SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 08-130 and 08-131
District Docket Nos. XIV-1996-0201E and XIV-1996-0202E

IN THE MATTERS OF

S. DORELL KING AND

DAVID BRANTLEY

ATTORNEYS AT LAW

Decision

Argued: November 20, 2008

Decided: December 17, 2008

John McGill, III appeared on behalf of the Office of Attorney Ethics.

Respondents appeared pro se.

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

These matters came before us on recommendations for discipline (a three-year suspension for respondent King and

disbarment for respondent Brantley) filed by Special Master Julio C. Morejon.

The complaint against King charged her with violating RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.15(a) (failure to safeguard client's funds).

The complaint against Brantley charged him with knowing misappropriation of escrow funds, a violation of RPC 1.15(a), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 93 N.J. 408 (1982);[1] commingling and willful failure to safeguard and maintain the identity of funds, violations of RPC 1.15(a), and RPC 1.15(d) and R. 1:21-6(a)(1); and failure to communicate with a client, a violation of RPC 1.4(a) (now RPC 1.4(b)). During the hearing, the special master granted the OAE's motion to amend the complaint to charge a violation of RPC 8.1(b) (failure to cooperate with disciplinary authorities).

The knowing misappropriation charge against Brantley is based on his receipt of several cash payments from clients,

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[1] In its brief submitted to the special master, the Office of Attorney Ethics ("OAE") acknowledged that the funds were not escrow funds and that Hollendonner is not applicable to Brantley's conduct.

Rogelio and Maria Peralta, to be held pending the completion of a real estate transaction.[2] Instead of depositing the funds in his trust account, Brantley placed them in a safe located in his law office. The OAE charged that Brantley commingled Peralta's and Brantley's own funds, which he maintained in his office safe. At the same time that Brantley received the Peralta funds, he deposited large sums of cash in his business account, which he later used for his own purposes. The OAE charged that a portion of these cash deposits had been funded by the Peralta monies. Relying primarily on a Louisiana case, the OAE argued that there is a mandatory presumption that Brantley knowingly misappropriated Peralta's funds.

In turn, Brantley claimed that Peralta asked him to keep the real estate deposit, in cash, in his safe. He denied that he had kept any personal money in the safe. Brantley insisted that he had maintained the Peralta funds intact in his safe until he returned them to the clients and that the source of the cash deposited in his business account was his own funds.

All of the charges against King stem from the allegation that she failed to safeguard client funds. After Brantley was

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[2] Because Rogelio, not Maria, was the primary contact with Brantley, this decision will refer to him as Peralta.

suspended, effective May 1, 1995, King (Brantley's wife) assumed the representation of the Peraltas. The OAE charged that King failed to take possession of the Peralta funds during the time that she represented the Peraltas and failed to discuss with them what action they wanted her to take to safeguard the funds.

For the reasons expressed below, we find Brantley guilty only of failure to safeguard client funds and failure to comply with recordkeeping requirements, misconduct that, in our view, warrants a censure. We also find King guilty of failure to safeguard client funds and determine that she, too, should receive a censure.

Both respondents have extensive ethics histories. King was admitted to the New Jersey bar in 1980. At the relevant times, she maintained a law office at 377 South Harrison Street, Suite One-I, East Orange, New Jersey. She has been reprimanded, temporarily suspended for failure to refund a retainer, suspended for three months, and twice suspended for one year. She has been continuously suspended since a June 16, 1998 order of temporary suspension.

Specifically, on February 3, 1998, the Court reprimanded King for gross neglect, lack of diligence, failure to communicate with a client, Branch, and failure to refund a $4,000 unearned retainer to the client; gross neglect, lack of

diligence, and failure to communicate with another client, Franklin, in three matters (in one of the matters, King also failed to return a $7,500 unearned retainer; in two of them, she failed to turn over the file to the client's subsequent attorney); and lack of diligence in a matter for a third client. The Court further ordered King to refund the $4,000 unearned retainer to Branch and the $7,500 unearned retainer to Franklin, within sixty days. In re King, 152 N.J. 380 (1998).

Although King apparently returned the $4,000 retainer to Branch, she did not refund the $7,500 to Franklin. Consequently, on June 16, 1998, the Court issued an amended order, temporarily suspending King until she submitted proof of compliance with the Court's February 3, 1998 order. In re King, 154 N.J. 119 (1998). According to a report issued by the New Jersey Lawyers' Fund for Client Protection ("the Lawyers' Fund"), King has not been reinstated after the June 16, 1998 suspension. On October 28, 1999, the Lawyers' Fund paid Franklin the $7,500 retainer.

On March 9, 1999, King was suspended for three months, in a default matter, for gross neglect, pattern of neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities. In re King, 157 N.J. 548 (1999). The suspension was to begin upon her submission of proof that she returned the $7,500 to Franklin.

On March 19, 2002, King was again suspended, this time for one year, in a companion matter with Brantley's, for similar violations, that is, gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities. In re King, 171 N.J. 79 (2002). The suspension was to begin at the expiration of the suspension ordered on March 19, 1999. As a condition of reinstatement, King was ordered to provide proof of fitness to practice law.

King was again suspended for one year, on October 13, 2004, in another default matter. Specifically, she failed to cooperate with disciplinary authorities and engaged in conduct prejudicial to the administration of justice, as a result of her failure to comply with R. 1:20-20, following her prior suspension. In re King, 181 N.J. 349 (2004). That suspension was to take effect at the expiration of the suspension ordered on March 19, 2002.

Brantley was admitted to the New Jersey bar in 1970. At the relevant times, he maintained a law office at 377 South Harrison Street, Suite One-J, East Orange, New Jersey. His ethics history includes three private reprimands, a one-year suspension, a three-month suspension, a reprimand, and two consecutive two-year suspensions.

Brantley received a private reprimand, in 1982, for failure to represent a client zealously in a discrimination case. He was

again privately reprimanded, in 1988, for driving with a suspended license and failing to pay fines. He received a third private reprimand, in 1988, for engaging in gross neglect and misrepresentation and failing to prepare a retainer agreement in a personal injury matter.

Effective April 15, 1991, Brantley was suspended for one year for the following conduct in four matters: lack of diligence in all four matters, failure to communicate in three, failure to carry out a contract of employment in all four, gross neglect in three, misrepresentation to a client about the status of a matter in one, failure to cooperate with disciplinary authorities in two, and a pattern of neglect in all four. In re Brantley, 123 N.J. 330 (1991). He was reinstated on June 9, 1992. In re Brantley, 128 N.J. 104 (1992).

On May 1, 1995, Brantley was suspended for three months for a pattern of neglect, lack of diligence, and failure to communicate with a client in two matters. He also failed to cooperate with disciplinary authorities. In re Brantley, 139 N.J. 465 (1995). He was reinstated on January 10, 1996, with the condition that he practice law under the supervision of a proctor for two years. In re Brantley, 143 N.J. 130 (1996).

On April 23, 1997, Brantley was reprimanded for lack of diligence in an estate matter. In addition, the Court ordered

him to practice under the supervision of a proctor for three years. In re Brantley, 149 N.J. 21 (1997).

On March 19, 2002, Brantley was suspended for two years, effective April 15, 2002, for gross neglect, a pattern of neglect, lack of diligence, failure to communicate with a client, failure to set forth in writing the basis of a fee, failure to return an unearned retainer, and failure to cooperate with disciplinary authorities. In re Brantley, 171 N.J. 80 (2002). This was the companion case in which King received a one-year suspension.

Also on March 19, 2002, the Court suspended Brantley for an additional two years, the suspension to be consecutive to the prior two-year suspension, for giving a false or misleading statement to a tribunal. In re Brantley, 171 N.J. 81 (2002).

The Court reinstated Brantley on May 13, 2008, on condition that he (1) not practice law as a sole practitioner or with King, (2) immediately enroll in the next available Skills and Methods Core courses and submit to the OAE proof of his successful completion thereof, (3) practice under the supervision of a proctor, (4) have all trust account disbursements co-signed by an attorney approved by the OAE, and (5) submit to the OAE quarterly trust account reconciliations. In re Brantley, 194 N.J. 559 (2008).

This case has a long procedural history. On November 2, 1995, Amilkar Velez-Lopez, Esq., filed a grievance against respondents with the District VB Ethics Committee ("DEC"), on behalf of Peralta. In the grievance, Velez-Lopez pleaded for the DEC's urgent intervention to obtain Peralta's file and $30,000 held in trust by respondents. Velez-Lopez requested a response by November 10, 1995. Three months later, on February 2, 1996, the DEC secretary replied that Velez-Lopez had failed to state the nature of the grievance and asserted that the DEC would consider the matter closed, unless he provided more information.

On February 21, 1996, Velez-Lopez provided additional details to the DEC, again urging the DEC to take immediate action. More than two months later, on May 2, 1996, the OAE informed Velez-Lopez that it had assumed responsibility for the grievance.

