SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 97-344

IN THE MATTER OF :
BARRY F. DAVIDOFF :
AN ATTORNEY AT LAW :

Decision

Argued: December 18, 1997

Decided: June 29, 1998

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Daniel J. Jurkovic appeared on behalf of respondent.

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

This matter was before the Board based on a recommendation for discipline filed by the District I Ethics Committee ("DEC"). The formal complaint charged respondent with violations of *RPC* 1.1(a) (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.5(b) (lack of

written fee agreement), *RPC* 1.15(a) (knowing misappropriation of client funds), *RPC* 1.15(c) (failure to safeguard client funds), *RPC* 1.16(d) (failure to protect client's interest upon termination of representation) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count I); *RPC* 1.15(d) (failure to maintain trust and business accounts) and *RPC* 5.5(a) (failure to maintain bona fide office in New Jersey) (count II); *RPC* 5.5(a) (engaging in the practice of law in jurisdiction where not admitted) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count III); *RPC* 1.1(a) (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.5(b) (lack of written fee agreement), *RPC* 1.16(d) (failure to protect client's interest upon termination of representation) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count IV); *RPC* 1.1(a) (gross neglect), *RPC* 1.3 (lack of diligence), *RPC* 1.4(a) (failure to communicate with client), *RPC* 1.5(b) (lack of written fee agreement), *RPC* 5.5(a) (engaging in the practice of law in jurisdiction where not admitted) and *RPC* 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count V).

Respondent was admitted to the New Jersey bar in 1978. He maintains an office for the practice of law and management consulting in Norwalk, Connecticut. Respondent has no prior disciplinary history.

* * *

Respondent admitted that, in May 1993, he retained a check that was originally written by his client to pay real estate closing costs, that he deposited the check into his personal checking account and that he used the funds for his personal expenses. The central issue in this matter is whether that conduct constituted knowing misappropriation of client funds, as contended by the Office of Attorney Ethics ("OAE"), or whether respondent reasonably believed that he was authorized to apply the check to his outstanding legal fees, as urged by respondent and found by the DEC.

Respondent was retained by Fredric and Genevieve Rubenstein, the grievants in this matter, to represent them in several real estate and litigation matters. Before their professional relationship began, respondent had established a friendship with Fredric as a result of tutoring him. Fredric had attended Pace University School of Law for one year, but was required to withdraw after failing to meet the school's academic standards. As a readmission requirement imposed by the dean of the law school, Fredric had to take a pre-law course in 1987, offered by respondent at Manhattanville College in Westchester County, New York. Thereafter, respondent began to provide tutoring services to Fredric. Over the next several years, respondent, his wife and the Rubensteins developed a close friendship.

In late 1991 Fredric retained respondent to represent him in an appeal of a union election. Believing that improprieties had occurred, Fredric unsuccessfully sought an injunction to prevent the election results from being certified and to require a new election to be held. Although Fredric sought administrative review by the United States Department of Labor, that agency rejected his appeal on jurisdictional grounds.

In addition, Fredric retained respondent to file a separate complaint for monetary damages against the union for the alleged unauthorized disclosure of confidential information from his personnel file. This matter also proved to be unsuccessful, as Fredric did not recover any damages.

Respondent did not prepare written fee agreements governing these matters. Although the record is not clear, it appears that the Rubensteins believed that the fee basis for the union election appeal was $125 per hour, while the lawsuit against the union was undertaken on a contingent basis with respondent to receive one-third of any recovery. In turn, respondent contended that his fee in both matters was to be computed on an hourly basis, at $125 per hour.

Respondent issued only two bills to the Rubensteins, totaling $4,321.98: one dated January 10, 1992, in the amount of $2,071.98, for services performed in 1991 and the other dated February 18, 1992, in the amount of $2,250, for services performed between January 17 and February 16, 1992. The Rubensteins made the following payments to or on behalf of respondent:

01/09/92	$ 117.07
01/30/92	100.00
03/21/92	300.00
04/18/92	300.00
05/14/92	300.00

08/18/92	300.00
11/23/92	70.00
12/18/92	2,000.00
	$3,487.07

Although the payments totaled less than the amount of respondent's bills, $4,321.98, the Rubensteins insisted that they had paid respondent in full, asserting that they were not able to produce all of the checks given to respondent for his services.

Meanwhile, the Rubensteins sold two properties in New York in order to purchase a residence in Barnegat, New Jersey. Respondent represented the Rubensteins in these real estate transactions, attending both closings on their behalf. The Rubensteins paid respondent for the legal services performed in connection with the sale of both properties. Respondent also represented them in the purchase of the Barnegat property. That closing took place on May 7, 1993.

In connection with the *Barnegat* closing, the DEC presenter introduced into evidence the Rubensteins' check number 6682, dated May 7, 1993, in the amount of $2,574.40. The check was payable to respondent. The memo column of the check contained the following entry: "title co./rec/BD fees." According to Fredric, the check was to pay the following items, as noted on the RESPA settlement statement:

Title insurance	$1,299.40
Attorney's fees	1,200.00
Recording fees	73.00
Total	$2,572.40

The difference of $2.00 between the check and the three settlement costs was attributed to a mathematical error. Genevieve Rubenstein testified that, at respondent's direction, she prepared one check for the title insurance, for respondent's fees and for recording fees. She contended that the memo column was filled in at the same time that she prepared the rest of the check.

