SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-077
District Docket No. XIV-2014-0599E

IN THE MATTER OF	:
MICHAEL A. LUCIANO	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 21, 2016

Decided: August 15, 2016

Jason D. Saunders appeared on behalf of the Office of Attorney Ethics.

Justin P. Walder appeared on behalf of respondent.

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

On January 30, 2014, we recommended to the Court that respondent be disbarred for his knowing misappropriation of $100,000 belonging to his elderly client, Doris A. Cox. In the Matter of Michael A. Luciano, DRB 13-177 (January 30, 2014) (Luciano I). In so doing, we rejected respondent's defense that the client had gifted the monies to him. Ibid. The Court accepted our recommendation, and, on May 12, 2014, disbarred respondent. In re Luciano, 217 N.J. 306 (2014).

Respondent filed a motion for reconsideration, asserting that, at all stages below, he had proceeded in the defense of this matter on the mistaken belief that he bore no burden in proving that the $100,000 was a gift. Rather, he understood, incorrectly, that the Office of Attorney Ethics' burden of proving knowing misappropriation, by clear and convincing evidence, included the burden of disproving that Cox had gifted the monies to respondent.

On October 30, 2014, the Court granted the motion, in part, and remanded the matter to the special ethics master

> for a hearing at which respondent may present additional proofs in support of his defense that the client's money at issue was a gift, including evidence as it relates to respondent's credibility, which proofs shall be subject to cross-examination by and counter-proofs from the Office of Attorney Ethics.
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> [In re Luciano, M-1204 September Term 2013, D-63-13, October 30, 2014.]

Further, the special master was directed to

> issue a supplemental report of findings of fact and conclusions of law as to whether respondent's additional proofs warrant reconsideration of the prior finding of knowing misappropriation, and, if so, to make recommendations for appropriate discipline or other action.
>
> [Ibid.]

Following a two-day hearing, on remand, the special ethics master, Charles F. Kenny, Esq., issued a supplemental decision,

finding that, although the evidence offered in support of respondent's claim that Cox had gifted the $100,000 to him was "not overwhelming," it was "just enough to push the scales to defeat the OAE's burden of proof below the required clear and convincing evidence standard." Consequently, the special master recommended respondent's reinstatement to the practice of law.

For the reasons set forth below, we find that, in the aggregate, the record lacks clear and convincing evidence that respondent knowingly misappropriated $100,000 in client funds. Accordingly, we recommend that the formal ethics complaint be dismissed and that respondent be reinstated to the practice of law.

Before reciting the facts established at the remand hearing, we take the opportunity to summarize the pertinent facts underlying Luciano I, which are taken from our decision in that case. Doris A. Cox died on January 11, 2008, at the age of ninety-one, in a nursing home where she had been confined, following one of several hospitalizations in 2007. Luciano I, supra, at 2-3. Cox, who had no family, was close friends with Barbara Von Rhein, a client of respondent. Ibid.

About three years before Cox's death, Von Rhein referred her to respondent. Ibid. On December 19, 2005, Cox and respondent entered into an agreement, whereby he would provide

legal and personal services to her at the hourly rate of $300. Id. at 4-5. On that same date, Cox executed a general power of attorney and a "power of attorney for decisions regarding health care," each in favor of respondent. Id. at 5. Von Rhein and respondent testified that, from the time these documents were executed up until a month before Cox's death, her mental capacity was "fine." Id. at 6-7.

On November 13, 2006, Cox executed a last will and testament, prepared by respondent. Id. at 6. The will named respondent executor of her estate and made a number of specific bequests, including fifteen percent of her residuary estate to Von Rhein. Ibid. Respondent was not a beneficiary under Cox's will. Ibid. Cox's gross estate was valued at $843,733. Id. at 3.

In the days preceding Cox's death, respondent deposited into the trust account of Glazer and Luciano (the firm) $100,000 in funds belonging to Cox. The Office of Attorney Ethics (OAE) alleged that respondent's subsequent use of those monies amounted to the knowing misappropriation of client funds. Because Cox was deceased, the OAE's knowing misappropriation case proceeded on circumstantial evidence.