On May 6, 1996, Gerald Smith, OAE Chief of Investigations, notified Brantley of a demand audit to take place on May 21, 1996. However, because a hearing in another ethics matter involving Brantley had been scheduled for May 21, 1996, the demand audit was rescheduled to June 13, 1996. It was again rescheduled to August 21, 1996.

On May 21, 1996, OAE investigator Anthony Higham sent a letter to King, who was Brantley's counsel, enclosing a copy of

the Velez-Lopez grievance that King had requested and notifying her of the rescheduled demand audit date. Although the grievance was also filed against King, neither the OAE nor the DEC directly served the grievance on King, as a respondent.

The demand audit took place on August 21, 1996. On January 7, 1998, the OAE filed formal ethics complaints against respondents. Brantley retained Thomas Ashley, Esq., to represent him; King proceeded pro se.

On January 29, 1998, Special Master Julio C. Morejon was appointed to hear the Brantley and King ethics matters, which the OAE had consolidated. The disciplinary hearings began on July 13, 1999, and ended almost seven years later, on May 1, 2006.[3] There were eighty-three days of hearings, almost 10,000 pages of testimony from fourteen witnesses, more than twenty-five motions filed, and approximately 200 exhibits admitted into evidence.

The hearings did not proceed quickly, partially because of the difficulty in finding hearing dates suitable for all those involved, including the special master, the OAE presenter,

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[3] Although the last transcript is dated Monday, May 1, 2006, the record also refers to the date as March 1, 2006. Because May 1 fell on a Monday, and March 1 did not, the May 1, 2006 date appears to be correct.

King, and counsel for Brantley. Unfortunately, the proceedings were delayed also because respondents often arrived late to the hearings. Although King had medical excuses that permitted her absence from the hearings, on other occasions, she failed to appear, without notice or explanation. In addition, as the special master admitted in his report, the hearings contained "combative and argumentative" sessions between him and King. The following is a representative exchange between the special master and King:

> Ms. King: The record can now close.
>
> Mr. Morejon: Let the record reflect that this lady has flipped her hand at me showing totally [sic] disrespect. I will talk now, Ms. King.
>
> Ms. King: You are the person who is showing me total disrespect in this hearing. You overlooked me. You have had ex parte conversations. You yelled and screamed at me yesterday. I told you I don't want to talk about this anymore.
>
> Mr. Morejon: Exactly. I don't want to talk about it either.
>
> Ms. King: If you are fair and impartial, then I am Snow White. . . .
>
> Mr. Morejon: You are out of order.
>
> Ms. King. No. You are out of order.
>
> [4T123-10 to 4T124-19]

> Ms. King: Your behavior is outrageous.
>
> Mr. Morejon: No, ma'am, I'm sorry.
>
> Ms. King: It's abominable as a special master.
>
> Mr. Morejon: You're making accusations about me?
>
> Ms. King: I'm telling you the truth about you.
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> [4T128-18 to 4T129-2][4]

Although Ashley represented Brantley throughout the ethics portion of the hearings, on November 17, 2003, the special master granted his motion to withdraw from the case.

On January 8, 2008, about twenty months after the last hearing date, ten years after the special master was appointed, and more than twelve years after the grievance was filed, the special master issued his report.

The Peralta Real Estate Transaction

On September 16, 1994, the Peraltas retained Brantley to represent them in the purchase of commercial property in East Orange, New Jersey. At that time, the Peraltas were tenants at the property. Brantley's written retainer agreement provided for

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[4] 4T refers to the July 27, 1999 ethics hearing.

a $2,500 fee. He had previously represented Peralta in another matter. In 1994, the Peraltas also owned rental property consisting of four apartments and a store.

The purchase price was $275,000. Kenneth Fast, Esq., represented the seller, Robert Ginsberg. The parties did not have a signed real estate contract. Because Ginsberg was not sure that Peralta would qualify for a mortgage, he was reluctant to incur attorney's fees for the drafting of a real estate contract. Consequently, Peralta agreed to pay $500 as Fast's fee to draft the contract, with the understanding that the sum would be applied toward the purchase price if the transaction occurred.

The down payment was $60,000 to $70,000. After Ginsberg later agreed to take back a second mortgage, Peralta's down payment decreased to $30,000. Because Peralta did not have the entire down payment, he suggested remitting funds to Brantley periodically, which Brantley would retain until Peralta had accumulated the necessary amount. According to Brantley, when he suggested that Peralta could hold the money himself, Peralta replied that he preferred that the funds be maintained by someone else.

On December 7, 1994, Fast sent a letter to Brantley, explaining a title problem affecting the property. In addition,

the transaction was delayed because Ginsberg was waiting for pending legislation to be passed that would reduce the capital gains tax.

On March 3, 1995, Brantley sent a letter to Fast, stating that Peralta was anxious to proceed and urging Fast to produce a real estate contract. On March 6, 1995, Fast replied that he had consistently notified Brantley that Ginsberg would not close until the passage of the capital gains tax legislation.

Four months later, on July 5, 1995, Fast sent a contract to King, who had previously assumed Peralta's representation, as seen below. During the OAE investigation, Fast indicated to the OAE that Brantley was not responsible for the closing delays. According to Fast, a contract was not signed until 1996 and the closing did not take place until 1998, when neither respondent was representing Peralta. Thus, although the draft contract provided that Fast would hold the deposit, because the parties never signed the contract while either respondent represented Peralta, Fast never asked them to release the deposit to him.

Contrary to Fast's testimony, Peralta claimed that the capital gains tax issue had been resolved in early 1995. In

contrast, Brantley pointed out that the tax law was passed in August 1997 and that the closing took place on May 28, 1998.[5]

According to Peralta, who testified via an interpreter, Brantley had requested that he bring cash because it was easier to deposit in a bank account. Peralta alleged that he understood that Brantley would deposit the payments in an interest-bearing account.

In turn, Brantley claimed that, because Peralta ran a bodega that was primarily a cash business, Peralta had suggested bringing cash. When Peralta asked what Brantley would do with the money, Brantley replied that he would deposit the payments in his trust account and then turn them over to the seller's attorney, when the contract was signed. According to Brantley, Peralta indicated that, if the transaction were not completed, he would want the funds returned in cash. Brantley replied that he would have to issue a check, because the funds would be in his trust account. Peralta, however, denied that he had instructed Brantley to keep the funds in cash.

Peralta retained Elite Mortgage, Inc. ("Elite"), a mortgage broker, to obtain a purchase money mortgage. At some point in

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[5] We note that the Taxpayer Relief Act of 1997, Pub. L. 105-34, 111 Stat. 788, which reduced the capital gains tax, was enacted on August 5, 1997.

late summer or early fall 1994, Peralta, Brantley, and two Elite representatives, Hipolito Colon and Carlos Peay, had a meeting at Brantley's office. The attendees' testimony about the events of this meeting was contradictory. As mentioned above, Peralta asserted that Brantley had agreed to deposit the cash in a bank account, while Brantley claimed that he was to maintain the funds, in cash, in his office safe.

Colon drastically changed his testimony on this issue. At first, while testifying on direct examination as an OAE witness, he claimed that Brantley agreed to deposit the Peralta cash in a trust or escrow account until Peralta had accumulated enough funds for the required down payment. This testimony is consistent with an October 9, 1996 letter that Colon sent to OAE investigative auditor D. Kenneth Tulloch, during the investigation. In that letter, Colon indicated that Brantley was to deposit the Peralta funds "into a trust account or escrow account until the down payment for the purchase was reached."

Because King was not present at the July 13, 1999 hearing when Colon testified, she cross-examined him almost two years later, on May 21, 2001. At that time, Colon changed his version of the events, testifying that Peralta had asked Brantley to keep his cash in a safe, so that if the deal did not close, Peralta would receive cash back. According to Colon, Peralta

said: "I'll give you the money in cash. Nothing happens, I want it back in cash." Colon further alleged that Brantley explained to Peralta that, once a real estate contract was executed and a mortgage commitment received, he would place the funds in his trust account.

Colon acknowledged that his later testimony was at odds with his letter to Tulloch. He insisted, however, that his most recent version was accurate. He explained that his letter had meant that Brantley was to issue an escrow letter for the closing, but he had forgotten to mention that it was an "in cash agreement." He added that, under an "in cash agreement," Brantley would hold the Peralta funds in cash and, as the time for the closing approached, he would deposit the funds in a trust or escrow account.

Colon also acknowledged that his later testimony contradicted the statement that he had given to Tulloch on September 30, 1996. He claimed that the questions asked at the hearing were clearer than those asked during the investigation and allowed him to remember more details.

