

> . . . in any document required by the title I of the [ERISA] . . . [to] make[] any false statement or representation of fact, knowing it to be false, or knowingly conceal[], cover[] up, or fail[] to disclose any fact the disclosure of which is required by such title or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such title to be published or any information required by such title to be certified.

The OAE did not pursue the charge of theft from an employee benefit plan and acknowledged that respondent "did not intend to overbill the client."

Although the OAE argued that respondent's "conduct [wa]s rooted in overbilling," the questioning at the demand audits primarily sought to determine whether respondent "devised or intended to devise a scheme" or ruse to defraud the Fund into paying O&M for work he did not perform. We had before us two lengthy transcripts during which respondent was unable to account for what services he did or did not provide to clients nearly a decade ago. The four one-page memoranda of interviews with those alleged clients and limited record do little to overcome respondent's assertions. During those audits, and in his February 2021 letter to the OAE, respondent described O&M's procedures for billing the Fund in great detail. Although these billing procedures ran afoul of best practices, they appear to be the long-standing procedures utilized by O&M, rather than a scheme to defraud "devised" by respondent. Notwithstanding his stipulation, the OAE presented no evidence to the contrary, and in fact acknowledged that respondent did not intend to overbill the client. Thus, on this record, we are unable to conclude that respondent committed wire fraud or mail fraud.

We also considered whether respondent knowingly made false statements in documents required by ERISA. Several cases have addressed the mens rea required for a conviction under 18 U.S.C. § 1027. In 1975, the Second Circuit affirmed a defendant's convictions, including two counts of 18 U.S.C. § 1027,

because "[t]he trial court properly charged that the Government was required to prove beyond a reasonable doubt that appellant made false statements knowing the same to be false." United States v. Santiago, 528 F.2d 1130, 1134 (2d Cir. 1975) (emphasis added). In 1983, the Sixth Circuit held that Section 1027 "imposes criminal liability upon one who makes 'any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by [ERISA]'." United States v. S & Vee Cartage Co., 704 F.2d 914, 918-19 (6th Cir. 1983) (emphasis in original). It further found that Section 1027, which was "enacted along with two other criminal statues, 18 U.S.C. § 644 (dealing with theft or embezzlement from employment benefit plans) and 18 U.S.C. § 1954 (dealing with kickbacks or conflict of interest payments to influence the operations of such plans) was "applicable to employers who knowingly make false statements" in ERISA documents. Id. at 918 (emphasis added).

In 1989, the Third Circuit found that "[o]n its face section 1027 requires proof that: (1) the defendant made a false statement; (2) the defendant made the statement knowing it to be false; and, (3) the false statement was in a document required by ERISA." United States v. Furst, 886 F.2d 558, 568 (3d Cir. 1989) (emphasis added), citing United States v. Martorano, 767 F.2d 63 (3d Cir. 1985) and United States v. S & Vee Cartage Co., Inc., 704 F.2d 914 (6th Cir. 1983).

In 1995, however, the Third Circuit upheld a defendant's conviction, finding that the trial court "correctly told the jury that to establish a violation [of 18 U.S.C. § 1027] the government must prove (1) the knowing making of a false statement or representation of fact in an ERISA-required document or (2) the knowing concealment, cover-up, or failure to disclose any fact the disclosure of which is required or is necessary to verify, explain . . . clarify, or check the accuracy of completed reports" required by ERISA. United States v. Coyle, 63 F.3d 1239, 1247 (3d Cir. 1995, emphasis in original). Although the court in Coyle held that a conviction can be affirmed when a defendant knowingly fails to disclose any fact which is "necessary to verify, explain, clarify, or check the accuracy of completed reports," we do not view respondent's failure to check the accuracy of records that O&M's secretary produced for the Fund as analogous to a knowing or intentional misrepresentation.