Respondent claimed that the monies were a gift to him from Cox. He testified, in Luciano I, that, on the evening of July 30, 2007, while Cox was recovering at Inglemoor Nursing and

Rehabilitation Center (Inglemoor), he presented her with a $25,000 bill for services rendered from November 6, 2006 to June 26, 2007. Id. at 15.[1] According to respondent, Cox insisted on paying him $30,000, rather than the billed amount, which he accepted. Ibid.

Respondent claimed that Cox had gifted him $100,000 at the July 30, 2007 meeting. On direct examination, he explained what transpired:

> A. She said Mike, I want to make a gift to you, and I said that's very nice, Miss Cox, but -- in fact, I think she even may have said the $100,000 in the first, the first time that she brought it up, and I said that's very nice, Miss Cox, but you may need this money to take care of you, and she -- actually, I said that's very kind, because she said back to me, no, you've been very kind.
>
> Q. And your first response was that she would -- that she may need the money?
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> A. That's right.
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> Q. All right. And did she have any response to that?
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> A. Yes, she did.

[1] Generally, the bill reflects charges for legal services, implementing the power of attorney with various financial institutions, discussions with Cox and her doctors about the state of her health and the appropriate care required by her condition, and fielding many calls from Von Rhein providing information about Cox's condition and expressing her concerns about Cox.

Q. And what was that?

A. She said you'll know if I don't need it and that she wanted me to have that.

Q. All right. And other than that conversation that you had with her was it ever discussed at any other time, if you can recall?

A. The gift was not. The gift to me was not discussed at any other time.

[2TI58-17 to 2TI59-14.[2]]

Respondent did not take the $100,000 at that time. Instead, he determined that he would take the gift in lieu of payment for future legal fees. Id. at 17. The July 2007 bill was paid from other funds. Id. at 15. On remand, respondent's testimony was consistent with the above facts, elicited from him in Luciano I.

OAE Senior Random Auditor Mimi Lakind testified, in Luciano I, that, when she conducted a random audit of the firm's attorney records, on August 25, 2009, she reviewed a handwritten trust account ledger card titled "DORIS COX ESTATE/GIFTS," which reflected two initial trust account deposits, totaling $100,000. Id. at 7. Specifically, on January 3, 2008, eight days before Cox died, respondent had issued a $25,000 check payable to himself, drawn against Cox's personal bank account with Bank of

[2] "2TI" refers to the transcript of the hearing before the special master on October 12, 2012, in Luciano I.

America. Ibid. A note on the memo line of the check reads "ATTORNEY FEES -- ON A/C." Ibid. Respondent signed the check, on behalf of Cox, using his power of attorney. Ibid. The check was deposited into the firm's attorney trust account on January 7, 2008, four days prior to Cox's death. Id. at 7-8.

On January 9, 2008, two days before Cox's death, Llewellyn-Edison Savings Bank issued a $75,000 check, payable to Doris Cox. Id. at 8. The check contains the notation "PAR W/D" (presumably, "partial withdrawal"). Ibid. Respondent endorsed the check, and deposited it into the firm's trust account on that same date. Ibid.

Respondent did not disburse the $100,000 until October 2008, nine months later. He used a portion of the monies to purchase savings bonds for his three children, among other things. Id. at 9.

In Luciano I, we found that respondent had failed to satisfy the burden of going forward regarding his claim that the funds were a gift, and, therefore, the circumstantial evidence clearly and convincingly established that he knowingly misappropriated the $100,000. Id. at 30. We offered the following reasons in support of our determination:

> (1) Respondent failed to obtain a writing substantiating the gift;

(2) He failed to report the $100,000 as a gift on the Cox inheritance tax return, despite a direct question from the accountant who had prepared the return;

(3) He failed to report the $100,000 as income;

(4) There was no reason for the funds to be transferred to the trust account because

(a) if they were a gift, they should have been transferred to respondent's personal account; or,

(b) if the funds were to be preserved in the event that Cox required the monies for future care, they could have simply remained in her account; or,

(c) if fees, the funds should have been deposited in the business account.

[Id. at 30-32.]