The testimony of Carlos Peay, the other Elite loan officer, was not definitive. According to Peay, Peralta had stated that he was to give Brantley cash for the down payment. Because Peay's father is an attorney, Peay was aware that all cash given

to a lawyer should be put in a trust account. Although he was not certain, Peay believed that Brantley was to keep the cash from Peralta until the transaction was ready to be funded. Peay assumed that Peralta would have wanted his funds returned from Brantley as cash. Peay recalled Peralta indicating, without explanation, that he kept as much of his funds as possible in cash. Peay never heard Brantley suggest that Peralta bring him funds in cash or mention having an office safe.

The Peraltas delivered the following cash payments to Brantley:

Date	Amount	Purpose
10/06/94	$1,000	Brantley's Fee
11/02/94	500	Fast's Fee
11/10/94	17,000	Down Payment
11/15/94	5,000	Down Payment
01/24/95	8,000	Down Payment

Peralta, or his wife, Maria, brought the above payments to Brantley. Brantley counted the cash, took it to another room, and issued a receipt. However, on January 24, 1995, at Brantley's request, King prepared the receipt. According to King, although she wrote the receipt, she did not see Peralta give the money to Brantley. Peralta did not observe where Brantley put the cash. He denied authorizing Brantley to keep his funds in a safe.

Brantley testified that he was not aware that the court rules required him to deposit the Peralta funds in his trust account. He assumed that, as long as he safeguarded them and kept them separate from his own funds, he was in compliance with the rules. He never recorded the funds in a client ledger, believing that, because he had not deposited Peralta's funds in his trust account, he was not required to comply with the recordkeeping rules. He understood that his obligation was to give Peralta a receipt and to hold the funds in the manner that his client had requested.

King's Representation of Peralta

As mentioned in the above ethics history, on April 4, 1995, Brantley was suspended from the practice of law for three months, effective May 1, 1995. Brantley claimed that, in April 1995, at a meeting in his office, he informed Peralta of his upcoming suspension and of the need to retain other counsel. According to Brantley, Peralta asked whether King could assume the representation. After discussing the matter with King, Brantley told Peralta that she had agreed to represent him. Brantley explained that he had not provided Peralta with written notice of his suspension because, after King agreed to assume the representation, Peralta was no longer his client.

In contrast, Peralta denied that Brantley had notified him of his suspension. He further denied knowing that King would be representing him, or having authorized her to do so. He even denied knowing that King was an attorney, asserting that he believed that she was a secretary in Brantley's office.

Peralta's statements concerning when he learned that King was an attorney were inconsistent. He claimed that, in March 1995, he reviewed a real estate contract with King, when he believed she was a secretary. In turn, respondents pointed out that Peralta could not have reviewed the real estate contract with King in March 1995 because, as of that date, no contract had been received. Moreover, in March 1995, King had not yet begun representing Peralta.

Peralta testified that he discovered that King was a lawyer in June 1995, when she sent a letter to him. However, Tulloch's investigative report indicated that, on October 9, 1996, Peralta remarked that he had learned only "recently" that King was a lawyer. Peralta alleged that the investigative report is incorrect. Peralta also testified that, in June 1995, Ginsberg informed him that King had taken over the representation. He also stated that it was Ginsberg's attorney who had told him that King had assumed his representation.

The OAE's investigation revealed contradictory statements from Peralta on this issue. Tulloch prepared an October 9, 1996 memorandum, based on Peralta's statements given during a September 26, 1996 interview. After Tulloch forwarded the memorandum to Peralta or to his attorney, Velez-Lopez, he received it with a change that Peralta had initialed. The memorandum had provided: "King took over his representation from Brantley after his suspension." Peralta had drawn a line through that sentence and replaced it with the following language: "King read the contract to Peralta."

Brantley denied that Peralta did not learn, until June 1995, that King was a lawyer. He claimed that, in 1994, he had introduced King, as an attorney, to the Peraltas.

For her part, King testified that, in April 1995, after Brantley was notified of his upcoming suspension, Peralta retained her for the Ginsberg real estate transaction. She did not prepare a written fee agreement. She did not charge Peralta a fee. According to King, she first met Peralta in the winter of 1994, when Brantley introduced her to Peralta as his wife and as an attorney. Brantley often used King's office to meet clients because it was bigger than his office.

King next saw the Peraltas on January 24, 1995, when they met with Brantley about the closing. She then had a meeting with

Peralta in April 1995, when he asked her to represent him and his wife at the closing, after learning of Brantley's upcoming suspension.

King sent a June 27, 1995 letter to Fast, confirming a conversation in which she had informed him that she had assumed the representation of Peralta and had asked for the status of the closing.[6] Fast informed King that Ginsberg was still waiting for the passage of the capital gains legislation. King claimed that she continued to call Fast periodically and kept Peralta advised of the status of the matter.

On July 10, 1995, King received the draft contract from Fast. After King notified Peralta that she had received the contract, she was unable to meet with him because she had become ill in July 1995. She produced a telephone memo indicating that, on August 2, 1995, she had discussed the terms of the contract with Peralta. She also produced an August 11, 1995 letter to the Peraltas confirming their August 16, 1995 appointment. King claimed that she met with Peralta on August 16, 1995 to discuss the contract. Peralta was able to communicate with King without a translator.

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[6] This is the letter by which Peralta allegedly learned that King was a lawyer.

King alleged that, although Peralta made an appointment with her on August 19, 1995, he failed to appear at her office. Thereafter, both King and her secretary became disabled. As a result, King temporarily closed her office. On November 28, 1995, Peralta made an appointment with King for December 6, 1995. However, once again, he did not keep the appointment. King had no further contact with Peralta.

Without Velez-Lopez's knowledge, King tape-recorded a September 1996 telephone conversation in which Velez-Lopez told her that he had instructed Peralta not to keep the December 6, 1995 appointment. During the OAE investigation, Peralta told Tulloch that, based on Velez-Lopez's advice, he had not kept the appointment.

The Return of the Funds to Peralta

After King discovered, at the demand audit, that she was permitted to contact Velez-Lopez, she called him to arrange the return of the Peralta funds. Because they could not agree on the arrangements, King contacted OAE Deputy Ethics Counsel John McGill, III, who suggested that Brantley photograph the cash, deposit it in his trust account, obtain a receipt from the bank specifying the number and denomination of each bill, and issue a trust account check to Peralta. King had been concerned about

maintaining the Peralta funds as evidence because Peralta had filed a criminal complaint against Brantley with the Essex County Prosecutor's Office. Following McGill's suggestion, Brantley photographed the funds to preserve their evidentiary value, obtained a receipt from the bank specifying the denomination of each bill, deposited the funds in his trust account, and issued a $30,500 check, which he hand-delivered to Peralta on October 21, 1996.

The Failure to Communicate Charge

Peralta claimed that he had tried to contact Brantley by telephone "hundreds of times," without success, to proceed with the real estate purchase. He denied having received a copy of the March 3, 1995 letter in which Brantley had urged Fast to prepare a real estate contract. Contrary to Fast's testimony, Peralta alleged that Fast was also unable to reach Brantley.

Despite Peralta's allegation that he had had no contact with Brantley after January 24, 1995, when he met with King, in March 1995, he never asked her about Brantley's absence from his law office. Peralta acknowledged that he did not try to contact either Brantley or King, in writing. Finally, Peralta retained Velez-Lopez to represent him. As previously mentioned, Velez-Lopez filed the Peralta grievance.

To counter Peralta's testimony, Brantley introduced copies of telephone messages and memos showing contact among Brantley, Peralta, Colon, and Fast between January and March 1995. According to the telephone messages, the transaction was in place, the mortgage application had been tentatively approved, and all parties were awaiting the enactment of the tax legislation that the seller required before proceeding. Specifically, Ex.R-79 is a copy of a telephone memo documenting a February 23, 1995 conversation in which Brantley informed Peralta that Fast had agreed to send a draft of the contract and that Colon had assured Brantley that Elite was willing to hold the mortgage commitment until all parties were ready to close.

Velez-Lopez testified that the Peraltas retained him to represent them in September 1995, because they could not contact Brantley. Velez-Lopez and his paralegal, Espinosa, had tried to contact respondents, without success. Velez-Lopez's file jacket contained notes of his and Espinosa's efforts to reach respondents. The notes indicated that Velez-Lopez called King on September 20, 1995, that he left another message for King or Brantley on September 25, 1995, and that Espinosa called Brantley on October 16, 17, 18 and 19, 1995.

On October 17, 1995, Velez-Lopez sent a letter to respondents, complaining that he had telephoned them three times

and demanding the return of the Peraltas' funds and file. Velez-Lopez received no reply from respondents. He then filed complaints with the DEC, the Lawyers' Fund, and the Essex County Prosecutor's Office.

Velez-Lopez conceded that, when he tried to contact Brantley, Brantley had been suspended from the practice of law. He further acknowledged that, although his file jacket notes indicated that Espinosa had called Brantley, they did not document any calls from Velez-Lopez to Brantley. Nevertheless, Velez-Lopez claimed that he had called Brantley, without success, at least five to ten times. King testified that she never received a telephone call or message from Velez-Lopez. As previously mentioned, due to illness, King was not in her office from September until the end of November 1995.