Additionally, in 2006, the Eighth Circuit affirmed a judgment of acquittal in favor of a defendant because "the district court erred when it instructed the jury that a reckless disregard of the falsity of statements or completeness of reporting was a sufficient basis upon which to convict." United States v Cacioppo, 460 F.3d 1012, 1016. The court found it "fairly obvious" that "reckless disregard" does not appear in § 1027. The court also noted that "the Supreme Court has repeatedly declined opportunities to imply a mens rea

requirement somewhere between knowingly and strict liability in cases similar to the one we consider here." Ibid. (citations omitted).

In short, although respondent admitted that he "should have watched the billing more carefully," we conclude that the record lacks clear and convincing evidence that he "knowingly made false statements" in the billing records. Further, respondent lacked the intent required to hold him criminally culpable because he believed that the Fund would pay the same amount regardless of how much work was done, even if that belief was erroneous. Ultimately, respondent's failure to check the accuracy of the records that O&M submitted to the Fund does not support the contention that he knowingly made false statements in any documents required by ERISA, or that he intentionally committed any type of fraud or theft. Accordingly, in the absence of clear and convincing evidence, we determine to dismiss the RPC 8.4(b) charge.

Finally, we considered whether respondent's failure to check his timekeeping records for accuracy constitutes conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of RPC 8.4(c). We find that it does not. The OAE asserted that respondent violated this RPC based on having engaged in an "overbilling scheme for unrendered legal services." It is well-settled, however, that a violation of RPC 8.4(c) requires intent. In re Hyderally, 208 N.J. 453 (2011). Here, the record lacks clear and convincing evidence that

respondent intentionally or purposefully committed any type of misrepresentation or fraud. Thus, we determine to dismiss the charge pursuant to RPC 8.4(c).

In sum, we find that respondent violated RPC 1.15(a) and RPC 1.15(d). We determine to dismiss, for lack of clear and convincing evidence, the charges pursuant to RPC 8.1(b), RPC 8.4(b), and RPC 8.4(c). 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 if accompanied by other recordkeeping infractions where, as here, they did not result in the negligent misappropriation of clients' funds. See e.g., In the Matter of David Stuart Bressler, DRB 22-157 (November 21, 2022) (the attorney commingled personal funds in his ATA; due to the his poor recordkeeping practices, the attorney failed, for two months, to remove his personal funds from his ATA; the attorney also committed several recordkeeping violations, including failure to perform three-way reconciliations, improper account designation, and failure to preserve images of processed checks; 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; the attorney's 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 the attorney 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).

Based on the foregoing, the baseline discipline for respondent's misconduct is an admonition. To craft the appropriate discipline, however, we also consider both mitigating and aggravating factors.

In mitigation, respondent cooperated with the OAE's investigation, corrected the recordkeeping deficiencies, and entered into the present disciplinary stipulation, thereby accepting responsibility for his misconduct and conserving disciplinary resources. Further, in compelling mitigation, he has no prior discipline in his more than forty-year career at the bar. Moreover, respondent no longer works for O&M and, thus, the misconduct is unlikely to recur.

In aggravation, respondent's role in O&M's timekeeping and billing practices resulted in significant financial harm to the Fund. He admitted that his misconduct resulted in the Fund being overbilled in the amount of $28,400 for legal services that were never provided and, indeed, as part of the deferred prosecution agreement, he repaid the Fund half of that amount. Respondent was aware that O&M's billing and timekeeping practices were problematic. He admitted that, in hindsight, he should have realized that the practices could result in overbilling. Yet, he failed to take steps to rectify his concerns and, consequently, his client was harmed.

Conclusion

On balance, despite the presence of compelling mitigation, we view the financial harm to the client as a significant aggravating factor warranting discipline greater than the baseline discipline of an admonition. Accordingly, we determine that a reprimand is the quantum of discipline necessary to protect the public and preserve confidence in the bar.

Member Campelo 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 Andrew L. Monteleone
Docket No. DRB 23-267

Argued: March 21, 2024

Decided: May 15, 2024

Disposition: Reprimand

Members	Reprimand	Absent
Gallipoli	X	
Boyer	X	
Campelo		X
Hoberman	X	
Joseph	X	
Menaker	X	
Petrou	X	
Rivera	X	
Rodriquez	X	
Total:	8	1

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