Fredric testified that the real estate closing was uneventful, specifically denying that respondent had brought to his attention a problem with the language in the deed. He asserted that, after the closing, respondent had indicated that he would record the deed with the Ocean County clerk and then send copies of the closing documents to the Rubensteins.

Respondent also represented the Rubensteins in a personal injury action resulting from an automobile accident in New Jersey. Although respondent did not prepare a written retainer agreement, his fee was to be a contingent fee of one-third of any recovery received by the Rubensteins. Fredric testified that, after he prepared the summons and complaint himself, respondent notified him that the complaint had been filed, that the defendant had defaulted and that respondent would be moving for a judgment of default.

In addition, Fredric gave respondent's name to Michelle Tutrone, the daughter of a colleague, for possible representation. Tutrone had been working at the World Trade Center at the time of an explosion in the building. Accompanied by her father, Tutrone consulted respondent, who agreed to file a personal injury complaint on her behalf. Again, although respondent did not prepare a written fee agreement, he agreed to represent Tutrone on a one-

third contingent fee basis. Respondent received the sum of $205 for filing and service of process fees.

Eventually, the relationship between the Rubensteins and respondent deteriorated. Even before the *Barnegat* closing, respondent had sent Fredric a letter dated April 28, 1993, stating, in part, as follows:

> We also had agreed to a monthly retainer of $300. I had agreed to suspend this amount during your current financial difficulties and Genny's condition. It would be appreciated however, if you could re-commence payments beginning in May. This would be in addition to the $89.30 that is due for the phone calls.

According to Fredric, after he received that letter he questioned respondent about it. Respondent did not reply, but "tap-danced" around the issue. Fredric denied having agreed to pay respondent a monthly amount, testifying that, when he asked respondent if he owed any money, respondent answered that he did not. Frederic was adamant that he had paid every bill received from respondent.

In July 1993 a controversy erupted between respondent and the Rubensteins. Respondent sent Fredric the following letter, dated July 8, 1993:

> This letter is to confirm our current understandings concerning my representation of you in your actions stemming from the election in Local 100 of the Transit Workers Union in December 1991. Considerable expenditures of time and materials have been made on your behalf in the course of the actions to date. The current outstanding balance of your account is $37,250.
>
> We had agreed that I was retained by you on a non-contingent basis and that I would be paid for my time and expenses regardless of the outcome. We had agreed that my time and expenses would be paid regardless of the outcome. I had agreed that all expenses would be paid as they were incurred and that you would make an additional payment of $300 a month towards the outstanding balance. The remainder of the outstanding balance would be paid upon the

earlier of either: (1) conclusion of your actions, or (2) termination of my services by either you or me.

My continuation of proceeding on your action is pursuant to the following:

1. My hourly rate has been increased from $125 to $135 effective on July 1, 1993.
2. All expenses would be paid as they are incurred along with $300 towards the outstanding balance on the first of every month.
3. Either you or I may terminate my services at any time, with or without cause. In the event of such termination the entire outstanding balance becomes due and payable. Interest will accrue on the outstanding balance once it becomes due and payable at the rate of 1½% per month.
4. In the event of any settlement I would receive as my fee the entire outstanding balance plus one-third of the remainder of such settlement; provided that the total amount of such fee does not exceed any limitations established by the Bar Association.
5. You would continue to use your best efforts to assist in the preparation of materials relating to your action on a timely basis as a means of reducing costs.

If the foregoing agrees with our understandings please execute both copies and return one copy to me.

Fredric testified that he was shocked to receive this letter, particularly since he had not had a bill from respondent since February 1992 and had been assured by respondent that he did not owe any more legal fees. By letter of July 19, 1993 Fredric disputed many of the issues raised in respondent's letter:

By this correspondence, I dispute your letter to me dated July 8, 1993. Your firm has been paid-in-full for all legal services, expenses, etc. regarding the appeal of the 1991 TWU election in which I was a candidate for Chairman of MABSTOA Division 1.

Acting on your advice and in acceptance of your unqualified offer, I agreed you would represent me in an action against MABSTOA on a strict contingency basis. I was to pay filing fees and do most of the limited legal

research you opined would be needed. That case was filed and no work has been performed by you since I paid to have the summons and complaint served and the Defendant answered. Our fee agreement was that you would be entitled to one-third of any settlement if I prevailed; you would be entitled to nothing if I did not . I have paid all expenses and fees relating to the case and there exists no balance due your firm at this time. The terms of our original agreement are non-negotiable and I demand that you honor your promise(s).

