SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 13-327
District Docket No. XIV-2010-0381E

IN THE MATTER OF	:	
RICHARD B. LIVINGSTON	:	
AN ATTORNEY AT LAW	:	Decision

Argued: February 20, 2014

Decided: March 28, 2014

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

Raymond S. Londa appeared on behalf of respondent.

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

This matter was before us on a recommendation for disbarment filed by Special Ethics Master Melinda Singer, based on her finding that respondent knowingly misappropriated client funds, a violation of RPC 1.15(a) (failure to safeguard funds) and the principle set forth in In re Wilson, 81 N.J. 451 (1979).

The special master also found that respondent failed to comply with the recordkeeping rules (RPC 1.15(d)) and failed to cooperate with disciplinary authorities (RPC 8.1(b)).

We note that the formal ethics complaint charged respondent with knowing misappropriation of trust funds, citing both Wilson and In re Hollendonner, 102 N.J. 21 (1985). The funds at issue were, in one case, ordered to be kept in escrow, in respondent's attorney trust account, until further order of the court. Yet, he removed the funds and spent them without such an order. In two other cases, the funds were real estate deposits, which required the consent of both parties to the transactions before respondent could use the monies for an unrelated purpose. Therefore, Hollendonner, rather than Wilson, is applicable in this matter. With the exception of the special master's characterization of the escrow funds as client funds, we accept her findings, and recommend respondent's disbarment.

Respondent was admitted to the Texas bar in 1970, the New Jersey bar in 1971, and the New York bar in 1972. At the relevant times, he maintained an office for the practice of law in Springfield, New Jersey. He has no disciplinary history.

On October 13, 2010, the Office of Attorney Ethics (OAE) conducted a demand audit of respondent's attorney books and

records, which was prompted by a $1,436.63 overdraft in respondent's attorney trust account. A second audit took place in March 2011.

As a result of the audits, the OAE issued a two-count complaint, charging respondent with recordkeeping violations, failure to cooperate with disciplinary authorities, and knowing misappropriation of trust funds. Prior to the disciplinary hearing, respondent stipulated the first two charges, though he insisted that "most" of them were "technical" in nature. He admitted that he failed to prepare three-way reconciliations of his trust account on a monthly basis; maintain receipt journals; include all debits and credits or a running balance in his disbursements journal, which was not fully descriptive; maintain separate client ledgers for all client funds held in trust; take his fees from the trust account within a reasonable time; and made cash withdrawals from the trust account.

As to the failure-to-cooperate charge, on February 8, 2011, the OAE instructed respondent to provide three-way reconciliations of his attorney trust account and a current list of clients and the amounts held in the trust account for each of them. As of the date of the disciplinary hearing, March 18, 2013, respondent had not complied with the OAE's directive.

Indeed, as of oral argument before us, respondent had not produced the reconciliations to the OAE, though he claimed that he was, and had been, performing them.

As stated previously, the complaint also charged respondent with knowing misappropriation of trust funds, specifically, real estate deposit monies in real estate transactions involving clients Jay Meegoda and Slawomir and Noelle Pajka, as well as escrow funds that were subject to a court order, in litigation between respondent's client, Rivermount Developers, LLC (Rivermount), and Artan Dauti. As shown below, the Rivermount misappropriation was discovered only as the result of the OAE's review of respondent's bank records subpoenaed by the OAE.

At the disciplinary hearing, respondent detailed the history of the Rivermount litigation. He testified that he represented Rivermount in the sale of three Chatham residential properties, which had taken place on different dates. The first closing was trouble-free. Closing on the second property, located at 692 River Road, was scheduled for May 6, 2008. Prior to that date, a dispute arose between Rivermount and Dauti, who claimed that he had lent monies to Rivermount and was, therefore, entitled to repayment from the proceeds of the sale.

The dispute was eventually settled and memorialized in a stipulation of settlement. The closing then went forward.

One of the settlement terms governed the disposition of certain proceeds from the sale of the third property, located at 820 Fairmount Avenue. Specifically, upon the sale of that property, all sums due to James Ferrentino, the holder of a second mortgage on that property, would be paid to him before any proceeds would be disbursed to Dauti.