The Demand Audit

Brantley claimed that, upon receiving the May 6, 1996 letter from the OAE scheduling the demand audit, he learned that Peralta was dissatisfied with his services. Although Brantley considered contacting Peralta, he believed that an attorney was not permitted to contact a client after a grievance had been filed.

According to Brantley, King discovered that he held Peralta's funds in his safe, when he discussed the demand audit letter with her. King insisted that he show her the Peralta funds; they then counted the money. King agreed to represent Brantley in the disciplinary matter.

King attended the demand audit as Brantley's counsel. On July 17, 1996, about one month before the demand audit, McGill contacted King because he perceived a potential conflict of interest in King's representation of Brantley. McGill was concerned because the grievance had been filed against both respondents. Yet, King planned to appear as Brantley's counsel at the demand audit. King assured McGill that she had never possessed the Peralta funds. Based on that representation, McGill agreed that King could represent Brantley at the demand audit. At the audit, both respondents represented that King had never held the Peralta funds.

During the audit, Brantley declared that he had held Peralta's funds in cash, pursuant to Peralta's request; that Peralta would confirm that he had asked Brantley to keep his money in cash; that he continuously maintained the Peralta currency intact in an envelope in his safe since he received it; that each time he received a deposit from Peralta, he put a copy of the receipt around each stack of bills; that the bills that he

produced at the demand audit were the same bills that Peralta had brought to him; and that he did not use or touch the Peralta funds.

At the end of the audit, Brantley was reluctant to leave his original trust and business account records with the OAE for photocopying. He, thus, returned the next day for that purpose.

The Random Audit

On January 9, 1995, about eighteen months before the demand audit, OAE auditor Mimi Lakind had conducted an unrelated random audit of Brantley's books and records. By that time, Brantley had received $22,500 from Peralta toward the down payment. Lakind testified that, when she appeared at Brantley's office, he introduced King as his wife and referred to her as "Mrs. Brantley." According to Lakind, King told her that she was Brantley's secretary and bookkeeper, never mentioning that she was a lawyer.

During the random audit, Brantley told Lakind that he had not deposited client trust monies anywhere other than in his trust account. Brantley explained, both at the demand audit and at the ethics hearing, that, because he had placed the Peralta funds in a safe, he had not "deposited" them; therefore, he had answered Lakind's question accurately. Lakind remarked that, at

the random audit, Brantley's records contained no reference to the Peralta funds, which he never mentioned.

Among several deficiencies that Lakind found in Brantley's records was his practice of depositing large sums of cash in his business account. She also noted the absence of business receipts or disbursements journals. According to Lakind, at the random audit, she asked King to prepare a detailed business receipts and disbursements journal for June 1994 through December 1994, identifying the source of each deposit. King replied that she had that information at home and would provide it.

King never provided the requested information and failed to return Lakind's telephone calls. Although Lakind left at least three or four messages for Brantley, he also did not return her telephone calls. Lakind later learned that, during the time that she had been attempting to contact Brantley, he had been suspended.

Although Lakind testified that she had asked King for the business journals, she later alleged that, pursuant to her practice to always ask that the attorney produce the records, she had asked Brantley to reconstruct the business journals. When she was shown her September 13, 1995 memorandum at the hearing, indicating that she had made the request of "Mrs. Brantley," Lakind maintained that Brantley had been present

during the entire random audit, that she had asked Brantley for the records, and that her report did not document every conversation from the audit.

In turn, Brantley denied that Lakind had ever asked him to prepare a reconstructed business account cash receipts journal. King, too, denied that Lakind had asked her or Brantley to reconstruct his business journals, insisting that, at the end of the audit, Lakind had instructed Brantley to start preparing those journals in the future.

On June 28, 1995, Lakind obtained Brantley's business account records from MidLantic Bank, pursuant to a subpoena. She determined that, after the random audit, Brantley had stopped the practice of depositing large sums of cash in his business account.

About eleven months after the random audit, on December 4, 1995, the OAE sent a letter notifying Brantley of the deficiencies revealed during the audit. The letter further noted that Brantley's use of his business account for transactions unrelated to his law practice was improper. On January 26, 1996, Brantley replied that he had corrected the deficiencies and submitted to the OAE three-way trust account reconciliations from November 1994 through July 1996. The reconciliations did not indicate that he was holding the Peralta funds.

The Alleged Connection Between the Peralta Funds and Brantley's Business Account Deposits

During the investigation of the Peralta grievance, the OAE suspected that cash that Brantley had deposited in his business account included some or all of the Peralta funds. OAE investigator Tulloch compared the dates and amounts of cash that Peralta gave Brantley with the cash deposits made to Brantley's business account. His purpose was to ascertain whether there was a correlation between the two. Tulloch concluded, in his March 25, 1997 memorandum, that he could not determine that any of the business account deposits were attributed to the Peralta funds. The deposits were not in the same amounts as the Peralta receipts. Tulloch testified that the deposits "might possibly have included Peralta's money."

Brantley denied that any of the cash deposited in his business account came from Peralta's funds. He claimed that the Peralta funds remained intact in his office safe at all times.

King, too, testified that Brantley had not deposited any of the Peralta funds in his business account. When asked about the source of her knowledge, King replied that, because she was acting as Brantley's unofficial proctor after his prior ethics problems, she monitored his records periodically. In addition, she asserted that, as Brantley's wife, she is aware of the amount of money that he has at all times.

The OAE's Request of Brantley for Information About His Business Account Cash Deposits

On February 14, 1997, six months after the demand audit, the OAE sent a letter to Brantley, indicating that his records disclosed numerous cash deposits made to his attorney business account during the months that he received the Peralta funds. The letter also stated that:

> During a random compliance audit of your trust and business records by compliance auditor Mimi Lakind, which began on January 9, 1995, you were asked to provide a reconstructed business account cash receipts journal for the period from June 1994 through January 1995. You did not provide that document. The normal supposition would be that all deposits to the business account were client fees. However, both you and S. Dorell King, Esq., told Ms. Lakind that you deposited personal funds, kept in your safe, to your attorney business account during that period. Compliance auditor Lakind determined that currency deposits to your business account totaled $47,065 during November 1994. During the same month you received $22,500 from Peralta. During January 1995, you made $5,037 in currency deposits to your attorney business account after you received $8,000 from Peralta.
>
> These facts indicate the possibility that you may have deposited some or all of Peralta's funds to your business account. Therefore, it is necessary for you to document the source of all of the currency deposits to your attorney business account between November 1, 1994, and February 15, 1995. Please provide documentation identifying client names, addresses, telephone numbers, the nature of your representation and purpose of the deposited funds. If they are not clients

> please fully document the source and purpose of the funds.
>
> Be advised that the aforementioned documented information is necessary to rebut any inferences that Peralta's funds were commingled and misused in your business account during this period.
>
> [Ex.C-47.]

At the April 4, 2000 hearing, McGill acknowledged that, contrary to the above letter, Brantley had not told Lakind that he had deposited in his business account personal funds kept in his office safe. McGill explained that Brantley had told Lakind that the cash that he deposited in his business account came from various personal accounts.

On June 6, 1997, in response to the OAE's February 14, 1997 letter, Brantley submitted a reconstructed business account cash receipts journal, identifying himself as the source of the cash funds deposited in his business account from November 1, 1994 through February 15, 1995. On July 28, 1997, the OAE notified Brantley's attorney, Ashley, that Brantley's response did not comply with the demand for information. The OAE requested a documented explanation of where Brantley had obtained those funds, as well as their purpose and use. Ashley replied, on August 25, 1997, that the deposits "came from [Brantley's] personal funds. This response constitutes full compliance with

your request to identify the source of funds in Mr. Brantley's attorney's [sic] business account."

By letter dated September 15, 1997, the OAE informed Ashley that Brantley's response was not acceptable and that the failure to comply with the demand for information (1) might constitute a willful violation of RPC 8.1(b) and R. 1:20-3(g)(3) (failure to cooperate with disciplinary authorities), and (2) evidenced a lack of full candor, calling into question Brantley's credibility and veracity. In an October 1, 1997 letter, Ashley replied that Brantley had fully cooperated with the OAE and that there was no merit to the suggestion that Brantley had deposited any of the Peralta funds in his business account.

On July 13, 1999, the first day of hearings, the special master granted the OAE's motion to amend the complaint to include a violation of RPC 8.1(b), based on Brantley's failure to provide additional information about the cash deposits to his business account.

At the hearing, respondents disclosed that King was the source of the personal funds that Brantley had deposited in his business account. Brantley asserted that King manages their personal finances and that he and King had accumulated those funds over the years. King explained that, rather than depositing the funds in her own account, she gave them to Brantley to

deposit in his business account because she has insomnia, sleeps during the day, and is not available during regular business hours to engage in banking transactions. She, thus, gave the funds to Brantley so that he could have access to them during banking hours.