Moreover, in our view, the issue of whether the "gift" had been taken in lieu of payment for future fees, which respondent did not assert until he filed his answer to the formal ethics complaint, presented several problems. In short, the claim perplexed us, for the following reasons:

(1) As of July 30, 2007, respondent had no idea how long Cox would live. Thus, he had no idea whether she would have survived long enough for him to even bill $100,000 in fees.

(2) He also had no idea whether she would have survived long enough for him to bill more than $100,000 in fees, thereby placing himself at risk of losing money.

(3) If as respondent claims, he had taken the monies in lieu of fees, then he kept more than he was entitled to receive, as his reconstructed time amounted to $88,000.

[Id. at 32.]

We concluded, in Luciano I:

Given respondent's failure to maintain the funds in a manner that was consistent with his stories, the only possible explanation for his transfer of the funds to the trust account was so that they could be hidden from the government and Cox's beneficiaries. Indeed, respondent himself acknowledged that, if he had not removed the $100,000 from Cox's account, "it would have been part of the estate."

Further, as the special master correctly observed, it is inconceivable that an attorney in such a position of trust, like respondent, would not have memorialized a substantial gift of $100,000 to avoid any potential claims of impropriety. He also could have had another attorney redo Cox's will to add a $100,000 bequest to him. That he did neither adds strength to the conclusion that there was no gift and that he availed himself of the $100,000 left in Cox's account, which he knew she no longer needed. Who would question respondent's spending of any of the funds in Cox's account or, in fact, who would question how much there was in the account at any given time? The circumstantial evidence that respondent took the $100,000 for himself is simply monumental, and he has failed to persuade us — and the special master — otherwise.

[Id. at 32-33.]

The remand hearing took place on June 9 and 10, 2015, before the special master who had presided in Luciano I.

Fourteen witnesses, including respondent, testified. Respondent's law partner, David B. Glazer, the firm's former secretary, Germaine Kirspel, and respondent's wife and two brothers testified on the issue of whether Cox had gifted the $100,000 to him. Eight others testified on the issue of respondent's character. With the exception of respondent, none of the witnesses had testified at the hearing in Luciano I.

In summary, the evidence offered by respondent on remand was intended to corroborate his claim that Cox had gifted the monies to him and to establish his credibility, by demonstrating Cox's propensity for generosity, as well as respondent's good character and the fond regard he and Cox held for one another.

Respondent's Relationship With Cox

Respondent and Glazer had practiced law together from late 1983 or early 1984 until respondent's disbarment in 2014. Their secretary, Kirspel, had worked for the firm for more than twenty years, but left its employ following respondent's disbarment because there was not enough work to justify a full-time position.

Both Glazer and Kirspel knew Cox and Von Rhein, who were firm clients. Kirspel's familiarity with both clients extended beyond the firm, however. Cox was her fifth-grade teacher, and, on

occasion, Kirspel saw Von Rhein in a grocery store where Kirspel held a second job.

On November 19, 2003, Glazer and Kirspel witnessed Cox's signature to her living will, which respondent had prepared. In the years following that event, whenever Cox was in the office, Glazer and Kirspel engaged in conversations with her on a variety of topics, including her love of animals. Glazer described Cox as "very engaging" and "very interesting."

Glazer testified that Cox's visits to the office "increased in the later years before her death in 2008." By 2006, it became obvious to him that respondent was becoming "much more involved" with her day-to-day needs. When Cox suffered from "some serious health issues" in 2007, respondent took on more responsibility. For example, at some point, respondent had arranged for a caretaker for Cox, and even wound up transporting that individual to and from Cox's home every day.

According to Glazer, respondent was tremendously devoted to Cox. In his view, Cox "certainly" knew that respondent would "be there" for her.

Kirspel testified that respondent visited Cox "[a]ll the time," both at her residence and at the nursing home and hospital when she was confined to those facilities. If Cox called and needed something, he "would get up and go."

According to Kirspel, Cox "loved" respondent, whom Cox believed to be "an honest guy and somebody who does what the person . . . wants to do." Cox had once declared that respondent was "the best thing" that von Rhein had ever done for her. Von Rhein also "adored" respondent.