The Fairmount Avenue property was sold on June 26, 2009. Two days before, Dauti had obtained an order to show cause, which provided, in pertinent part:

> 3. **ORDERED**, that all net closing proceeds otherwise payable to Defendant James Ferrentino on account of the mortgages held by Defendant Ferrentino which encumber the property, which are derived from the sale of 820 Fairmount Avenue, Chatham, New Jersey, after payment of closing costs and liens detailed in the draft HUD-1 attached to the certification of Richard B. Livingston, Esq. dated June 23, 2009, be placed in escrow in the attorney trust account of Richard B. Livingston, Esq. until further order of this Court. A copy of the actual HUD-1 for the closing shall be furnished to all counsel within two days of closing of title; and it is further
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> 4. **ORDERED**, that of the $20,000 counsel fee shown on line 1107 of the HUD-1 settlement statement attached to the certification of Richard B. Livingston, Esq.

> dated June 23, 2009, $5,000 of that amount shall be retained in escrow by Richard B. Livingston, Esq. until further order of this Court. . . .
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> [Ex.9.]

On June 23, 2009, the day before the court issued the order to show cause, respondent submitted a certification to the court, stating, in pertinent part:

> As a result of the transaction I am presently holding $297,846.48 in my trust account. From this, $750.00 is being held for the resolution of issues between the Seller and Buyer as to the condition of the house; $5,000.00 of my attorney's fee and $23,180.84 (the expected payoff of the Chatham Boro assessments), thus leaving $268,915.64 in satisfaction of the James Ferrentino mortgages.
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> [Ex.10¶3.]

Respondent conceded that the court order required him to hold the monies in his attorney trust account.

On March 31, 2010, Dauti's lawyer, Alice Beirne, wrote a letter to respondent, informing him that a court-initiated settlement conference would take place on April 5, 2010. Beirne requested that respondent "confirm the exact amount in your trust account" from the proceeds of the sale of the Fairmount Avenue property. At the bottom of Beirne's letter was the following typewritten notation: "The amount of $ is being

held in my trust account as described above." Underneath that language was a signature line, with respondent's name typed below.

Respondent provided the requested information at the bottom of Beirne's letter and faxed it back to her. In the space between the text and the signature line, respondent wrote the following:

> FERRENTINO – 268,946.48
> RBL att fee -- 5,000
> TOTAL $273,946.48
>
> [Ex.11.]

On April 29, 2010, Ferrentino filed a motion for summary judgment, seeking, among other things, the release of the $268,000. In support of his motion, Ferrentino offered a certification from respondent, dated April 29, 2010. There, respondent represented to the court that, as a result of the June 24, 2009 court order,

> I am holding in escrow the aggregate amount of $292,096.48 from the sale of 820 Fairmount Avenue, which is allocated as follows: $5,000 is reserved for my legal fees per the Order of Judge Langlois; $18,150 is allocated as an amount which may have to be applied in whole or in part to a property tax obligation payable to the Township of Chatham (that issue is unresolved as of this date[)], and if any portion of the $18,150 does not have to be

> paid over to the Township of Chatham, it is available for release as ordered by the Court in this matter; and $268,946.48 is unallocated and available for release as ordered by the Court.
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> [Ex.13¶11.]

On July 19, 2010, the court ordered respondent to release the funds that he "held in escrow." Specifically, $268,915.64 was to be disbursed to Ferrentino; $5000 was to go to respondent for his attorney fees; and the difference between the $18,500 escrowed for the potential municipal assessment and the actual amount paid to the municipality was to go to Ferrentino. The next day, respondent disbursed $287,415.64 to Ferrentino.

As stated previously, respondent's certification of April 29, 2010 represented to the Court that he was holding "in escrow" an aggregate amount of $292,096.48. According to OAE disciplinary auditor Gary Stroz, however, respondent's trust account statement for the month of April 2010 reflected a balance of only $38,663.05, on April 29, 2010.

On April 30, 2010, respondent withdrew $7000 from his trust account and deposited $4000 in his business account, which, at the time, had a $2,468.91 balance. The $4000 deposit raised the balance to $6,468.91. According to Stroz, if respondent had not deposited the $4000, the business account would have had a

negative balance of $50, when the checks issued between the date of the deposit, April 30, 2010, and May 4, 2010, would have been presented for payment.