As to the OAE's request for information, Brantley contended that he had complied with it, given that he had no additional details to provide regarding the source of the funds.

Brantley's Personal Home Safe

To refute the OAE's theory that Brantley had maintained personal funds in the office safe, along with the Peralta funds, Brantley claimed that he maintained his personal funds in a personal safe at home since October 1991, when he and King were married. Issues concerning this personal safe were hotly contested at the hearing. Neither Brantley nor King had referred to a personal safe at the random audit, the demand audit, during the OAE investigation, or in their original or amended answers. The personal safe was first mentioned in Ashley's opening statement on Brantley's behalf, at the first hearing date.

On January 18, 2001, the OAE made a discovery demand for specific information about the safe, such as the manufacturer, the model and serial numbers, and a copy of the purchase

receipt. Although respondents did not provide the requested information, the special master permitted them to introduce into evidence two photographs allegedly depicting the personal safe.

According to Brantley, he discarded the personal safe in 2001 or 2002, when the digital combination stopped working properly. Brantley denied that he had intentionally discarded the personal safe to prevent the OAE from examining it or obtaining information about it.

<u>The Failure to Safeguard Funds Charge Against King</u>

The charge that King failed to safeguard Peralta's funds was based on her failure to take possession of the money when she assumed Peralta's representation and to ask Peralta what he wanted her to do with the funds.

When King began to represent Peralta, in April 1995, she did not review Brantley's file, which contained copies of the receipts given to Peralta. She claimed that, because there was no activity in the file, she had no reason to review it. Although King knew, when she took over the representation, that Peralta had made a deposit for the transaction, she believed that Brantley had deposited the Peralta funds in his trust account. When Brantley showed King the May 6, 1996 OAE letter notifying him of the demand audit, King learned that he had kept

the Peralta funds in his office safe. At that time, he showed her the cash in the safe, which they both counted.

King, thus, denied any knowledge, until May 1996, that the Peralta funds were not in Brantley's trust account. Although King acknowledged that, at Brantley's request, she had prepared a receipt for $8,000, on January 24, 1995, she had no reason to believe at that time that Brantley was holding those funds anywhere other than in his trust account.

At the August 21, 1996 demand audit, however, the following exchange took place:

> McGill: Did you have an understanding at that time that you wrote the receipt that there was a cash payment and there had been prior cash payments taken place from Mr. Peralta on this particular transaction?
>
> King: Oh, yes. I'm aware of that . . . but I am aware of all of the cash payments. It's a matter of common knowledge that Mr. Brantley is in fact my husband . . . he's not just a lawyer. [Emphasis added].
>
> [Ex.C-13 at 32-583 to 32-590.]

King testified that she had answered that question based on her knowledge at the time of the demand audit, not as of January 24, 1995, when she had prepared the receipt.

King further maintained that Peralta had never asked her for the return of the funds and that, until Brantley received the OAE letter in May 1996, she did not know that Peralta had

any complaints about her or Brantley. She also denied that Velez-Lopez had ever asked her to turn over the funds. The OAE acknowledged that respondents returned the funds to Peralta on a timely basis.

In turn, the OAE pointed out that, as late as the August 21, 1996 demand audit, King was not sure whether she continued to represent Peralta. Thus, the OAE contended, when she brought the funds to the demand audit in August 1996, she took no action to return the funds to Peralta, but instead, assisted Brantley in counting them and returning them to his safe.

The OAE's Legal Theory

In its pre-hearing memorandum submitted to the special master, the OAE argued that Brantley's alleged deposit and maintenance of the Peralta funds in his office safe raised a rebuttable presumption that Brantley had knowingly misappropriated those monies. The OAE referred to Brantley's defense – that client funds were kept secretly, but securely, in a private safe – as a "black box defense." Relying primarily on Louisiana State Bar Association v. Krasnoff, 515 So.2d 780 (La.1987), the OAE contended that, when an attorney advances a black box defense, the likelihood of embezzlement is so great and the public policy of protecting clients is so strong that

the attorney is presumed guilty of embezzlement, unless the attorney presents evidence rebutting the presumption.

At the end of the presenter's case, Brantley moved to dismiss the complaint, arguing that the OAE had failed to meet its burden of proof. In reply, the OAE argued that, based on the black box defense, the presumption of knowing misappropriation had shifted the burden of persuasion to respondent.

On April 27, 2001, the special master denied Brantley's motion to dismiss, ruling that the OAE had sustained its burden of establishing a prima facie case. On May 18, 2001, the special master determined that the presumption that the OAE advocated applied to Brantley.

In its summation brief to the special master, the OAE argued that Brantley could be found guilty of knowing misappropriation "under either the 'rebuttable presumption' standard applied in Louisiana State Bar Association v. Krasnoff, supra, 515 So.2d 780,782 (La.1987) and In re Herr, 22 N.J. 276 (1956), or the 'permissive inference' standard applied in In re Freimark, 152 N.J. 45 (1997), In re Mysak, 162 N.J. 181 (1999), Matter of Mezzacca, 120 N.J. 162 (1990) (DRB Docket No. 88-200) and In re Thompson, 579 A.2d 218 (D.C.App.1990)."

As to the less serious charges, the OAE contended that Brantley's admission that he placed the Peralta funds in his

office safe required a finding that he had failed to safeguard and maintain the identity of client funds. The OAE argued that, even if Peralta had permitted Brantley to maintain the funds in his safe, Peralta could not have authorized Brantley to violate the rules, which require all client trust funds to be deposited and maintained in an approved bank trust account.

In addition, the OAE asserted that Brantley's failure to notify Peralta of his impending three-month suspension constituted a failure to communicate with a client.

Finally, the OAE contended that Brantley violated RPC 3.4(a) (unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal evidence) by discarding the personal safe, and that he violated RPC 3.4(d) (fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party) by failing to comply with the OAE's demand for discovery about the personal safe. The OAE did not move to amend the complaint to conform to the proofs.

As for King, the OAE contended that she failed to safeguard Peralta's funds when she took over his representation and did nothing to ascertain the whereabouts of the money or to discuss the funds with Peralta. Furthermore, the OAE argued that King also failed to safeguard Peralta's funds when she counted them,

in May 1996, and allowed Brantley to return them to the safe. The OAE alleged that King's failure to safeguard funds also amounted to gross neglect and a lack of diligence.

Additionally, the OAE claimed that King failed to communicate with Peralta by not discussing with him the status of the deposit funds. Although McGill conceded that the complaint did not charge King with violating RPC 1.4(b), he contended that, at the end of the OAE's case-in-chief against King, the complaint had been amended to conform to the proofs, under In re Logan, 70 N.J. 222 (1976).

The OAE urged the special master to recommend disbarment for both Brantley and King. The OAE contended that King's good character and fitness to practice law have been permanently lost, citing In re Templeton, 99 N.J. 365 (1985). King's contempt for the disciplinary process was also advanced as an aggravating factor.

As for Brantley, the OAE argued that disbarment is required because of his knowing misappropriation of client funds, as well as his recidivism and continuing bad character.

After the matter was transmitted to us, Brantley filed a motion to supplement the record with certain documents that had been marked for identification and prepared during the course of the proceedings. The OAE did not object to Brantley's motion. At

oral argument, King joined in Brantley's motion. We determine to grant respondents' motion to supplement the record.

The Special Master's Findings

The special master found both respondents guilty of all of the charged ethics violations. Specifically, the special master determined that Brantley knowingly misappropriated client trust funds; commingled client and personal funds; willfully failed to safeguard and maintain the identify of client funds; failed to communicate with a client; failed to cooperate with disciplinary authorities; willfully destroyed evidence, a violation of RPC 3.4(a); and willfully failed to comply with a demand for discovery, a violation of RPC 3.4(d).

The special master agreed with the OAE that Brantley can be found guilty of knowing misappropriation under either the rebuttable presumption or the permissive inference standard.

In response to Brantley's contention that the OAE had failed to establish that he had either taken or used Peralta's funds, the special master concluded:

> I cannot disagree more. The record does reflect that Brantley accepted Peralta's funds and placed them in his attorney trust

> account,[7] thus fulfilling the definition of "taking". Brantley admitted receiving from Peralta cash payments representing deposit monies, which totaled $30,500, in connection with the real estate transaction.
>
> [SMR52][8]
>
> Here, Brantley's "taking" of Peralta's funds occurred when he put Peralta's cash in his safe, rather than his trust account, without the authority to do so.
>
> [SMR54]
>
> Brantley's response that the source of the cash funds were [sic] "personal funds" (R-98), and that he actually maintained Peralta's funds in his "home safe" (T7/13/99 19:5-13 21:8-7, T3/24/00 65:11-25) is incredible, and not believable.[9]
>
> [SMR55]

Thus, the special master adopted the argument set forth in the OAE's brief that Brantley "took" Peralta's funds when he deposited them in his safe, instead of in his trust account.