We agreed you would represent my wife and me as Plaintiffs in lawsuits stemming from a New Jersey motor vehicle accident in March of 1992. Your fee was strict contingency; you would keep one-third of any settlement(s). You advised my wife and me that you filed those actions on a timely basis. Despite several requests, you fail [sic] to produce any proof that these cases were filed. You went on to advise us that the Defendant had defaulted by not serving an answer. You then said that you moved for default judgments. We require copies of the affidavits of service and evidence of your motions for default judgments. The index numbers or other identifiers must be included.

You represented my wife and me at a closing on May 7, 1993. To date you have not sent the completed paperwork, etc. The many errors made by you in that transaction caused us great expenditures and loss of time. You were paid in full for that representation. I now require copies of the checks from your attorney's account showing exactly what dollar amounts and to whom you disbursed the funds we gave to you on that date.

The other matters you represented me and/or my wife in were paid for at their conclusions. I refer to the clearance of title on and sale of my wife's interests in our former Bayside, NY residence. Also my dispute with Clemson Park Condominium (in coordination with Warren Greher, Esq.) and the sale of that property.

I was the source of numerous referrals to your firm. Your misrepresentation(s) to those clients concerning our supposed partnership and my credentials was done without my consent. Your chicanery when it came to calculating their bills is something that should be investigated. Only recently did I learn that the fees you discussed with me were far less than the amounts you billed to Messrs. Cox, Runyon, et al. I hereby forbid you to associate my name with yours in future business dealings.

I resent your telephone call to my home on July 17. The duplicity you manifest is bizarre and totally unprofessional. It is *you* who has violated the trust of our

> relationship. Your bills were paid and many courtesies were extended to you that caused me considerable expenditures of time and money. If you now want to withdraw, come forward like a professional to discuss your reasons. I will only consider releasing you when all pending matters are concluded in a businesslike manner.
>
> Therefore, I demand you produce the documents mentioned herein by 5:01 PM EDT, July 28, 1993. Failing that, you will make it necessary for me to advise the New York and New Jersey Bar Associations and request their assistance. You will also force me to consider retaining counsel for the purpose of seeing outstanding matters through to conclusion.
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> Submarining a buddy is a hell of a way to end our friendship, Barry. I don't know what deep-rooted problems you may have, I only hope you muster the courage to acknowledge and deal with them.

On September 16, 1993 respondent sent a letter to Fredric, acknowledging receipt of "your letter terminating the services that I have provided." In his letter, respondent reminded Fredric, that despite this termination, Fredric was still responsible for "payment of all past costs" and advised him to retain alternate counsel.

After these letters, the Rubensteins and respondent had very little contact with each other. Ultimately, the Rubensteins discovered numerous other problems stemming from respondent's representation. They became aware that respondent was not admitted to practice law in the state of New York, despite his having represented them in litigation and real estate matters in that state. The Rubensteins learned in October, 1994 that the deed and mortgage for the Barnegat property had never been recorded and that respondent had never procured title insurance. In addition, although the Rubensteins understood from respondent that he would be moving for a default judgment in their New Jersey personal injury case, they found out that the complaint had never been filed. The court clerk had rejected the complaint

because respondent, who did not have a New Jersey office, had placed his Connecticut office address on the pleading.[1] However, the Rubensteins did not find out until after the statute of limitations had expired that the complaint had not been filed. Finally, they discovered that, although respondent had filed a complaint on behalf of Michelle Tutrone, whom Fredric had referred to respondent, he had never served the complaint and had neglected to file a required tort claims notice. The statute of limitations had expired in that case as well.

In March 1995 the Rubensteins filed a civil complaint against respondent, alleging legal malpractice in his handling of (1) the union litigation concerning the disclosure of Fredric's confidential personnel file, (2) the New Jersey personal injury matter and (3) the Barnegat real estate purchase. In the complaint, the Rubensteins alleged that respondent had received the sum of $2,575.40 for real estate closing costs and had converted those funds to his own use. Although respondent filed a counterclaim alleging that Fredric was indebted to him in the amount of $33,000 plus interest for legal fees incurred in the union appeal, respondent ultimately settled the litigation by paying the Rubensteins and agreeing that his counterclaim be dismissed.

For his part, respondent explained that, for most of his legal career, he had been employed as corporate counsel, concentrating on environmental regulation. After he became unemployed in 1991, respondent established a consulting business and law practice from his home in Connecticut. He also taught at Manhattanville College. Respondent testified that he

[1] Respondent is not admitted to the Connecticut bar.

began to represent Fredric in the union election appeal in November or December 1991. Respondent introduced many exhibits to demonstrate the amount of work performed for Fredric in the union matter. To substantiate the work he also correlated the dates of the services performed with entries in his billing diary. Respondent explained that he stopped sending bills to the Rubensteins because they had not paid the January and February 1992 statements. According to respondent, although he failed to issue written statements, from time to time, he verbally informed Fredric of the amount of the fee. Respondent claimed that he kept a running balance of the amount owed and the amount paid by the Rubensteins. Respondent did not, however, produce that document at the ethics hearing. Respondent further contended that, during an April 28, 1993 telephone conversation, Fredric acknowledged that his legal bills were large and agreed to resume paying $300 per month, an amount Fredric had been paying until he stopped working and received disability payments. This telephone conversation prompted the April 28, 1993 letter from respondent to Fredric, requesting that he pay $300 per month plus the telephone expenses.