Stroz further testified that, between June 1 and 8, 2010, respondent did not maintain sufficient funds in his trust account for the Rivermount escrow. For example, on June 1, 2010, the trust account balance was only $63,709.56. On June 8, 2010, it was $77,267.63, or way less than the amount that respondent was required to hold in trust, as ordered by the court.

Stroz testified that, in addition to the monies that respondent should have had available in his trust account for the Rivermount litigation, as of April 29, 2010, he should have been holding $4000 for his clients, the Johns, $6,737.50 for a client named Cocuzi, and $3050[1] for a client named Goldberg.[2] Thus, on April 29, 2010, the total trust account balance should have been $305,883.98. Yet, because the balance was only

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[1] The ledger showed $3090, but that was a recording error.

[2] The complaint did not charge respondent with the knowing misappropriation of these clients' funds.

$38,663.05, there was a $267,220.93 shortage in the account.

Stroz testified that other trust funds, too, were invaded. They represented real estate deposits received from Meegoda and the Pajkas, the buyers, in separate real estate transactions. Specifically, on May 20, 2010, respondent received $34,000 from Meegoda.[3] According to Stroz, this amount should have remained intact in respondent's trust account through June 23, 2010. Yet, as of June 1, 2010, the trust account balance was only $23,709.56. Because the Rivermount funds should have been intact as well, respondent was out of trust to the tune of $267,986.92. By June 2, 2010, the trust account shortage was $98,041.18, as the balance was now $233,655.30. Meegoda told the OAE that respondent was not authorized to use the deposit monies for any purpose other than the real estate transaction.

Furthermore, on May 30, 2010, respondent deposited the Pajkas' $25,000 deposit in his trust account. From June 3, 2010 through at least June 8, 2010, these monies should have remained inviolate. Thus, between June 3 and 8, 2010, respondent should

[3] The actual date of the deposit, as demonstrated by the bank records, was May 13, 2010. Erroneously, respondent recorded it on the ledger as having occurred on May 20, 2010.

have held $356,696.48 for the Meegoda and Pajkas real estate transactions and the Rivermount litigation. Yet, he did not. On June 3, 2010, the trust account balance was $258,655.30, leaving a $98,041.18 shortage. Between that date and June 8, 2010, the trust account remained short, with the lowest balance dipping to just over $77,000. Noelle Pajka told the OAE that she and her husband had not authorized respondent to use their deposit for any reason other than the real estate transaction.

During this time period, that is, June 1 through 8, 2010, respondent transferred monies out of the trust account for his own purposes. Specifically, on June 2, 2010, respondent transferred $4400 to his business account, at a time when the balance in that account was $572.69. Yet, more than $4000 in outstanding items were about to be presented for payment. Stroz testified that, without that transfer, respondent's business account would not have had sufficient funds to cover those outstanding checks.

As stated previously, on July 19, 2010, the court ordered respondent to release the Rivermount funds. By then, respondent

had been replenishing the trust account deficiencies with personal funds for more than a month.[4] Because the balance in the account exceeded $400,000 by that date, respondent was able to write a trust account check for $287,415.64, which was posted the next day.

Despite respondent's claim to the court, in his July 2009 certification, that he was holding the $297,000 in Rivermount funds in his trust account, upon questioning by the special master, he admitted that the funds were "not being held directly" in his trust account, although they were "being held . . . in escrow," at that time. Moreover, he claimed, the monies were in his trust account as of the date of his April 29, 2010 certification.[5]

Despite respondent's claims to the special master that the funds were being held in escrow, between his receipt of the

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[4] It appears that respondent's deposits of personal funds were characterized on the trust account statements as "SPEC DEP," presumably meaning "special deposit."

[5] Respondent's trust account statement for April 2010 reflected a balance of more than $700,000 on April 28, 2010. The balance on April 29, 2010, however, was only $44,099.26.

Rivermount monies, in June 2009, and July 19, 2010, when he was ordered to release them, he admitted that he had removed those monies from the trust account and had used them for his own benefit. He testified that the funds, which were transferred into a joint checking account with his wife,[6] were used for the payment of household and personal expenses, such as the $3100 monthly mortgage, because his business "wasn't doing so well at that time."