Although the special master recommended Brantley's disbarment, he did not mention knowing misappropriation or the

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[7] It is undisputed that Brantley placed the Peralta funds in his office safe, not in his trust account.

[8] SMR refers to the special master's report, dated January 8, 2008.

[9] Brantley testified that he maintained Peralta's funds in his office safe and his own funds in his home safe.

Wilson case in the section of his report containing the sanction. Instead, he referred to Brantley's failure to safeguard funds and his ethics history, asserting that:

> disbarment is appropriate based solely upon new findings of unethical conduct, when considering the DRB's most recent disciplinary recommendation of disbarment based upon his cumulative prior ethics history. The record here demonstrates that Brantley's character is irretrievably lost, in that he either cannot or will not conform his conduct to the high standards expected of members of the profession. Matter of Templeton, 99 N.J. 365,376 (1985).
>
> [SMR65-66]

As for King, the special master determined that she was guilty of a lack of diligence, gross neglect, and failure to safeguard funds. He noted that King took no action to safeguard Peralta's funds, despite her knowledge that his money was allegedly maintained in the safe of a suspended attorney. In recommending a three-year suspension, the special master remarked that King failed to communicate with a client, although she had not been charged with a violation of RPC 1.4(b). The special master considered as an aggravating factor King's disrespectful conduct and contempt for the disciplinary process during the ethics hearing, observing that she was on notice, from our decision in In the Matters of S. Dorell King and David

Brantley, DRB 00-330 and 00-331 (August 22, 2001), that such obstructive conduct was prohibited.

The special master made no mention of the passage of time between the relevant events (which occurred between 1995 and 1996) and the issuance of his 2008 report.

Following a de novo review of the record, we are satisfied that the special master's finding that Brantley failed to safeguard the Peralta funds is supported by clear and convincing evidence. We find, however, that the record does not contain clear and convincing evidence to sustain the other charges. Similarly, although the record supports the special master's finding that King failed to safeguard the Peralta funds, we dismiss the remaining charges against her (RPC 1.1(a) and RPC 1.3) as duplicative. In any event, RPC 1.15(a) is the more applicable rule.

The OAE sought to tie Brantley's deposits of cash in his business account with his receipt of the Peralta funds. However, the charge of knowing misappropriation is based on speculation, coupled with a presumption or an inference that has not been recognized in New Jersey ethics law.

As Lakind's random audit memorandum established, Brantley began depositing large sums of cash in his business account in June 1994, five months before he had received any of the Peralta

funds. Moreover, both Tulloch's investigative report and testimony revealed that he could not conclude that any of Peralta's funds were deposited in Brantley's business account. Tulloch's March 25, 1997 memorandum indicated that he could not determine that any of the business account deposits were attributed to the Peralta funds. He testified that the deposits "might possibly have included Peralta's money." This equivocal proof is not sufficient to meet the clear and convincing standard applicable in disciplinary cases pursuant to R. 1:20-6(c)(2)(B).

The satisfaction of the clear and convincing standard is especially critical when an attorney's license to practice law is in peril. As the Court stated in In re Konopka, 126 N.J. 225 (1991),

> [w]e insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. . . . If all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof. [Emphasis supplied].
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> [Id. at 234.]

"The burden of proof in proceedings seeking discipline or demonstrating aggravating factors relevant to unethical conduct charges is on the presenter." R. 1:20-(c)(2)(C). The OAE, thus, was required to prove, by clear and convincing evidence, that

Brantley had used the cash funds, that he had done so without Peralta's consent, and that he had done so knowingly. As the Court held in In re Noonan, 102 N.J. 157, 160 (1986), "[t]he 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." Mere proof that the client's funds were missing does not suffice. The presenter must prove that the lawyer knowingly misused the funds:

> We have been equally resolute in requiring proof of respondent's state of mind by clear and convincing evidence. Proof of misappropriation, by itself, is insufficient to trigger the harsh penalty of disbarment. Rather, the evidence must clearly and convincingly prove that respondent misappropriated client funds knowingly. *See In re Moras,* 131 *N.J.* 164, 168-69, 619 *A.*2d 1007 (1993) (evidence that attorney wrote check for client on trust account against uncollected funds does not establish knowing misappropriation); *In re Konopka,* 126 *N.J.* 225, 233, 596 *A.*2d 733 (1991) (attorney's negligent misappropriation of client funds due to careless record-keeping does not mandate disbarment); *In re Goldstein,* 116 *N.J.* 1, 6, 560 *A.*2d. 1166 (1989) (OAE failed to establish that respondent knew misappropriation of interest earned on trust funds was improper); *In re Hollendonner,* 102 *N.J.* 21, 29, 504 *A.*2d 1174 (1985) (OAE failed to prove by clear and convincing evidence that respondent invaded escrow

funds with knowledge that use of funds was improper).

[In re Barlow, 140 N.J. 191, 196 (1995).]

In addition to the circumstantial evidence, the OAE relied on a presumption of embezzlement, arising when a "black box" defense is asserted. That presumption was articulated by the Supreme Court of Louisiana in Louisiana State Bar Association v. Krasnoff, supra, 515 So.2d 780 (1987). During the investigation, the OAE demanded that Brantley provide specific information concerning the source of the cash deposited in his business account. Brantley, while represented by Ashley, indicated that he could not provide any detail, other than the fact that his personal funds were the source of the cash. The OAE contended that, because Brantley did not provide specific information, a presumption is created that he knowingly misappropriated the Peralta funds that were in his possession at the time of the business account deposits.

In Krasnoff, the attorney settled a personal injury action for $7,500. Id. at 782.[10] Krasnoff did not notify his client of the settlement, endorsed her name on the check, pursuant to a

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[10] At the time of the disciplinary proceeding, Krasnoff had already been disbarred. Id. at 781. The court, however, entertained the case because "of the propensity of disbarred attorneys to seek readmission." Id. Thus, if Krasnoff applied for reinstatement, the discipline in the current case could be considered in evaluating his application.

power of attorney he had obtained from her, and deposited the check in his business account. Ibid. He did not maintain a trust account. Ibid. During the next seven years, the attorney misrepresented the status of the matter, telling the client that he was working toward a settlement and deliberately misleading her to believe that he had not recovered any money for her. Ibid. At the disciplinary hearing, more than seven years after he had received the settlement check, Krasnoff finally disbursed the client's portion of the proceeds to her. Ibid.

Krasnoff claimed that, although he had promptly notified his client of the settlement, she had asked him to retain the money for her because she was concerned that her family would steal it from her. Ibid. He further alleged that he withdrew the funds in cash and kept them in his safe for seven years, exchanging larger bills for smaller denominations just before the disciplinary hearing. Ibid.

The client testified that the attorney did not notify her of the settlement until two days before the disciplinary hearing, that she had no concerns about her family taking her money, and that she desperately needed the funds, describing her dire health and financial circumstances. Id. at 782-783. The client's sister confirmed her testimony, asserting that she had

been present when the attorney had promised to recover money for the client. Id. at 783.

The Supreme Court of Louisiana determined that the attorney converted the client's funds to his own use, finding it unlikely that the client knowingly and voluntarily allowed Krasnoff to retain her money in his safe for more than seven years, particularly at a time when she was in desperate straits. Ibid. The court proclaimed that, when an attorney asserts a "black box" defense, he is presumed guilty of embezzlement unless he presents evidence otherwise. Ibid. The court observed that Krasnoff introduced evidence that made conversion even more probable. Id. at 784.

We note several critical facts that distinguish Krasnoff from the instant case. In Krasnoff, the attorney received a settlement check on behalf of a client; failed to notify her of his receipt of the check; had no reason to delay disbursement of the funds to his client; misrepresented the status of the matter to lead her to believe that the case had not been settled; and claimed to have cashed the check and maintained the cash in a safe for seven years at the client's request. Moreover, the client denied having asked the attorney to hold her funds, and the client's health and financial circumstances rendered it unlikely that she would have so authorized the attorney.

Here, although Peralta claimed that he brought cash at Brantley's request, he admitted that he had deposited cash with Brantley. Because the real estate closing was delayed by the seller's circumstances, Brantley had no reason to distribute the funds. There is no allegation that Brantley made any misrepresentations to Peralta. Peralta admitted that he had asked Brantley to retain the funds pending the real estate transaction.

In sum, the suspicious circumstances that may have justified a presumption of knowing misappropriation in Krasnoff do not exist in this case.