With respect to the Barnegat property closing, respondent contended that the Rubensteins planned to pay the title insurance bill directly and were told to bring separate checks to the closing for the lender, seller, title insurance, respondent's fees and other closing expenses. Instead, the Rubensteins brought one check combining the expenses for title insurance, his fees and recording fees. Respondent disputed the Rubensteins' testimony that he directed them to prepare one check for these three expenses. According to respondent, because he did not maintain an escrow account and consequently could not deposit the check,

he and Fredric engaged in a heated discussion about what should be done. Respondent claimed that Fredric agreed to pay the title insurance directly, permitting respondent to retain the entire check of $2,574.40 as payment for his legal fees for the closing – $1,200 – and for past due fees. Respondent further contended that, although he and Fredric never discussed payment of the fee for recording the closing documents, he had planned to pay it himself, in consideration of their friendship.

Respondent claimed that several problems had developed at the closing. He contended that there was a discrepancy in the amount of the title insurance cost. Respondent noted that, because the title insurance company issued different statements for various charges, he was not able to determine the exact amount of the charge and could not pay it. Respondent also contended that the title insurance company required the deed to contain a metes and bounds description, which was not on the proposed deed from the builder. Respondent testified that, although he requested that the deed be revised before the closing, it was not. Respondent claimed that he advised the Rubensteins to postpone the closing, but they refused. Respondent asserted that, because the seller assured him that he would receive a corrected deed immediately after the closing, he permitted the closing to proceed. According to respondent, despite his requests for a corrected deed, the seller did not send it until August 12, 1993, after respondent's services had been terminated. Respondent further testified that he did not record the deed and mortgage immediately after the closing because he was awaiting a corrected deed. He added that, after waiting several months, he had sent a July 14, 1993 letter to the Ocean County clerk's office, requesting that the deed, mortgage and

note be recorded. Respondent testified that he enclosed a signed check in the amount of $64 in payment of the recording fee. The clerk returned the documents because either the amount of the fee was in error, or the check was not signed or enclosed. Contrarily, respondent contended that the deed was returned because it was not "recordable." He explained that he had not recorded the corrected documents after receiving them from the seller because he believed that the Rubensteins had terminated his services in July 1993. Thus, the original documents remained in respondent's file for approximately fifteen months until November 2, 1994 when he sent them to the title company at its request.

The presenter introduced into evidence respondent's reply to the grievance: the reply addressed the issue of the Rubensteins' check to respondent for the *Barnegat* closing as follows:

> The payment of $2,574.40 which Mr. Rubenstein made to Mr. Davidoff by check on May 7, 1993 was to be allocated, pursuant to a prior oral agreement, in three ways. First, the sum of $74.40 was intended for the payment of an estimated fee to the Clerk of Ocean County for recording the deed to the Rubenstein's [sic] Barnegat house. Mr. Davidoff mailed a $64.00 check to the Ocean County Clerk, as a fee for recording the deed to the Rubensteins' house, on July 14, 1993. See Exhibit F. The check was returned because the deed was not in recordable form. Second, the sum of $1,200.00 was intended for the payment of Mr. Davidoff's fee for representing the Rubensteins in the purchase of their Barnegat house. Third, the sum of $1,300.00 was to be applied to the outstanding bill for Mr. Davidoff's services in connection with Mr. Rubenstein's union election challenge.

Respondent admitted that his statement that $74.40 was for recording fees was false, arguing that his former counsel had prepared the reply to the grievance and that he had

reviewed it very briefly. Respondent then disputed the contents of his answer to the formal complaint on this issue. Respondent's answer stated as follows:

> Respondent admits that check #6682 was originally written for the purposes outlined in paragraph five[2], however, respondent denies that the final purpose of said disbursements were [sic] the same, and states to the contrary that arising out of dispute between Respondent and the client referred to herein, Fredric Rubenstein, as to fees, that when the closing failed to consummate on May 7, 1993 due to a faulty deed description, Respondent and client agreed that the check was to be utilized towards outstanding consulting bills owed by Mr. Rubenstein.

Despite this concession in his answer that the check was written originally to pay the three stated expenses, at the DEC hearing respondent denied having made such an admission.

Respondent acknowledged that, before the closing, he prepared a preliminary RESPA statement listing attorney's fees of $1,200, title insurance of $1,299.40 and recording fees of $73, for a total of $2,572.40 ($2.00 less than the check given to respondent). Although respondent claimed that the final RESPA contained different amounts, he failed to produce the document. He asserted that he did not know why the Rubensteins had prepared the check in the amount of $2,574.40, speculating that, after he had discussed the real estate closing expenses with the Rubensteins, they had the check for the wrong amount. According to respondent, he had instructed the Rubensteins to prepare separate checks, but they had issued a combined check. Respondent testified that, when he accepted the check from the Rubensteins, the memo line did not contain any writing. Respondent stated that he was not

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[2] Paragraph five of the complaint provides as follows: Grievants gave this check to respondent to pay respondent's attorney's fees in the amount of $1,200.00, title insurance in the amount of $1,299.40 and recording costs in the amount of $73.00

present when the check was prepared. Although the DEC offered respondent an adjournment to obtain an expert to determine whether the memo column was completed contemporaneously with the rest of the check, respondent declined the offer. Respondent then argued in his brief filed with the Board that the fact that the check had been in the Rubensteins' possession until they turned it over to the OAE raised questions about its "originality and authenticity."

Respondent took inconsistent positions on the issue of whether the *Barnegat* deed prepared by the seller could be recorded. In his answer to the formal complaint and in his answer to the legal malpractice action filed by the Rubensteins, respondent contended that the deed could not be recorded because it lacked a metes and bounds description. Although upon cross-examination at the ethics hearing respondent tried to insist that the document could not be recorded, he ultimately conceded that it was recordable.

Betty Chew Palmer, a sales and marketing director for the builder that sold the Barnegat property to the Rubensteins, testified that she had prepared the deed. Palmer explained that she used a standard form of deed and that the clerk always recorded the builder's deeds. Although she is not an attorney, Palmer offered the opinion that the deed she had prepared for the Rubensteins was recordable.

As noted above, in his answer to the formal complaint, respondent contended that the real estate closing "failed to consummate" and was "temporarily stayed." Nevertheless, at the DEC hearing, respondent denied that the closing was stayed, contending that it was not completed because the seller had failed to provide a corrected deed. Respondent testified that

the title insurance company had "faxed" him instructions not to proceed with the closing without a metes and bounds description. However, when shown that the documents did not contain any such instructions, respondent claimed that a title insurance representative had informed him by telephone that a metes and bounds description was required in order for title insurance to be issued. After the closing, respondent did not inform the title insurance company, mortgage lender, seller or the Rubensteins that the closing had not been completed, insisting that the seller and the Rubensteins knew that a new deed would be required. Respondent was not able to produce any document notifying the Rubensteins that their deed had not been recorded and that title insurance had not been issued.

When questioned about his reason for attempting to record the Rubensteins' promissory note to the mortgage lender, respondent conceded that he had not handled many closings, particularly in New Jersey. He also acknowledged that he was not aware of whether an affidavit of exemption should be recorded.

As mentioned earlier, respondent interpreted the July 19, 1993 letter from the Rubensteins as a termination of his services. Although he could not point to any language that specifically indicated such termination, respondent claimed that he drew that conclusion from the context of the letter, coupled with a July 17, 1993 telephone conversation with Fredric. Respondent asserted that he understood from the letter that Fredric was terminating both their friendship and their professional relationship.

Respondent insisted that, although he had not issued written bills to the Rubensteins after February 1992, he had verbally kept Fredric informed of the amount of his fees. He

testified that the fees related to the services performed in the union election matter. Respondent maintained that, although he was not admitted to practice law in the state of New York, it was proper to charge and collect fees for services rendered in that state.

With respect to the automobile accident litigation, respondent testified that, until the Middlesex County clerk's office returned the complaint to him, he was not aware of the *bona fide* office requirement. He claimed that, after receiving such notice, he informed the Rubensteins that he could not open a law office in New Jersey just to handle their litigation. He added that, since the Rubensteins had terminated his services in July 1993 and the statute of limitations did not expire until March 1994, he believed he was not required to take any further action. In his answer to the grievance, respondent stated that he had agreed to file the complaint, which would not be served unless Fredric made a substantial payment toward his outstanding fees from the union litigation. Although the clerk returned the complaint unfiled, respondent's answer to the grievance alleges that the complaint was filed. At the DEC hearing, respondent tried to explain this inconsistency as follows: "The word filed in this case means attempted to file, not actually file."

In the *Tutrone* matter, respondent agreed that, after he had filed the complaint, he had discovered that Tutrone had not sustained any injury from the explosion. According to respondent, Tutrone's father notified him that she no longer wished to proceed with the action. Respondent did not communicate directly with Tutrone, however, and did not withdraw the complaint.

* * *

The DEC found that, with respect to the *Barnegat* real estate closing, respondent violated *RPC* 1.1(a), *RPC* 1.3 and *RPC* 1.16(d), remarking that he was inexperienced and unfamiliar with New Jersey real estate practices and had failed to protect his clients' interests. The DEC dismissed the charged violations of *RPC* 1.5(b), finding that, due to the close personal relationship between respondent and Fredric, they had an informal course of dealings and that the Rubensteins had a clear understanding of the basis for the fees. The DEC dismissed the charges that respondent violated *RPC* 1.15(a) and *RPC* 1.15(c), concluding that the Rubensteins owed respondent at least as much as the amount of the title fee charges and that respondent could reasonably have concluded that he was authorized to apply the check for title fees to his outstanding legal fees. The DEC found incredible Fredric's testimony that, at the time of the *Barnegat* closing, he had paid all fees due to respondent. The DEC found no clear and convincing evidence that respondent knew it was inappropriate and improper to retain those funds. The DEC also dismissed the violation of *RPC* 8.4(c), finding that respondent's conduct was not intentional but was caused by ignorance and inexperience about real estate closings.

The DEC found that respondent violated *RPC* 1.15(d) and *RPC* 5.5(a) (count II), noting respondent's admission that he failed to maintain business and trust accounts and to maintain a *bona fide* office in the state of New Jersey.

In count III, the DEC found that respondent violated *RPC* 5.5(a) by practicing law in New York where he was not admitted. However, the DEC dismissed the charge of a violation of *RPC* 8.4(c), finding not credible Fredric's testimony that respondent misrepresented that he was a member of the New York bar.

In the automobile accident litigation in New Jersey (count IV), the DEC found that respondent violated *RPC* 1.1(a), *RPC* 1.3 and *RPC* 1.16(d). The DEC concluded that respondent was grossly negligent and failed to act with diligence by allowing the Rubensteins' complaint to remain unfiled without notifying them of the status of the lawsuit and by failing to take any action to preserve the statute of limitations. The DEC dismissed the charged violation of *RPC* 1.5(a), determining that the Rubensteins were aware that any fee charged would be one-third of any recovery. The DEC also dismissed the allegation that respondent violated *RPC* 8.4(c), finding that respondent's conduct was caused by ignorance, inexperience and the fear of embarrassment that would result if the Rubensteins learned of his inability to perform simple legal functions on their behalf.

Finally, with respect to the charges in the *Tutrone* matter (count V), the DEC found that respondent violated *RPC* 5.5(a) by practicing law in New York when he was not authorized to do so. However, the DEC found no violation of *RPC* 1.1(a), *RPC* 1.3 and *RPC* 1.4(a), finding no clear and convincing evidence that respondent's conduct adversely affected any of Tutrone's legal rights. The DEC dismissed *RPC* 1.5(b) because it could not conclude that Tutrone was unaware that respondent had charged a one-third contingent fee. The DEC

also dismissed the charge of a violation of *RPC* 8.4(c), again concluding that respondent's conduct was based on ignorance, inexperience and a desire to respond to a friend's request.

The DEC recommended that respondent be suspended for one year, that before reinstatement he obtain instruction on the operation of a *bona fide* office and maintenance of business and trust accounts and that, after reinstatement, he practice under the supervision of a proctor.

The OAE disputed the DEC's recommendation to dismiss the charged violations of *RPC* 1.5(b), *RPC* 1.15(a) and (c) and *RPC* 8.4(c), contending that there was clear and convincing evidence to support those charges.

* * *

Following a *de novo* review of the record, the Board is satisfied that the DEC's finding of unethical conduct is clearly and convincingly supported by the evidence.

In count I, respondent violated *RPC* 1.1(a), *RPC* 1.3 and *RPC* 1.16(d) with regard to the *Barnegat* closing. There is little doubt that respondent was unfamiliar with New Jersey real estate closing procedures. As a result, he failed to ascertain the exact amount of the title insurance and recording costs and did not know which documents were required to be recorded. However, even if respondent reasonably believed that his services had been terminated, he failed to take the necessary steps to protect the Rubensteins' interests. He should have recorded the deed and mortgage and should have informed the Rubensteins that

no title insurance had been issued. At the hearing before the Board, respondent's counsel conceded that respondent "made a mess" of the real estate transaction.

The Board, however, was unable to agree with the DEC's dismissal of all other charges in count I. *RPC* 1.5(b) provides that, if an attorney has not regularly represented a client, the basis or rate of the fee shall be communicated in writing to the client. Respondent had not previously represented the Rubensteins in a New Jersey real estate purchase. Thus, his failure to prepare a written fee agreement violated *RPC* 1.5(b).

The central issue in count I is whether respondent was guilty of knowing misappropriation. In *In re Noonan*, 102 *N.J.* 157 (1986), the Court discussed the elements of knowing misappropriation of trust funds:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. . . . [I]t is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment.
>
> [*In re Noonan*, *supra*, 102 *N.J.* at 159-160]

In *In re Hollendonner*, 102 *N.J.* 21 (1985), the Court extended the *Wilson* rule to escrow funds. Obviously, the taking of escrow funds is not always a knowing misappropriation. One factor that will save attorneys from a finding of knowing misappropriation of escrow funds is their reasonable belief of entitlement to the funds, even if the attorneys are mistaken. A case in point is *In re Rogers*, 126 *N.J.* 345 (1991), where the attorney's mistaken belief that he could use escrow funds saved him from disbarment. In *Rogers*, after the attorney disbursed funds following a real estate closing, American Express

improperly levied on his trust account to satisfy a personal debt to American Express. As a result, the attorney's check issued to pay off a prior mortgage against the property was returned for insufficient funds. The attorney thereafter paid most of the mortgage and obtained the consent of the mortgagee to repay the balance after the resolution of his financial difficulties. When American Express returned the monies to respondent, however, he deposited them into his business account, instead of his trust account, and did not pay off the mortgage. Although the attorney paid some of the mortgage balance, he used the remainder to pay business and personal debts. The attorney testified that, because he believed that he had assumed the obligation to pay the mortgagee, it was his understanding that the "loan" from the mortgagee converted the monies returned by American Express from escrow funds to personal funds, available for his personal use. The Court found that knowing misappropriation had not been established:

> [W]e are unable to conclude that under the totality of circumstances the record clearly and convincingly demonstrates that respondent knowingly misappropriated the escrow funds. The evidence indicates that respondent may have had a good faith belief that the character of the returned American Express check had been converted from 'escrow funds' to his own funds, subject of course to his debt to [the mortgagee]. Although respondent's belief was incorrect, we cannot conclude from this record that his misappropriation was 'knowing.'
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> *[In re Rogers, supra,* 126 *N.J.* at 347]

The Court imposed a two-year suspension.

In the instant case, respondent alleged that he had a verbal agreement with Fredric, authorizing him to retain the check originally written, in part, for title insurance fees. Had respondent followed standard closing procedures, that check would have been deposited in

his attorney trust account. Respondent then would have disbursed the funds to the respective payees: the title insurance company, the Ocean County clerk and himself. The funds were, thus, escrow funds. So far, the Supreme Court has not disbarred for knowing misappropriation when attorneys have taken their legitimately owed fees from their trust account, without the clients' consent. More simply stated, where an attorney is entitled to a fee, the attorney's unauthorized removal of the fee from the trust or escrow account has never been called knowing misappropriation. Instead, it is considered failure to safeguard funds, that is, failure to segregate funds in dispute, a violation of *RPC* 1.15(c). In fact, such unauthorized removal, without more, is ordinarily met with only an admonition (formerly a private reprimand).

Clearly, had respondent availed himself of the funds without any claim of entitlement — had he borrowed or stolen the funds designated as closing costs — disbarment would follow. Here, however, respondent claimed a belief that he was entitled to those funds. Indeed, the DEC found that the Rubensteins owed respondent at least $1,200. The Rubensteins, however, vigorously denied owing respondent any money. The Board assessed respondent's and Fredric's testimony, finding neither witness to be particularly credible. In light of conflicting testimony and the absence of documentary evidence, the Board could not find by clear and convincing evidence that respondent and Fredric did or did not have an agreement permitting respondent to apply the real estate check to his fees. Under these circumstances, it cannot be found that respondent knowingly misappropriated the

Rubensteins' funds. Similarly, the Board could not find by clear and convincing evidence that respondent had failed to safeguard client funds, in violation of *RPC* 1.15(c).

As to count II, respondent admitted that he violated *RPC* 1.15(d), failure to maintain trust and business accounts, and *RPC* 5.5(a), failure to maintain a *bona fide* office in the state of New Jersey.

With respect to count III, respondent admitted that he practiced law in the state of New York when he was not admitted to the bar of that state. He represented Fredric in the union election appeal and represented the Rubensteins in real estate closings. The Board found sufficient evidence that respondent misrepresented to the Rubensteins that he was admitted in New York. Apart from the Rubensteins' testimony that respondent misrepresented his status as an attorney, the fact that the Rubensteins filed a grievance with the disciplinary authorities in New York, signifies that they believed that respondent was a member of the New York bar. Moreover, in their legal malpractice complaint against respondent, the Rubensteins alleged that respondent was admitted to practice in New York, New Jersey and Connecticut. These actions are consistent with their testimony that respondent represented that he was admitted in those jurisdictions or that, at the very least, respondent led them to that understanding. Thus, the Board found a violation of *RPC* 8.4(c).

Count IV of the complaint addressed respondent's conduct in the Rubensteins' personal injury litigation arising from their automobile accident in New Jersey. As with the *Barnegat* closing, respondent was woefully ill-equipped to assume that representation. Because respondent was not aware of the *bona fide* office rule, the complaint he attempted

to file in Middlesex County was returned unfiled. Thereafter respondent made no effort to protect the Rubensteins by suggesting that they proceed *pro se* or obtain other counsel. Not only did respondent fail to notify the Rubensteins of the statute of limitations, but he did not even disclose to them that the complaint had not been filed. Indeed, at the Board hearing, respondent's counsel acknowledged respondent's inadequate representation of the Rubensteins in this litigation.

Respondent's misconduct in this count constituted a violation of *RPC* 1.1(a), *RPC* 1.3 and *RPC* 1.16(d). By failing to prepare a written fee agreement, respondent also violated *RPC* 1.5(b). Moreover, the Board determined that respondent violated *RPC* 8.4(c), as well. Fredric testified that respondent misrepresented the status of the litigation, informing the Rubensteins that the complaint had been filed and served, that the defendant had defaulted and that respondent would be moving for a default judgment. Although respondent testified that he notified the Rubensteins that the complaint could not be filed because he did not maintain a *bona fide* office, respondent did not produce any written documentation to support his testimony. In his reply to the grievance, respondent alleged that he had filed the complaint. When presented with this inconsistency, respondent replied that "filed" meant "attempted to file." Furthermore, in his answer to the formal complaint, respondent attributed his failure to file the personal injury complaint to the Rubensteins' termination of his services, rather than to his failure to maintain a *bona fide* office. It is thus clear that, either affirmatively or through his silence, respondent misrepresented the status of the lawsuit. *See*

Crispin v. Volkswagenwerk, A.G., 96 *N.J.* 336, 347 (1984) ("In some situations, silence can be no less a misrepresentation than words").

With respect to the *Tutrone* matter (count V), the Board was aware that the client, Michelle Tutrone, did not file a grievance and did not testify at the ethics hearing. The evidence was adduced through Fredric's and respondent's testimony, as well as documents, including Tutrone's affidavit. According to that affidavit, although respondent agreed to represent Tutrone in a personal injury action arising out of the World Trade Center explosion, leading her to believe that he was admitted to the New York bar, he failed to file the necessary tort claim notice, to file a complaint and to notify Tutrone of the status of the matter. According to respondent, however, he filed the complaint, only to discover that Tutrone had sustained no injury in the explosion. Respondent alleged that Tutrone's father confirmed that she no longer wished to proceed with the litigation. Even under respondent's version of the events, however, he should have communicated directly with Tutrone to confirm that she did not wish to proceed and should have withdrawn the complaint. He did neither. There is also no question that there was no written fee agreement, although Tutrone understood that respondent would charge a one-third fee. It is clear, thus, that respondent violated *RPC* 1.1(a), *RPC* 1.3, *RPC* 1.4(a), and *RPC* 1.5(b). He also violated *RPC* 8.4(c) by explicitly or implicitly misrepresenting to Tutrone his status as a New York attorney. In addition, respondent acknowledged that, although not a member of the New York bar, he practiced law in that jurisdiction, in violation of *RPC* 5.5(a).

In summary, respondent exhibited a pattern of dishonesty, lack of competence and a lack of appreciation for fundamental ethics responsibilities. He practiced law in New York, a jurisdiction in which he was not admitted. Additionally, although respondent was admitted to practice law in New Jersey, he had no understanding of basic New Jersey practice requirements, such as how to record a mortgage or file a complaint. Despite his ignorance of New Jersey practice, respondent undertook to represent the Rubensteins in a real estate closing and personal injury litigation. He botched both of them, failing to record the deed and mortgage, to obtain title insurance and to file a complaint before the statute of limitations expired. Furthermore, respondent misrepresented to his clients not only his status as a New York attorney, but also the status of their litigation. He not only failed to maintain a *bona fide* office in this state, but, until the clerk's office rejected a complaint he tried to file listing a Connecticut office address, was unaware of the *bona fide* office requirement. Respondent also failed to maintain required business and trust accounts.

Throughout the ethics hearing, respondent showed little, if any, remorse, contrition or acknowledgment of wrongdoing. He showed an appalling lack of appreciation for his actions, his ethics responsibilities and the deleterious effect his misconduct had on his clients. He also attempted to transfer the responsibility for his wrongdoing to others, particularly his clients.

There remains the issue of appropriate discipline for this respondent. Conduct similar to respondent's has resulted in the imposition of a long-term suspension. In *Rogers,* the Court found that, although the attorney had not knowingly misappropriated escrow funds, he had

failed to advise his clients that the mortgage had not been discharged, to provide an accounting of rent collected for another client, to maintain proper trust account records, and to promptly notify his client of receipt of, and to deliver, funds to which the client was entitled. The Court imposed a two-year suspension for the totality of Rogers' conduct.

In *In re Chidiac*, 120 *N.J.* 32 (1990), the attorney failed to keep records on his management of his client's property and did not deposit the rents from that property into an attorney trust account. Because of the attorney's good faith belief that his use of the funds was authorized, the Court did not find knowing misappropriation. The attorney was suspended for three years.

The Board is aware that the primary purpose of discipline is not to punish the attorney, but to protect the public. *In re Rutledge*, 101 *N.J.* 493, 498 (1986). The "principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general." *In re Wilson*, 81 *N.J.* 451, 456 (1979). Here, the public needs protection from respondent, who "dabbles" in the private practice of law. While respondent has no prior disciplinary history, he practiced law in New Jersey only minimally, having been corporate counsel for most of his legal career.

In light of the need to protect the public from further harm from this respondent and of the egregious acts of misconduct committed by him, the Board unanimously determined to suspend respondent for two years. Before reinstatement, respondent must complete the Skills and Methods courses offered by the Institute for Continuing Legal Education. Upon reinstatement, respondent must provide proof that he is in compliance with the rules

requiring attorneys to maintain appropriate business and trust accounts and to maintain a *bona fide* office within the state. Two members did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/29/98

LEE M. HYMERLING
Chair
Disciplinary Review Board