Even though respondent admitted taking the Rivermount funds and using them to pay personal expenses, he maintained that his April 29, 2010 certification's reference to having the monies in escrow was true. He explained that, when he was put on notice, in April 2010, that the court would be asked to release the Rivermount funds, he placed $338,000 into his trust account, rather than $279,000, because he "wanted to make sure that there was enough" and "didn't want any problems with checks not clearing."

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[6] Respondent and his wife held joint accounts with PNC Bank, Hudson City Savings Bank, Valley National Bank, and Bank of America. Respondent also maintained an individual IRA account with Morgan Stanley.

Upon questioning by the special master, respondent stated that, despite the withdrawal of the Rivermount funds, he "considered it always held in escrow and always maintained a more than sufficient balance to cover it." He defined an escrow account broadly, to include monies that he had "control over," that is, his personal accounts. In other words, he contended that he could freely use the Rivermount monies because he had enough funds in his personal accounts to "cover" them, when the time came to turn them over:

> THE WITNESS: I would -- it was my thinking that if I started putting [the Rivermount monies] into those accounts, I would never keep anything straight, whose was what. And I had a total and I knew I had another total. And I knew it was always there, so that I was always safe with my clients.
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> In other words, I knew those [personal] accounts were always there with the monies. Those were accounts that were never used. In other words, we didn't -- they were never used for anything. It was just money that was -- that stayed put. So that it was a consistent [sic] money. If I -- in other words, if I had used my personal checking account, that money keeps going up and down and sideways.
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> [SPECIAL MASTER]: But that's where you took the trust monies-- the trust money withdrawals went into—
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> THE WITNESS: But I knew—

[SPECIAL MASTER]: -- that account.

THE WITNESS: But I know—

[SPECIAL MASTER]: -- into the personal account.

THE WITNESS: And the business account. But I knew the total that had to be. And I knew that the [personal] accounts -- the other accounts had that total in, so that I was never worried over —

[SPECIAL MASTER]: I'm going to go way off for a second, but I just want to ask a question. When you and your wife opened up these accounts — and there's no testimony on this -- these other accounts and we'll call them from your exhibit numbers, probably 40 -- Mr. Londa's letter is starting on Exhibit 46 through and including I think 50, those accounts I would assume were for your retirement with your wife; is that correct? You were amassing, you can see the Valley National Bank book, it looks like a savings book. And it's from the year 2006 and there are incremental monetary deposits on a pretty regular basis. So I'm guessing those other accounts that you call them were really for the purpose of your retirement; is that correct?

THE WITNESS: They —

[SPECIAL MASTER]: They weren't to pledge against something in the business, meaning something —

THE WITNESS: Well, I had -- I was not-- my business wasn't doing so well at that time. So that I would have had to take money out of those [personal] accounts to

> live on. If I had done that, then the Rivermount money would have stayed in there.
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> [T186-12 to T188-14.]

Respondent also offered another reason for removing the Rivermount funds from the trust account, that is, his fear that Sovereign Bank, where he kept his trust account, might fail, in some respect, and that the Rivermount monies would be lost because the amount on deposit exceeded the amount insured by the FDIC. He explained:

> And at that time, the country and the banking system was [sic] in turmoil.
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> As I understood the situation at that time was that bank accounts were only insured up to $100,000 in one name. I, in order to protect these monies, because Sovereign itself was having issues . . . .
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> [T117-23 to T118-4.]

Respondent's statement was cut off by a lengthy discussion of a hearsay objection.

Respondent continued:

> A. Because I was afraid that there was a problem with the bank and the money would not be there when it was necessary. So that I maintained all monies, both personal and business, at as low under the hundred thousand dollars as possible. My trust account did go over the hundred thousand dollars numerous times. But they were short

periods of time because the monies were in and out.

[SPECIAL MASTER]: Next question.

Q. And what did you –

MR. LONDA: Thank you.

Q. And what did you do with respect to the money that you had on account of the Rivermount deposit?

A. It was -- I maintained sufficient monies in various accounts in order to protect this money and to be available at a moment's notice to distribute it.

And in July of 2010, I knew that – I knew in July that the money was going to have to be distributed. So I brought it back to the account at that time because the situation was better with Sovereign, the situation -- I brought it back. And then I received a phone call the day before the court order that the -- that they were expected to receive a court order from the Court as a result of the trial.