Indeed, all of the cases cited by the OAE may be distinguished by factors not present in this case. In In re Herr, 22 N.J. 276 (1956), the attorney represented Bertha Breckwoldt, an unsophisticated woman who had inherited substantial funds upon the death of her brother, a previous client of the attorney. Seven years later, when Breckwoldt was 72 years old, Herr arranged for Breckwoldt to sign a living trust, naming him as sole trustee, and granting him broad powers to manage the trust. Id. at 279-280.

Three years after Breckwoldt executed the trust, she signed a will that Herr drafted, designating him sole executor and trustee, granting him broad administrative powers, and naming

him as residual beneficiary. Id. at 281. After Breckwoldt died, a relative contested her will on grounds of undue influence and testamentary capacity. Id. at 282. Herr's law partner testified at the will proceeding that, two years before she signed the trust, Breckwoldt's mental state had deteriorated dramatically. Id. at 283. Herr had rejected his partner's suggestion that Breckwoldt was incompetent and that she should have a guardian appointed. Id. at 283-284.

In assessing the attorney-client relationship, Justice William J. Brennan, Jr., writing for the Court, observed:

> There existed an unusually close relationship of attorney and client between respondent and Miss Breckwoldt and she trusted him implicitly. . . . It is this unquestioning confidence and trust, without regard to Miss Breckwoldt's age or capacity, which heightened the obligation of the respondent for punctilious adherence to the high standards which measure an attorney's obligations to his clients.
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> [Id. at 285-286.]

Although the trust generated income in excess of $541,000, and although Herr claimed to have disbursed almost $300,000 to Breckwoldt or on her behalf, Breckwoldt neither possessed those funds upon her death nor enjoyed a lifestyle demonstrating her expenditure of those funds. Id. at 293-295. In addition, Herr borrowed funds from Breckwoldt, which he did not repay. He was unable to produce Breckwoldt's bank statements, canceled checks,

or any books or journals that, as trustee, he was required to maintain. Id. at 288-289;290.

The Court concluded:

> A confidential relationship such as existed here between the respondent and Miss Breckwoldt, plus the existence of suspicious circumstances constituting a strong *prima facie* case of misconduct, is enough to cast the burden on to the respondent to show by impeccably clear and convincing proof his freedom from fraudulent and unduly influential conduct. *In re Blake's Will*, 21 *N.J.* 50 (1956); *In re Rittenhouse's Will*, 19 *N.J.* 376 (1955). He has not come close to carrying that burden.
>
> [Id. at 299.]

The Court placed the burden of proving the absence of fraud and undue influence on Herr because of the presence of highly suspicious circumstances suggesting that he exerted undue influence over his client and abused the trust and confidence that she had placed in him. Indeed, the cases that the Court cited are will contests in which a presumption of undue influence arises under certain circumstances, such as a relationship of control by a beneficiary over a testator, coupled with an unnatural and unjust disposition of property. In re Blake's Will, supra, 21 N.J. at 55-56; In re Rittenhouse's Will, supra, 19 N.J. at 378-379.

The Court listed those circumstances:

> Here, the respondent's reckless treatment of the funds committed to his care, his self-dealing, his failures to pay back the large sums he borrowed, the highly suspicious manner in which he permitted payments to be made to Miss Breckwoldt, the disappearance of her bank account records committed to his care, and his lack of candidness compel the conclusion that in the several particulars discussed he abused and took advantage of, for his personal profit and gain, the trust and confidence reposed in him by Miss Breckwoldt.
>
> [Herr, supra, 22 N.J. at 299,300.]

The above factors are not present in this case. There is, thus, no basis for imposing on Brantley a presumption of knowing misappropriation.

The OAE next contends that a permissive inference applies, relying on a District of Columbia case, In re Thompson, 579 A.2d 218 (D.C.App.1990). In that case, the attorney was the conservator for his client, an incompetent. Id. at 219. He withdrew $5,000 from his client's bank account, without the client's authorization. Id. Thompson claimed that, although he had planned to invest the funds in a money market account for his client, he became dissatisfied with the available interest rate and decided to wait until interest rates became more favorable. Id. The attorney claimed that he put the cash in his office safe, presumably until interest rates increased. Id. Without ever investing the funds, he later returned them to the

client's bank account in two installments, the second one about seventeen months after he had withdrawn the funds. Id. at 219-220.

Although the District of Columbia Board on Professional Responsibility applied a rebuttable presumption that shifts the burden of persuasion to the attorney, the District of Columbia Court of Appeals rejected that concept. Id. at 221. The court ruled, instead, that the attorney's explanation, or lack of explanation, may be considered in determining whether the burden of proof by clear and convincing evidence has been satisfied. Id. The court held that Thompson's explanation was "implausible on its face" because leaving his client's funds in his safe for seventeen months was not to his client's advantage. Id. at 223.

Unlike Thompson, Brantley was not a conservator for an incompetent. Peralta was a business owner who previously had bought property. Furthermore, unlike Thompson, who removed funds from a bank and illogically claimed to keep them in cash in a safe while hoping for interest rates to rise, Brantley received cash from Peralta, who admitted that he gave Brantley funds in the form of cash and who, according to Peay, indicated his preference for cash transactions. Thus, in this case, we do not have a vulnerable client whose trust was abused.

Moreover, even if the holding in Thompson applied here, the import would be that we should consider Brantley's explanation, or lack thereof, in determining whether the OAE has submitted clear and convincing evidence of knowing misappropriation. We consider attorneys' defenses as a matter of course. In this case, even if we were to reject Brantley's representation that he kept the Peralta funds intact in his safe, there is no evidence connecting the business account cash deposits to the Peralta funds.

The New Jersey cases that the OAE cites are also not on point. The OAE quoted the following from In re Avis, 9 N.J. 27 (1952): "[t]he court has heretofore made it plain that it will not accept the easy alibi of 'money in the safe.'" Id. at 30. Because the quotation appears in the dissent, its precedential value is limited. In Avis, the attorney received a $500 settlement for a client, deposited it in his attorney account, and immediately depleted the proceeds. Id. at 28. At the hearing, Avis conceded that his own explanation for failing to disburse the funds to his client was not reasonable. Id. at 29-30. Moreover, he offered as additional defenses (1) the maintenance of a joint account with his wife that had a balance of at least $2,000, but that account turned out to be in his wife's name only; (2) the maintenance of at least $500 of his

own money in that account, although he offered no documentation to support that claim; and (3) the maintenance of at least $500 in cash in his safe. Id. at 30.

Here, Brantley's explanation that Peralta instructed him to keep the funds in his safe in cash has been consistent from before the August 21, 1996 demand audit (twelve years ago) to date. Moreover, the Court in Avis suspended the attorney for three months.

The OAE also relied on In re Malanga, 45 N.J. 580 (1965), In re Lanza, 41 N.J. 330 (1964), In re Conroy, 56 N.J. 279 (1970), In re Perez, 104 N.J. 316 (1986), In re Freimark, 152 N.J. 45 (1997), In re Mysak, 162 N.J. 181 (1999), In re Mezzacca, 120 N.J. 162 (1990), and In re Stern, 92 N.J. 611 (1983). In those cases, the attorney was required to disburse the client's funds and was not authorized to hold them. In addition, in those cases, the attorney had no valid reason to hold the client's funds as cash. Those facts are absent in this case. Here, it is undisputed that Peralta instructed Brantley to retain the deposits until the real estate transaction could proceed. It is undisputed that the seller, Ginsberg, would not complete the sale until the capital gains tax legislation was passed, which did not occur until August 1997, almost three

years after Peralta began to deposit funds with Brantley. It is undisputed that Peralta gave cash to Brantley.

The disputed issue is whether Peralta instructed Brantley to retain his funds in the form of cash, or to deposit them in his trust account. Although Peralta insisted that Brantley had agreed to deposit the funds in his trust account, his credibility is suspect. For example, he insisted that he had reviewed the contract with King in March, when, by all accounts, the contract had not been sent to King until July. He claimed that, when he gave a statement to Tulloch in September 1996, he had learned only "recently" that King was an attorney. Yet, he testified that he discovered, in June 1995, that King was a lawyer when he received a copy of a letter that she had sent to Fast. He also testified, inconsistently, that Ginsberg told him that King was a lawyer, but also testified that it was Ginsberg's attorney who had given him that information. Significantly, after Tulloch had interviewed Peralta, he prepared a memorandum indicating that King took over his representation from Brantley after his suspension. Yet, upon reviewing the memorandum, Peralta deleted that information and replaced it with the statement that King had reviewed the contract with him.

Colon dramatically changed his testimony, such that neither version is reliable. Peay, a neutral witness, testified that he assumed that Peralta would have wanted his funds returned from Brantley as cash because Peralta had indicated that he kept as much of his funds as possible in cash. Peay also testified that Brantley never suggested that Peralta bring him funds in cash and that Brantley never mentioned having an office safe.

We find that neither the mandatory presumption nor the permissive inference has any application in this case. Although it is a risky and unethical practice to hold client funds in cash, instead of in an attorney trust account, as the rules require, we cannot draw the inference, under these circumstances, that the Peralta money was not held intact in Brantley's office safe.