Respondent's wife, Gina Luciano, also was aware of the things that respondent had done for Cox, based on conversations with her husband.[3] She recalled that he did Cox's grocery shopping and took her to medical appointments. She also recalled that respondent had received "several calls" about Cox in the middle of the night from doctors and hospitals.

Respondent's testimony reflected the closeness of his relationship with Cox, whom he viewed as a friend. For example, prior to Cox's discharge from Inglemoor, respondent met with an Inglemoor representative at Cox's home, where he was told what to do to prepare the house for her return. He was the person who carried out those tasks. He also signed a personal guaranty for the company that he had hired to provide home care for Cox at that time.

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[3] Mrs. Luciano testified that she knew of Cox, but that she had never met her. The Lucianos' daughters, Jenna and Mary, had met Cox, however, in the summer of 2007, when they accompanied respondent to a visit with her.

In October 2007, Cox signed a form authorizing a different company to provide in-home services to her. On that form, she named respondent as the person with whom her care could be discussed, identifying him as both a lawyer and a friend. Respondent testified that he had no involvement with the preparation of the form, and he was not involved in any discussions relating to it.

Cox was hospitalized sometime after Christmas 2007. On January 11, 2008, when Cox had taken a turn for the worse, it was respondent who was notified and who went to her bedside. It was respondent who called "certain people," including Von Rhein, to inform them of Cox's death, and it was respondent who made the funeral and burial arrangements. Luciano I, supra, at 25.

Respondent's Relationship With Other Clients

According to Glazer, respondent's relationship with Cox was not unique, as there were "other cases" involving elderly and infirm clients to whom respondent had shown compassion and kindness. For example, respondent became very involved with Mr. and Mrs. Bley, who had received "a sizeable recovery" in a personal injury action instituted by the firm on behalf of Mr. Bley. Respondent remained involved with them after the case had concluded. When Mrs. Bley became ill with cancer, "three or four years ago," respondent drove her to Johns Hopkins Hospital in

Baltimore for an appointment. Mrs. Bley confirmed Glazer's testimony on this point.

According to Kirspel, respondent had "[q]uite a few" older clients whom he also helped by doing grocery shopping and taking them to doctor appointments. Further, when Kirspel first started working at the firm, she learned that, once a week, respondent left work early and went to St. Barnabas Hospital, where he hosted a wine and cheese event for people in the cancer wing. Kirspel witnessed many other acts of compassion on his part, regardless of whether the clients were able to pay their bills.

Additional evidence proffered in respect of respondent's generosity is set forth, infra, at 29-39.

Cox's Gift To Respondent

Respondent's testimony about the gift, elicited in Luciano I, was summarized earlier in this decision. Absent in Luciano I, however, was any corroborating evidence of the gift. Respondent attempted to remedy that deficiency on remand through the testimony of several witnesses.

After Cox gifted the $100,000 to respondent at their July 30, 2007 meeting, respondent discussed the gift with Glazer, Kirspel, and his wife. He also informed his brothers about the gift at a later date.

Glazer testified that, in the summer of 2007, respondent told him that "Mrs. Cox is giving me a gift of $100,000 and she wants me to devote at least a portion of it for my children's education." According to Glazer, although respondent was happy about the gift, he was concerned because Cox wanted to remain at home, and he wanted her to have enough money to be able to do so.

Glazer estimated that his conversation with respondent took no longer than a minute. Glazer had no issue with the gift, such as whether a conflict of interest was involved or whether the gift should be documented, because he had "complete faith in the integrity" of respondent, whom he described as "an honest person."

Glazer stated that no one else was present during the conversation, although "Ms. Rothfeld" may have been in the office.[4]

Kirspel testified that, in the summer of 2007, respondent told her that Cox wanted to gift him "like about $100,000" and that she wanted a portion of the funds to go to his children's education. Respondent never told her that the gift was in lieu of the payment of fees. The conversation was brief and respondent was "flattered" that "a stranger wanted to give him this money." Respondent and Kirspel had no further conversation about the subject of the gift.

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[4] "Ms. Rothfeld," who is now deceased, was an attorney who shared office space with the firm.

Mrs. Luciano, who had been married to respondent for twenty-three years, testified that, sometime in the summer of 2007, respondent told her that Cox "was going to be giving him a gift." He also said that "a small amount" would go to the children, and the rest "was going to our home equity loan."

Respondent's older brother, Leonard Luciano, a contractor who had repaired a door lock at the Cox house, testified that, when respondent paid him for the repair, he mentioned to Leonard that Cox "wanted to give him a gift" and that it was for his children's education. Respondent and Leonard did not discuss the amount of the gift or why Cox had offered it to him. When respondent told Leonard about the gift, he replied that respondent should adopt him so that he could "get some, too." Leonard did not know, however, whether respondent was going to accept the gift. Respondent's testimony was consistent with Leonard's.

Respondent's younger brother, realtor Thomas Luciano, testified that, after Cox had died, respondent listed her home with him for sale. At respondent's request, Thomas agreed to reduce the real estate commission from six to five percent. During a walk-through of the house, respondent talked about how nice Cox was. On their way back to the office, respondent told Thomas about the gift. Thomas recalled only that the gift was a "large amount" and that "it was supposed to be for education." Thomas knew nothing of

the details, such as the amount or the timing of its offer and acceptance. He asked no questions. Respondent expressly remembered telling Thomas that the money he was receiving was a gift and that it was from Cox.

In addition to respondent's conversations with others, he told Lakind about the gift at the August 2009 random audit. As previously noted, the firm's records included a hand-written ledger titled "DORIS COX ESTATE/GIFTS." Moreover, in an October 4, 2009 memorandum, Lakind wrote that respondent had claimed to her that Cox had promised him an inter vivos gift of $100,000 because he "took care" of her.

Respondent testified that Lakind never questioned the gift, during the random audit, but, rather, was merely concerned that funds had been commingled.[5] This claim also is supported by Lakind's October 4, 2009 memorandum in which she referred to the $100,000 as "commingled funds."

There was other evidence that the OAE had been aware of respondent's claim that the funds were a gift, prior to the filing of the ethics complaint. An OAE memorandum, dated March 15, 2010, asserts that "[r]espondent stated that he advised his law partner of Cox's gift." This memorandum was not included in the record in

[5] Respondent was not charged with commingling.

Luciano I. As Glazer testified, and the OAE memorandum confirms, the OAE never interviewed him.

In Lakind's August 25, 2009 post-audit letter to respondent, in respect of the Cox estate, she requested a "[l]edger card, fully descriptive, as to source and recipient of all disbursements for transactions in the trust account, comporting with the Outline of the Rule booklet." Respondent recalled that Lakind had asked him to "redo the ledger and to add information and delete information from the [handwritten] ledger." According to respondent, Lakind made the request because some of the entries were illegible and, further, respondent had not been "doing the ledgers properly." Thus, he prepared a ledger that was more descriptive and provided it to Lakind with a letter dated October 12, 2009.

In his October 2009 letter, respondent gave the following account of the gift:

> The amount of time that I spent devoted to assisting Ms. Cox and the types of services increased dramatically during the last couple of years, and in expressing her appreciation, and affection she told me that she wanted to make a gift to me of $100,000.00. She conditioned the gift on the circumstance that she would no longer need the funds for her own continuing care and living expenses, and instructed me to take the funds at the appropriate time.
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> These funds were deposited into our Trust Account when Ms. Cox was hospitalized and the doctors were not encouraging about her ability to rebound. I remained hopeful that she would

> rally, and I had made arrangements for her to return home where she had a full-time caregiver residing with her, as well as with the added assistance of Hospice. The funds were deposited to our firm's trust account as a precaution to observe the client's instructions and concern that the funds be available for her care and expenses if needed. When Ms. Cox passed, I determined to leave the funds in the trust account because I felt it more appropriate and more in keeping with her intent that the gift funds be distributed when her Estate was distributed. Ms. Cox had expressed to me that I should use some of the funds to purchase savings bonds for my three children for their future education. Once the Estate had been substantially completed, I distributed the gift funds partially for the purchase of the bonds as she had suggested, with the remainder to myself. The saving bond purchase was later rejected as the amount exceeded the annual purchase limit, and these funds were then re-issued to purchase the bonds in successive calendar years. There was certainly no mal-intent in placing or keeping these funds in the Trust Account.
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> [Ex.OAE1.]