I received the court order, I issued the trust check to Mr. Ferrentino for his monies spent, except for approximately $4,500, which I retained in my trust account because I had some questions of whether he owed me some money. And I asked him to come in on a regular basis. And finally, he came in in November, we resolved it. And I wrote him out a check and I maintained it on my statements, the $4,500, I believe.

[T120-25 to T122-11.]

Respondent testified that, despite his concern with the solvency of Sovereign, he did not go to a different bank or use multiple accounts because he simply did not trust any bank with an account balance of more than $100,000:

> And then I had the chance, in my mind, of losing it all. And then how was I going to explain it if I lost the money, if the bank went belly up for some reason?
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> [SPECIAL MASTER]: So you thought it was a better idea to take it out of the trust account, put it into the business account and personal accounts —
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> THE WITNESS: I thought the business -- I thought the trust account was only covered for a hundred thousand dollars. I had no idea that each individual accounts -- I thought if I had a trust account with segregated accounts, sub-accounts, I had that once, I tried to maintain that. And I had that at Broad National. I had a big book of checks and sub-accounts and deposits. And it went absolutely nowhere and I got crazy keeping it up.
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> [SPECIAL MASTER]: When you first received the deposit in 2009 and you saw that it was a large amount, did it come into your mind to perhaps place that deposit in a separate bank, if you were so concerned about this viability of your banking institution? In other words, right then and there, you got a deposit because that came out of the court order that was 2009, that was the very beginning of the Rivermount monies, didn't it occur to you at that point in time, in the year 2009, to go put it in a

separate account, if you were that concerned about—

THE WITNESS: It didn't occur to me because [sic] two reasons. One, I didn't think of it. And two, it still would have been over the 250 or of [sic] the hundred thousand.

[SPECIAL MASTER]: Did it occur to you that maybe you could have divided it up into two different deposit amounts?

THE WITNESS: Never crossed my mind.

[T188-14 to T189-25.]

Respondent acknowledged that he had removed the Rivermount funds in amounts ranging from $1500 to $23,000. When asked why he had not removed the monies in one lump sum, if he feared that they might be lost, he replied that he did not know what he would have done with the entire sum.

Respondent continually referred to a $100,000 FDIC limit, but was confronted with the fact that, in 2009, the trust account would have been insured up to $250,000 per client. He claimed, however, that he thought that this only applied to segregated accounts, which he did not have. He did not review the FDIC rules.

Although the Rivermount ledger card reflected monies that respondent received, he acknowledged that it did not reflect the

removal of the monies that were "placed in escrow." He conceded that he "should have done it that way, but [he] didn't." Moreover, the Rivermount ledger card was not maintained with the ledger cards for his other client matters because, he said, "this money had been removed to protect it from the trust account." Nevertheless, respondent contended, the monies were "kept in escrow" until they were paid, "as the card says."

At this point, the special master interjected: "I have no idea what you mean by escrow, what do you mean? What is escrow?" Respondent explained:

> In other words, I kept it under my control until there was [sic] further order of the court as to what I was to do with it and that was in July. I did not keep it in the trust account because I was afraid of [sic] situation with Sovereign and the banks. If you look at all my accounts, they're all under a hundred thousand dollars.
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> [T124-16 to 23.]

On cross-examination, respondent conceded that none of the accounts in which he was holding the funds were escrow accounts. He reiterated that, by removing the Rivermount funds from the trust account, he "thought [he] was protecting the money."

Stroz testified that the Rivermount funds were not identified in any of the records that respondent produced at the

first audit, in October 2010. The OAE learned about the funds when it obtained respondent's firm and personal records from Sovereign Bank. The firm bank records included a $287,415.64 trust account check issued as a result of the Rivermount litigation.

Respondent was questioned about the check at the second audit, in March 2011. Until then, he "never brought it up." He claimed that the Rivermount ledger card was not with the other ledger cards that were provided to the OAE because it was in the Rivermount file, which had been closed.

According to Stroz, respondent stated that funds moved from the trust account to the business account represented expenses and fees. Further, Stroz testified that respondent never told him that he had removed the Rivermount funds from the trust account because he was concerned about Sovereign Bank's solvency.