We conclude, thus, that the proofs do not amount to clear and convincing evidence that Brantley knowingly misappropriated Peralta's funds. They do establish, however, that he failed to safeguard those funds. Even if Peralta had authorized Brantley to retain the cash in his safe, Brantley was required to deposit the funds in his trust account.

By placing Peralta's funds in his office safe, instead of in his trust account, Brantley failed to safeguard client funds. He violated RPC 1.15(a), which provides that client funds "shall

be kept in a separate account maintained in a financial institution in New Jersey." He also violated RPC 1.15(d), which requires attorneys to comply with the recordkeeping rule, R. 1:21-6. In turn, R. 1:21-6 requires a lawyer to maintain a trust account for the deposit of funds entrusted to the lawyer's care. We, therefore, find that Brantley violated RPC 1.15(a) and (d).

Parenthetically, we strongly encourage attorneys not to hold funds in cash. Apart from the court rules, common sense dictates that a lawyer keep client's funds in a trust account, not only to safeguard them for the client, but also for the attorney's own protection against claims of misuse of the funds.

The complaint also recited that, between April and October 1995, Peralta was unable to contact Brantley. The OAE's brief, however, relies solely on Brantley's failure to notify Peralta of his suspension, in support of the RPC 1.4(b) charge. Apparently, the OAE accepts the fact that Brantley could not have communicated with Peralta after his May 1, 1995 suspension.

The failure to notify a client of a suspension usually results in a charge of a violation of RPC 8.1(b) (failure to respond to a lawful demand for information from a disciplinary authority) and RPC 8.4(d) (conduct prejudicial to the administration of justice). These charges are based on the attorney's failure to comply with R. 1:20-20(b)(10), which

requires attorneys to notify their clients, in writing, of their suspension.

Brantley testified that, in April 1995, he orally notified Peralta of his upcoming suspension, that Peralta asked whether King would represent him, that King agreed to assume Peralta's representation, that Peralta knew that King had taken over the matter, and that, by the time his suspension became effective, King was Peralta's attorney. Brantley, thus, argued that he was not required to notify Peralta in writing of his suspension, because Peralta was no longer his client at the time of the suspension.

Given the undisputed fact that King assumed Peralta's representation in April 1995, the record does not contain clear and convincing evidence that Brantley failed to notify Peralta of his suspension. We, therefore, dismiss the RPC 1.4(b) charge.

We also dismiss the charge that Brantley failed to cooperate with disciplinary authorities. The special master granted the OAE's motion to amend the complaint to add this charge. The amendment was based on dissatisfaction with Brantley's reply to the OAE's request for more information about the source of the cash that he deposited in his business account. Brantley's reply that he had obtained the money from his own personal funds was not accepted by the OAE. Ashley, who

represented Brantley at that time, informed the OAE that, because Brantley had provided as much information as he could, Brantley had complied with the OAE's request. Under these circumstances, we do not find that Brantley failed to respond to a lawful demand for information from a disciplinary authority. For this reason, we dismiss the RPC 8.1(a) charge.

The OAE argued, in its brief, that Brantley violated RPC 3.4(a) and (d) by obstructing the OAE's access to evidence when he destroyed his personal safe, and by failing to reply to the OAE's discovery demand for information about that safe. The complaint did not charge respondent with a violation of those rules. R. 1:20-4(b) requires ethics complaints to specify the particular RPC alleged to have been violated. Therefore, we are precluded from finding that Brantley violated RPC 3.4(a) and (d).

In sum, the only violations established against Brantley by clear and convincing evidence are failure to safeguard client funds and failure to comply with the recordkeeping rule.

Usually, an admonition is imposed for recordkeeping violations. See, e.g., In the Matter of William P. Deni, Sr., DRB 07-337 (January 23, 2008) (attorney routinely deposited earned legal fees in his trust account, thereby commingling in excess of one million dollars of personal funds; the attorney also committed other recordkeeping violations); In the Matter of

Chong S. Kim, DRB 06-341 (March 27, 2007) (attorney used his attorney trust account for approximately $50,000 of personal or business-related transactions, failed to maintain an attorney business account, and failed to comply with other recordkeeping requirements, violating RPC 1.15(a) and R. 1:21-6(a)); and In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (attorney failed to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards).

Failure to safeguard funds has resulted in an admonition. See, e.g., In the Matter of Patrick DiMartini, DRB 04-440 (February 22, 2005) (attorney failed to promptly deposit in his trust account a settlement check for clients, resulting in its theft; the attorney had a prior three-month suspension for unrelated misconduct; mitigating factors included the attorney's assistance to the clients to obtain reimbursement and his prior bar membership of forty-six years, marred only by the three-month suspension, which had been imposed after a thirty-year unblemished career).

Here, we consider the passage of time as a substantial mitigating factor. Through no fault of Brantley, the proceedings in this case were significantly prolonged. The relevant events took place between 1994 and 1995, thirteen to fourteen years

ago. We are mindful, however, that Brantley's ethics history at that time included three private reprimands, imposed in 1982 and 1988, and a one-year suspension, imposed in 1991. At oral argument before us, Brantley acknowledged his substantial ethics history and his previous failure to comply with the rules of the profession.

Although Brantley's conduct in this matter would ordinarily result in the imposition of no more than a reprimand, perhaps even an admonition, because of his ethics history, we conclude that more serious discipline is warranted. Seven members determined that a censure is the appropriate level of discipline for his failure to safeguard funds and failure to comply with recordkeeping requirements. Member Lolla voted to recommend disbarment, based on Brantley's extensive ethics history. In Member Lolla's view, disbarment is required to protect the public from Brantley's recidivist nature. Member Baugh recused herself.

As for King, the only infraction with which she was charged was the failure to safeguard Peralta's funds. Although the complaint also charged King with gross neglect and lack of diligence, the OAE made it clear that all of the allegations relate to her failure to safeguard funds.

There is no question that King did not safeguard Peralta's funds. Although she had prepared the $8,000 receipt on January 24, 1995, she claimed that she never saw the money at that time. She conceded that, when she assumed Peralta's representation, she did not review the file, which contained the receipts showing the deposits that Peralta had made.

Moreover, when King was asked, at the demand audit, whether she knew, at the time that she prepared the receipt, in January 1995, that Peralta had given cash payments to Brantley, she replied that she had been aware of those payments. Although King testified that she had answered the question based on her current knowledge, we were not persuaded by her testimony. Thus, when King took over the file from Brantley, a suspended attorney, she either knew or should have known that Peralta had entrusted Brantley with his money. King should have taken steps to secure her client's funds.

Furthermore, it is undisputed that, in August 1996, respondents brought cash to the random audit, alleging that those funds represented the same currency that Peralta had given to Brantley. At that time, King believed that she still represented Peralta. Yet, she made no effort to take possession of those funds, to deposit them in her trust account, or to determine her client's wishes with regard to the funds. Her

failure to take any action to safeguard Peralta's money, thus, violated RPC 1.15(a).

Because that rule adequately addresses King's misconduct, we dismiss the charged violations of RPC 1.1(a) and RPC 1.3. We do not find that King failed to communicate with a client. In any event, the complaint did not charge a violation of RPC 1.4(b).

As in Brantley's case, we consider, in mitigation, the passage of time. These events occurred in 1994 and 1995. Although King has had many encounters with the disciplinary system, at the time of these events, she had no disciplinary history.

We also consider, however, King's contumacious and insolent conduct at the disciplinary hearings. Unfortunately, this is an area where King has not learned from her prior mistakes. In In the Matters of King and Brantley, DRB 00-330 and 00-331 (August 22, 2001), we noted that King had tried to control the proceedings and that both she and Brantley had set about a "scorched-earth strategy of intimidation, false accusations and intolerable disrespect for the hearing panel and its individual members and attempted to protract the proceedings, when it appeared that things were not going their way" (slip op. at 25).

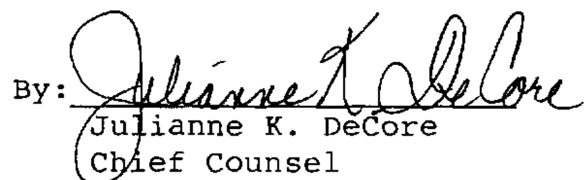
Although Brantley appears to have learned how to conduct himself appropriately at disciplinary hearings, King has not. In the matter now before us, she failed to appear at numerous

hearings, without notice or excuse. Her verbal combat with the special master was contemptuous. She was also rude and disrespectful to witnesses and to the OAE presenter. We, thus, conclude that her inappropriate conduct during the disciplinary proceedings requires enhanced discipline.

Based on the foregoing, we determine that King's conduct, aggravated by her reprehensible behavior at the disciplinary hearings, warrants a censure. Member Baugh recused herself.

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

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel