

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 24-120
District Docket No. XIV-2023-0022E

In the Matter of John Stephen Lubenesky
An Attorney at Law

Argued
July 25, 2024

Decided
November 8, 2024

Tara L. Hanna appeared on behalf of the
Office of Attorney Ethics.

Raymond S. Londa 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(b) (two instances – failing to promptly deliver funds to a client), RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6), and RPC 8.1(b) (failing to cooperate with disciplinary authorities).

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

Ethics History

Respondent earned admission to the New Jersey bar in 2000 and to the New York bar in 2001. He has no disciplinary history. During the relevant period, he maintained a practice of law in Montclair, New Jersey.

Facts

Recordkeeping and Failing to Cooperate

On December 20, 2022, Bank of America notified the OAE of a \$1,544.30 overdraft of respondent's attorney trust account (ATA), caused by his failure to maintain sufficient funds to cover a recently issued \$120,000 ATA check.¹ Following the overdraft notice, the OAE commenced an investigation into respondent's attorney accounts.

On April 17, 2023, the OAE conducted a demand audit, which revealed numerous recordkeeping deficiencies. Specifically, the OAE determined that respondent (1) maintained improper account designations on his ATA and attorney business account (ABA), as R. 1:21-6(a)(2) prohibits; (2) failed to maintain ATA and ABA receipts and disbursements journals, as R. 1:21-6(c)(1)(A) requires; (3) failed to maintain separate ledger cards for clients and for law firm funds held for bank charges, as R. 1:21-6(c)(1)(B) and (d) require; (4) failed to conduct monthly three-way ATA reconciliations, as R. 1:21-6(c)(1)(H) requires; (5) failed to maintain a running cash balance for his ATA checkbook, as R. 1:21-6(c)(1)(G) requires; (6) conducted improper electronic

¹ The OAE did not charge respondent with having engaged in negligent misappropriation in connection with the \$1,544.30 ATA overdraft.

transfers from his ATA, as R. 1:21-6(c)(1)(A) prohibits; and (7) failed to maintain proper ABA image-processed checks, as R. 1:21-6(b) requires.

On April 17, 2023, following the demand audit, the OAE sent respondent a letter enumerating his recordkeeping violations and requiring that he demonstrate, in writing by May 17, 2023, the actions he had taken to correct the deficiencies. In its letter, the OAE also required that he produce his (1) monthly three-way ATA reconciliations; (2) ATA checkbook with a running cash balance; (3) client ledger cards; and (4) ATA and ABA receipts and disbursements journals from January 2021 through April 2023. To assist respondent in correcting his recordkeeping deficiencies, the OAE provided him with a recordkeeping requirement outline.

On May 15, 2023, two days before the May 17 deadline, respondent sent the OAE an e-mail requesting an extension, until June 17, to submit the required materials. In his e-mail, respondent claimed that he needed additional time because of “some home issues that took too much time over the last few weeks.” In reply, the OAE granted an extension, to June 1, 2023.

On June 1, 2023, respondent sent the OAE a letter enclosing his ATA receipts and disbursements journals from January 2021 through April 2023. Respondent, however, failed to provide his (1) ATA reconciliations; (2) ATA

checkbook with a running cash balance; (3) ABA receipts and disbursements journals; and (4) client ledger cards. Similarly, respondent failed to demonstrate that he had corrected his ATA and ABA account designations or had rectified the deficiencies underlying his ABA image-processed checks.

In his letter, respondent claimed that, because he primarily practiced real estate law, “it [was] taking a very long time to do all the individual client ledgers.” He also alleged that his law practice recently had experienced “employee turnover.” Consequently, he requested a “small extension,” until June 12, 2023, to provide the remaining financial records. The OAE granted respondent’s extension request.

On June 30, 2023, respondent sent the OAE a “flash drive” containing only his client ledger cards and additional copies of his ATA receipts and disbursements journals. On July 6, 2023, the OAE sent respondent an e-mail notifying him that his partial submission was insufficient and directing that he provide, by July 10, 2023, the outstanding financial records it had requested in its April 17, 2023 correspondence.

On July 26, 2023, respondent sent the OAE a letter alleging that he recently had contacted an accounting software company to assist him in preparing his monthly three-way ATA reconciliations. Respondent noted that

the company was “sending [him] a proposal today,” and he expressed his “hope” that the company could “start immediately” assisting him “in completing [his ATA] reconciliations.” In reply, the OAE granted respondent a two-week extension, until August 9, 2023, to provide his (1) outstanding ATA reconciliations, (2) ATA checkbook with a running cash balance, and (3) ABA receipts and disbursements journals. The OAE further reminded him of his obligation to demonstrate that he had corrected his ATA and ABA account designations and had rectified the deficiencies underlying his ABA image-processed checks.

On August 8, 2023, respondent sent the OAE a letter requesting “a little more time” to allow his accounting software company to complete his ATA reconciliations. In his letter, respondent represented that he had provided the company “all requested information” and that he was “just waiting on their finalizing the trust so that [he could] submit everything requested to [the OAE].” He claimed that the company’s efforts “should not take that long.” Finally, he represented that he was suffering from an illness, which he maintained had “slowed” his “ability” to comply with the OAE’s directives.

Two days later, on August 10, 2023, the OAE granted respondent a final extension, until August 23, 2023, for respondent to provide the outstanding

financial records. On August 23, 2023, respondent sent the OAE another letter requesting an additional extension, for an unspecified amount of time, to submit his outstanding records. Although the OAE denied his request for an additional extension, it notified him that it would continue to accept his submissions, including “partial records,” until it completed its investigation.

On October 30, 2023, respondent provided “an incomplete partial” submission to the OAE. The content of his submission, however, is unclear based on the record before us.

By December 5, 2023, the date of the formal ethics complaint,² respondent stipulated that he had failed to demonstrate to the OAE that he had (1) corrected his ATA and ABA account designations; (2) prepared ledger cards identifying attorney funds held for bank charges; (3) created an ATA checkbook with a running cash balance; (4) maintained proper ABA image-processed checks; and (5) prepared ABA receipts and disbursements journals.

In the disciplinary stipulation, the parties represented that respondent had failed to resolve all the recordkeeping deficiencies identified during the OAE’s investigation. Specifically, respondent stipulated that he had failed to (1) create

² Prior to the execution of the disciplinary stipulation in this matter, the OAE filed a formal ethics complaint against respondent, who, on February 8, 2024, filed a verified answer. Copies of those pleadings are not included in the record before us.

an ATA checkbook with a running cash balance, (2) maintain proper ABA image-processed checks, and (3) prepare ABA receipts and disbursements journals. Thereafter, at oral argument before us, the parties represented that respondent's recordkeeping deficiencies remained uncorrected. Specifically, respondent admitted to his ongoing failure to prepare ABA receipts and disbursements journals and to create an ATA checkbook with a running cash balance.

Inactive Client Balances

At some point during the investigation of respondent's financial records, the OAE discovered two client ledger cards indicating that respondent had maintained a total of \$143,066.77 in inactive ATA funds in connection with two real estate transactions.

Specifically, regarding his representation of the seller concerning property designated in his records as "41 Maple," respondent's client ledger card indicated that, as of May 21, 2022, \$138,392.77 of the seller's funds had languished in his ATA. The parties stipulated that respondent had claimed, in his February 8, 2024 verified answer, that he previously had disbursed, via wire transfer to the seller, the \$138,392.77 in ATA funds. Respondent further

maintained, in his verified answer, that the disbursement “was inadvertently not recorded on his client ledger card.”

In connection with his representation of the buyer concerning property designated in his records as “47 Ann,” respondent’s client ledger card indicated that, as of January 25, 2021, \$4,674 of the buyer’s funds, representing a “canceled deposit,” had languished in his ATA.

In the disciplinary stipulation, the parties represented that respondent had failed to provide proof to the OAE that he had disbursed all inactive funds to his clients or that he had corrected the client ledger card underlying the 41 Maple client matter. However, at oral argument before us, the parties represented that respondent since had disbursed all inactive funds to his clients and had corrected the 41 Maple matter client ledger card.

Based on the foregoing facts, respondent stipulated that he violated RPC 1.15(d) by committing the numerous recordkeeping infractions enumerated in the OAE’s April 17, 2023 correspondence. Respondent further stipulated that he violated RPC 1.15(b) by failing to promptly deliver funds belonging to his clients. Finally, respondent stipulated that he violated RPC 8.1(b) by failing to fully cooperate with the OAE’s investigation of his financial records.

The Parties' Arguments Before the Board

The OAE recommended the imposition of an admonition or a reprimand, with the condition that, within thirty days of the Court's disciplinary Order in this matter, respondent demonstrate to the OAE that he has corrected his outstanding recordkeeping deficiencies. The OAE also recommended that respondent be required to attend an OAE-approved recordkeeping course and to submit proof of such attendance within fifteen days of completing the course.

In support of its recommendation, the OAE noted that respondent's recordkeeping deficiencies have persisted despite multiple opportunities to bring his records into compliance. Indeed, in aggravation, respondent failed to remediate his recordkeeping violations in the more than sixteen months since the December 2022 overdraft notice, despite the OAE providing respondent with instructional materials and numerous extensions to correct his records. Moreover, the OAE noted that respondent had engaged in impermissible "partial" cooperation by submitting only "some" of the requested financial records.

At oral argument before us, respondent, through counsel, urged the imposition of an admonition for his stipulated misconduct. Respondent emphasized, in mitigation, his lack of prior discipline in his twenty-four-year

career at the bar and the fact that he stipulated to his misconduct and, thus, conserved disciplinary resources. Respondent also maintained that, during the timeframe underlying his misconduct in this matter, he had suffered from a persistent illness. Finally, he expressed his agreement with the OAE's recommended conditions and noted his intention to correct his outstanding recordkeeping deficiencies.

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 most, but not all, of 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, he (1) maintained improper ATA and ABA account designations; (2) failed to maintain ATA and ABA receipts and disbursements journals; (3) failed to maintain separate ledger cards for each client and for law firm funds held for bank charges; (4) failed to conduct monthly three-way ATA reconciliations; (5) failed to maintain a running cash balance for his ATA checkbook; (6) conducted improper electronic

transfers from his ATA; and (7) failed to maintain proper ABA image-processed checks.

Although respondent, eventually, corrected most of the foregoing recordkeeping deficiencies, he still has failed to demonstrate that he has created an ATA checkbook with a running cash balance and prepared ABA receipts and disbursements journals.

Additionally, respondent violated RPC 1.15(b) by failing to promptly deliver funds to his client in connection with the 47 Ann real estate transaction. Specifically, as respondent conceded, he had allowed \$4,674 of his client's funds, representing a "canceled deposit," to languish, since January 2021, in his ATA. However, the parties agree that respondent, eventually, provided proof to the OAE that he had disbursed those funds to his client in that matter.

We decline, however, to sustain the RPC 1.15(b) charge on the additional basis that respondent failed to promptly deliver client funds in connection with the 41 Maple real estate transaction. Respondent's client ledger card for that matter revealed that, since May 21, 2022, he had allowed \$138,392.77 of the seller's funds to languish in his ATA. Nevertheless, the parties stipulated that respondent had claimed, in his February 2024 verified answer, that he previously had disbursed, via wire transfer, the entirety of those funds to the seller. The

parties also agreed that respondent had represented, in his verified answer, that he inadvertently had failed to record that disbursement on his client ledger card. Following the filing of his verified answer, respondent, at some point, corrected the client ledger to reflect the disbursement. Respondent's initial failure to record the disbursement on his client ledger card, however, does not clearly and convincingly establish that he had, in fact, allowed the seller's funds to languish in his ATA. Indeed, respondent made no such clear admission in the disciplinary stipulation. Consequently, we decline to sustain the RPC 1.15(b) charge on the additional basis that respondent failed to promptly deliver client funds in connection with the 41 Maple matter.

Finally, respondent violated RPC 8.1(b) by failing to fully cooperate with the OAE's investigation of his financial records. An attorney who fails to comply with the requirements of R. 1:21-6 "in respect of the maintenance, availability and preservation of accounts and records or who fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of RPC 1.15(d) and RPC 8.1(b)." R. 1:21-6(i).

It is well-settled that cooperation short of the full cooperation required by the Rules results in a finding that the attorney violated RPC 8.1(b). See, e.g., In re Sheller, 257 N.J. 495 (2024) (although the attorney timely replied to the

OAE's correspondence, he admittedly failed to bring his financial records into compliance, despite the OAE's extensive efforts spanning fourteen months; indeed, on at least four occasions, the OAE provided the attorney with specific guidance on how to correct his records; notwithstanding the OAE's repeated good faith efforts to accommodate him, his submissions consistently remained deficient; we, thus, determined that the attorney violated RPC 8.1(b)); In re Higgins, 247 N.J. 20 (2021) (the attorney failed, for more than seventeen months, to comply with the OAE's numerous requests for information regarding the matters under investigation, necessitating his temporary suspension; although the attorney ultimately filed a reply to the ethics grievance, brought his records into compliance, and stipulated to his misconduct, we concluded that his lengthy period of non-compliance constituted a failure to cooperate); In re Palfy, 225 N.J. 611 (2016) (wherein 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").

Here, like the attorney in Sheller, respondent repeatedly failed to provide the OAE with the complete financial records it had requested and that he was required, by Court Rule, to maintain. Specifically, between May and August

2023, the OAE granted respondent several extensions to provide his financial records, considering his personal circumstances and to allow his accounting software company sufficient time to prepare his ATA reconciliations. Nevertheless, by August 23, 2023, more than four months after the OAE's demand audit, respondent only had produced his ATA receipts and disbursements journals and client ledger cards. Thus, his (1) ATA reconciliations; (2) ATA checkbook with a running cash balance; (3) ABA receipts and disbursements journals; (4) proof that he had corrected his ATA and ABA account designations; (5) client ledger cards identifying attorney funds held for bank charges; and (6) proof that he had corrected his ABA image-processed checks remained outstanding.

Thereafter, on October 30, 2023, more than two months after the final deadline to submit his complete financial records, respondent stipulated that he provided the OAE another "incomplete" submission. By May 21, 2024, the date of the disciplinary stipulation, respondent conceded that he had failed to provide the OAE (1) his ATA checkbook with a running cash balance, (2) his ABA receipts and disbursements journals, and (3) proof that he had corrected his ABA image-processed checks. Thereafter, at oral argument before us, he admitted to his ongoing failure to provide the OAE his ATA checkbook with a running cash

balance and his ABA receipts and disbursements journals.

Despite the OAE's repeated, good faith efforts to accommodate respondent by providing him instructional materials and granting several extensions, he, ultimately, provided the OAE only a portion of the required financial records. Consequently, as he stipulated, respondent failed to adequately cooperate with the OAE's investigation.

In sum, we find that respondent violated RPC 1.15(b) (one instance), RPC 1.15(d), and RPC 8.1(b). For the reasons set forth above, we dismiss the second charged instance of RPC 1.15(b). The sole issue left for our determination is the appropriate quantum of discipline for respondent's misconduct.

Quantum of Discipline

Absent serious aggravating factors, attorneys who fail to promptly deliver funds to clients or third parties ordinarily receive an admonition, even if accompanied by other infractions. See In the Matter of Brian Francis Fowler, DRB 12-036 (April 27, 2012) (in connection with his representation of an estate, the attorney was required to collect funds due on a note given to the estate; for a three-year period, the attorney collected the funds but failed to deposit at least nineteen checks and did not supply a required accounting; he also failed to reply

to more than a dozen inquiries from the client about the funds; although the attorney had two prior admonitions, an admonition was imposed due to mitigating factors, including the attorney's mental health difficulties), and In the Matters of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) (in connection with three personal injury matters, the attorney neither promptly notified his clients of his receipt of settlement funds nor promptly disbursed their share of the funds; the attorney also failed to properly communicate with the clients; no prior discipline).

Similarly, recordkeeping irregularities ordinarily are met with an admonition where, as here, they have not resulted in negligent misappropriation. See In the Matter of David Stuart Bressler, DRB 22-157 (Nov. 21, 2022) (the attorney committed several recordkeeping violations, including failing to perform three-way reconciliations, maintaining an improper ATA account designation, and failing to preserve images of processed checks; the attorney also commingled client and personal funds; in mitigation, the attorney rectified his recordkeeping errors, caused no ultimate harm to his clients, and had no disciplinary history), and In the Matters of Grant J. Robinson, DRB 21-059 and DRB 21-063 (July 16, 2021) (the attorney failed to properly designate his ATA, maintain ledger cards for bank charges, and maintain ABA receipts and

disbursements journals; the attorney also allowed an inactive balance to remain in his ATA; the attorney's recordkeeping deficiencies resulted in the return of more than twenty checks, issued to the Superior Court, for insufficient funds; in mitigation, the attorney corrected his recordkeeping errors and took remedial measures to decrease the likelihood of a future recordkeeping violation).

Respondent, however, also failed to cooperate with the OAE's investigation of his financial records. Admonitions typically are imposed for failure to cooperate with disciplinary authorities, if the attorney does not have an ethics history, if the attorney's ethics history is remote, or if compelling mitigation is present. The quantum of discipline is enhanced, however, if the failure to cooperate is with an arm of the disciplinary system, such as the OAE, which uncovers recordkeeping improprieties in an ATA and requests additional documents. See, e.g., In re Schlachter, 254 N.J. 375, 376 (2023) (reprimand for an attorney who committed recordkeeping violations, including failing to maintain adequately descriptive receipts and disbursements journals, ledger cards, and checkbooks with running balances; the attorney also failed to properly designate his ATA and to retain checks for seven years; the attorney repeatedly failed, for almost a year, to comply with the OAE's numerous record requests and ultimately provided only a portion of the requested records; although the

OAE attempted to help the attorney take corrective action, he remained non-compliant with the recordkeeping Rules; in mitigation, his misconduct resulted in no harm to his clients and he had no disciplinary history in sixteen years at the bar); In re Leven, 245 N.J. 491 (2021) (reprimand for an attorney who, following two OAE random audits uncovering numerous recordkeeping deficiencies, including an unidentified client ledger card that held a negative \$50,200.35 balance, repeatedly failed, for more than three months, to comply with the OAE's requests for his law firm's financial records; thereafter, for more than eight months, the attorney repeatedly assured the OAE that he would provide the required records but failed to do so, despite two Court Orders directing him to cooperate; the attorney, however, provided some of the required financial records; we found that a censure could have been appropriate for the attorney's persistent failure to address his recordkeeping deficiencies and his prolonged failure to cooperate with the OAE; however, we imposed a reprimand in light of the lack of injury to the clients and the attorney's remorse, contrition, and otherwise unblemished forty-seven-year career at the bar); In re Tobin, 249 N.J. 96 (2021) (censure for an attorney who, following an OAE random audit that uncovered several recordkeeping deficiencies (including more than \$800,000 in negative client balances), failed to provide the documents requested

in the OAE's seven letters and eight telephone calls, spanning more than one year; although we noted that a reprimand was appropriate for the attorney's recordkeeping violations and failure to cooperate, we imposed a censure in light of the attorney's prior reprimand for recordkeeping violations and the default status of the matter; in mitigation, the attorney had been practicing law for sixty-three years and suffered serious health problems prior to the continuation date of the random audit).

Here, like the reprimanded attorney in Schlachter, respondent repeatedly failed, for more than a year, to adequately comply with the OAE's repeated efforts to obtain his complete financial records. Although the OAE granted him several extensions, he provided the OAE only a portion of the requested financial records. Compounding matters, unlike the admonished attorney in Robinson, who ultimately corrected his recordkeeping and took remedial measures to prevent future infractions, respondent's noncompliance with the recordkeeping Rules has persisted, despite the OAE having provided him instructional materials.

However, in mitigation, unlike the censured attorney in Tobin, who had a prior reprimand for recordkeeping violations, respondent has no disciplinary history in his twenty-four-year career at the bar. Moreover, unlike Tobin, who

had allowed his matter to proceed as a default, respondent stipulated to his misconduct and, thus, conserved disciplinary resources.

Conclusion

On balance, weighing respondent's failure to cooperate with the OAE or to remediate his recordkeeping errors against his otherwise unblemished twenty-four-year career at the bar, we determine that a reprimand is the appropriate quantum of discipline necessary to protect the public and preserve confidence in the bar.

Additionally, given respondent's ongoing failure to comply with the recordkeeping Rules, we determine to adopt the parties' recommended conditions. Specifically, within thirty days of the Court's disciplinary Order in this matter, respondent shall demonstrate to the OAE that he has corrected all outstanding recordkeeping deficiencies. Further, within sixty days of the Court's disciplinary Order, respondent shall complete an OAE-approved recordkeeping course and submit proof of completion within fifteen days of attendance.

Member Campelo voted to recommend the imposition of an admonition, with the same conditions recommended by the majority Members.

Member Hoberman 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. Mary Catherine Cuff, P.J.A.D. (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 John Stephen Lubenesky
Docket No. DRB 24-120

Argued: July 25, 2024

Decided: November 8, 2024

Disposition: Reprimand

<i>Members</i>	Reprimand	Admonition	Absent
Cuff	X		
Boyer	X		
Campelo		X	
Hoberman			X
Menaker	X		
Petrou	X		
Rivera	X		
Rodriguez	X		
Spencer	X		
Total:	7	1	1

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