In an effort to show that he had sufficient funds in his personal accounts to cover the Rivermount escrow, respondent testified that a PNC joint account with his wife had a balance of $47,372.95 for the one-month period encompassing May 28 to June 26, 2009. According to respondent, those funds were in the account prior to May 28, 2009 and they "had been put in over

years of [his] earnings or however [he] got [his] money." A Hudson City joint account had a balance of $36,597.86, as of May 29, 2009, which grew to $39,712.81 by June 30, 2010. The Valley National Bank joint account reflected a $50,000 balance as far back as 2006, which was maintained up through July 30, 2010.

In sum, respondent asserted that he always maintained, within his control, an amount of money in these accounts that either equaled or exceeded the amount of money that he was to hold for the Rivermount litigation, despite his withdrawals from the trust account. When asked why he had not simply used the personal funds, respondent replied:

> Because I -- it would confuse me completely to take money out, put it into these accounts, take money -- I would never keep anything straight. So this money was kept straightforward and protected. And that -- and I knew the total of the Rivermount money.
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> [T131-20 to 25.]

As for the trust monies placed into his IRA, respondent conceded that the value of that account was tied to market conditions. He denied that his wife would ever empty the joint checking account, even though he acknowledged that she would be able to do that, legally. He "never thought about" the fact that, if he and his wife died at the same time, no one would

ever know that the money in their accounts was subject to the court order in the Rivermount litigation. Nevertheless, he insisted that the funds were secure in those various accounts. Stroz testified that, after respondent disbursed the Rivermount funds, on July 19, 2010, respondent continued to remove funds from the trust account and put them into his personal accounts, up through the end of the year. He continued to make cash withdrawals, during the same period, and continued to make direct transfers into the business account.

In mitigation, before the special master, respondent detailed the pro bono work that he performed, mostly in guardianship matters, exceeding the twenty-five hours per year requirement for attorneys.

In the special master's report, which she delivered on the record, she accepted respondent's stipulated violations of RPC 1.15(d) and RPC 8.1(b), as charged in the complaint. She also found that respondent knowingly misappropriated trust funds, noting Stroz's testimony that, during one of the audit interviews, respondent stated that he had removed and used monies from the trust account for his own benefit. The special master noted, too, that, when respondent realized that he was

going to be short in the trust account, he began to infuse the account with personal monies.

With respect to the Rivermount litigation, the special master pointed out that respondent never mentioned that matter to Stroz, until Stroz questioned him about it. Moreover, he never provided the OAE with a client ledger card for the Rivermount matter. In the special master's view, respondent's explanation for his failure to produce the ledger card, that is, that it was not kept with the other cards, was "not credible whatsoever."

Further, according to the special master, after respondent was alerted by Bierne, in March 2010, that a settlement conference was scheduled for April 5, 2010 and was asked to confirm the amount of the funds that he was holding in his trust account for the Rivermount matter, respondent replied that he was holding $273,946.48. In fact, respondent's trust account balance was only $38,663.05 at that time. Finally, respondent admitted that the funds were not kept in the trust account.

The special master also found that respondent invaded funds belonging to Goldberg, John, Cocuzi, Meegoda, and the Pajkas. As to the Pajkas' funds, the special master noted that, from June 3 to at least June 10, 2010, respondent was required to

have $25,000 of the Pajkas' monies in his trust account.[7] The special master also noted that, as of April 29, 2010, the total amount of monies held for Rivermount, Cocuzi, Goldberg, and John should have been $305,883.98. Yet, the trust account had a shortage of $267,220.93 on that date.

As to Meegoda, who had given respondent $34,000 to be held in trust until June 23, 2010, the special master observed that, as of June 1 and 2, 2010, the trust account balance should have been $331,696.48, including the Rivermount funds. Yet, the trust account balance, on June 1, 2010, was only $23,709.56, with a shortage of $267,986.92. By the next day, the shortage was $98,041.18.

The special master also reviewed certain withdrawals from the trust account, made on two occasions: one in April 2010 and the other in June 2010, which were made for the purpose of funding respondent's joint checking account, thereby providing respondent with cash and, most significantly, preventing checks issued against his business account from bouncing. Indeed, the

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[7] The special master did not mention that the trust account balance was short during this time.

special master noted that, between June 26, 2009 and July 19, 2010, respondent "invaded his client funds repeatedly," causing his trust account balance, seventy-four times, to fall below what he should have been holding with respect to the Rivermount transaction.

The special master identified a number of factors demonstrating that respondent's actions were knowing. The special master rejected respondent's explanation that he had removed funds from the trust account due to a fear that Sovereign Bank, as well as other banks, might fail. The special master noted that, despite respondent's concern, his trust account balance was as high as $2 million at times. In addition, his claim that the total amount of Rivermount funds exceeded the amount insured by the FDIC was not only incorrect, but he had no idea what the FDIC regulations provided in this regard and had made no effort to ascertain that information, at the time of his alleged concern. Moreover, respondent never mentioned to the OAE this concern about Sovereign's solvency or the FDIC regulations and that he had transferred funds to personal accounts, in order to protect them. Based on the foregoing, the special master found respondent's claim that he

removed the funds to protect them to be "without any merit and . . . not credible."

Also, the special master remarked, if respondent were truly concerned about a potential bank failure, he would have removed the Rivermount funds in one lump sum and placed them in other banks, rather than make withdrawals over time, in amounts ranging from $1500 to $23,000. The special master pointed to respondent's testimony that he had used the trust account funds to live on, at a time when his practice "was not doing so well."

The special master concluded that respondent's claim that any account over which he had control could be an escrow account was simply wrong. For example, some of respondent's personal accounts were joint accounts with his wife, who could have withdrawn the funds, thereby dissipating the Rivermount monies. Also, the value of his IRA, as respondent acknowledged, could go up or down, depending on market conditions.

The special master concluded that, when respondent's business was doing poorly and he needed the money to live on, he knowingly misappropriated the Rivermount funds and the trust funds belonging to Cocuzi, Goldberg, John, Meegoda and the Pajkas. The special master recommended respondent's disbarment.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical was fully supported by clear and convincing evidence.

The clear and convincing evidence establishes that respondent violated RPC 1.15(d) and RPC 8.1(b) and that he knowingly misappropriated the Rivermount escrow funds, as well as the real estate deposit monies held in his trust account for Meegoda's and the Pajkas' real estate transactions. We do not consider whether the evidence establishes that respondent knowingly misappropriated funds belonging to Cocuzi, Goldberg, or the Johns, because the complaint did not charge him for these defalcations. Moreover, although the evidence demonstrates a "shortage" in the funds held for these individuals, there was no evidence that the shortage was caused by respondent's unauthorized use of their monies.

As mentioned previously, however, in the case of Meegoda and the Pajkas, the OAE spoke directly to them and learned that they had not authorized respondent to use their monies for any purpose, other than that for which they had been given to him, that is, for the purchase of real estate.

According to respondent's own records, on May 13, 2010, he deposited into his trust account $34,000, representing Meegoda's

deposit in a real estate transaction, the closing for which took place on June 23, 2010. Yet, on June 1, 2010, the trust account balance was only $23,709.56. At the same time, respondent should have had Rivermount's $297,846.48 in the account.

On June 3, 2010, respondent deposited into the trust account $25,000, representing the Pajkas' deposit in a real estate transaction that took place later that month. Yet, at a time when the account should have held Rivermount's $297,846.48, the Meegoda $34,000 deposit, and the Pajkas' $25,000 deposit, for a total of $356,846.48, the balance was as low as $77,267.63, on June 7, 2010.

Respondent admitted that he used the trust account funds for personal expenses, during this time, because his business was doing poorly. Unquestionably, thus, he knowingly misappropriated trust funds.

Respondent's claim that he was concerned with the bank's solvency at the time is undercut by the fact that he mentioned this for the first time at the ethics hearing and that he admitted not knowing what the FDIC rules and regulations were with respect to the insured limits on bank accounts. If respondent were truly concerned about the safety of the monies in the trust account, he would have removed the funds, in one

lump sum, and placed them in a trust account at another bank, instead of taking them out, in "dribs and drabs," "to live on," as he so readily admitted.

Moreover, respondent's argument that, despite his depletion of the trust account, the monies were still in escrow because he had personal accounts that contained enough funds to "cover" the shortages is meritless. First, he was required to maintain those funds in an attorney trust account, pursuant to R. 1:21-6(a)(1). Second, the accounts that respondent had jointly with his wife were not under his complete control and, therefore, were not exempt from depletion. The same is true for the IRA account, which was subject to fluctuations, based on market conditions. Third, his personal accounts, on occasion, did not, in fact, have enough monies to "cover" the total amount of funds that should have been held in the trust account.

In short, respondent used the Rivermount funds and the deposit funds tendered by Meegoda and the Pajkas for his own expenses, without a court order (in the Rivermount case), or consent (in the case of the Meegoda and Pajka transactions). That the funds could be replenished with personal monies, as respondent claimed, is of no moment. Restitution or availability of other funds, even if available, is not a defense to knowing

misappropriation. See, e.g., In re Blumenstyk, 152 N.J. 158, 161 (1997) (attorney disbarred for using trust funds for personal expenses, such as a family vacation and his son's Bar Mitzvah, and to avoid overdrafts in his business account; although he replenished the trust account with personal monies in order to make restitution, the Court noted that "restitution does not alter the character of knowing misappropriation and misuse of clients' funds"); In re Barlow, 140 N.J. 191, 198-99 (1995) (intent to repay funds or otherwise make restitution is not a defense to knowing misappropriation); and In re Noonan, 102 N.J. 157, 160 (1986) (noting that, under Wilson, it makes no difference that the lawyer "intended to return the money when he took it").

At oral argument before us, counsel for respondent stated that "what happened should not have happened." Nevertheless, he pointed out, respondent never intended to injure any client, whatever was required to be paid was paid, and respondent has practiced law for more than forty years, without incident.

It is of no moment, of course, that respondent did not intend to harm anyone whose funds were entrusted to him. As the Court observed in In re Noonan, 102 N.J. 157, 160 (1986):

> The misappropriation that will trigger automatic disbarment that is "almost invariable" . . . 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. It makes no difference whether the money was used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of "good character and fitness," the absence of "dishonesty, venality or immorality" — all are irrelevant.

Moreover, counsel suggested that the Court's recent decisions in In re Wigenton, 210 N.J. 95 (2012), and In re Malvone, 216 N.J. 10 (2013), militate against disbarment in this case. We are unable to agree. In Wigenton, for example, the Supreme Court adopted our determination that the attorney had engaged in the negligent, not knowing, misappropriation of trust and escrow funds. Therefore, it was proper to consider mitigating factors, such as the absence of harm and an

unblemished disciplinary record, when determining the appropriate measure of discipline. In this case, we have determined that respondent knowingly, not negligently, misappropriated trust and escrow funds. Thus, no amount of mitigation may be considered.

We are also unable to agree with counsel's argument that the facts of Malvone are "a far cry from this case" because, in Malvone, the attorney was engaged in a conspiracy to defraud his client's spouse, by hiding assets from her. As quoted above, "the relative moral quality of the act . . . is irrelevant." In re Noonan, supra, 102 N.J. at 160.

Finally, the division among the members of the Malvone Court does not, as respondent's counsel suggested, signify that "the time has come" for the Wilson rule to be re-examined. The majority in Malvone concluded that the attorney had conspired with his client to defraud the client's spouse in divorce proceedings and that he had knowingly misappropriated marital funds in which the client and the client's spouse had an interest. The dissenting justices, including the Chief Justice, agreed on a three-year suspension, as determined by us. We had made that determination based on our findings that, although the attorney conspired with this client to hide funds from his

client's wife, there was no clear and convincing evidence that the client directed the attorney, or that the attorney agreed, to place the monies in the law firm's trust account. Moreover, the client's checks were made out to "cash" and, thus, we did not find that the exchange of funds fell within the attorney/client relationship regarding keeping funds separate.

In conclusion, respondent must be disbarred for his knowing misappropriation of escrow funds. In re Hollendonner, supra, 102 N.J. 21. We so recommend to the Court.

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
Bonnie C. Frost, Chair

By: Isabel Frank
Isabel Frank
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard B. Livingston
Docket No. DRB 13-327

Argued: February 20, 2014

Decided: March 28, 2014

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost	X					
Baugh	X					
Clark	X					
Doremus	X					
Gallipoli	X					
Hoberman	X					
Singer	X					
Yamner	X					
Zmirich	X					
Total:	9					

Isabel Frank
Acting Chief Counsel