When respondent was asked why he had not stated in the letter that the $100,000 represented the payment of fees, he replied: "It wasn't payment of fees. It was a gift from Ms. Cox." When pressed about the absence of that claim in the letter, he retorted: "No, I don't mention anything about the fact that I had worked for seven months for her and not charged her any fees." Nevertheless, he had accepted the gift with no intention of billing Cox for future attorney fees. He explained:

> I can state unequivocally that Ms. Cox made a gift to me of $100,000, that I accepted her gift, and that in accepting her gift, I determined that I wasn't going to charge her any additional legal fees. I can unequivocally state that to you, yes.
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> [2T149-25 to 2T150-4.]

Although respondent performed a considerable amount of legal services for Cox between July 30, 2007, when she gifted the money to him, and January 11, 2008, when she died, he did not bill her for any of those services.

On the issue of respondent's failure to document the gift, respondent testified that he "didn't think that [he] had to." He explained:

> I can't explain to you why it was so other than what I was just trying to say, which was that I didn't think anybody would ever question it; I really didn't. I thought I had the power of attorney. I thought I had the retainer agreement. I thought that authorized me in writing to put into effect what her directions and instructions were to me, and those were her instructions to me, that she wanted me to have it.
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> [2T141-2 to 9.[6]]

Respondent testified that, when he transferred the monies to the trust account, he was effectuating Cox's intent, which

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[6] "2T" refers to the transcript of the June 10, 2015 hearing before the special master.

was for him to have the gift, but also for him to have the funds available for her use "if we needed it." Respondent viewed the gift "really as part of her estate almost in a way," even though that was not the case. When the estate "was just about done," he decided to distribute the monies. He did so by issuing trust account checks and creating a trust account ledger. He made notations on the checks and corresponding check stubs and entered the data on the ledger.

The handwritten entries on the ledger were made contemporaneously with the issuance of the trust account checks. For example, two trust account checks (nos. 10364 and 10365), each in the amount of $3,250, were issued on October 17, 2008, which was nine months after Cox's death and nearly a year before the random audit. The memo line on the first check contains the notation "COX – GIFT BOND – JENNA LUCIANO," and on the second check, "COX – GIFT BONDS – MARY LUCIANO." A third trust account check (10368), in the amount of $1,000, also dated October 17, 2008, contains the notation "COX GIFT – MARY LUCIANO," followed by an account number.[7]

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[7] On February 4, 2009, a $4,500 trust account check was issued to Bank of America, and contains the notation "PURCHASE OF GIFT BONDS COX ESTATE." Two more trust account checks were issued on the same date and in the same amount.

Glazer and Kirspel testified that each of these checks was consistent with respondent's claim to them, in the summer of 2007, that Cox had gifted $100,000 to him. Kirspel pointed out that the notations on the checks were not placed after the fact because the notations were already present when the canceled checks were returned to the firm with the corresponding bank account statements.

Although there was no doubt in Glazer's mind that Cox had intended for a portion of the gift to go to respondent's children's education, he acknowledged that he had not prepared the checks, that he had no role in completing trust account records for the checks, and that, "normally," he was not advised of deposits "in or out of the trust account." Glazer knew only that Cox had made the gift and that, after she died, a portion of the funds was allocated to respondent's children.

Glazer rarely used the firm's trust account because the majority of his practice consists of criminal work. Both Glazer and Kirspel testified that respondent handled trust account deposits.

Cox's Generosity to Others

As Cox's last will and testament demonstrates, she was extremely generous. Cox's will named four charitable

institutions and left them each $10,000. She named eight individuals as beneficiaries. Two of them were her next-door neighbors of fifty years, Mr. and Mrs. Pifko. According to respondent, the Pifkos were Cox's family. She gave them fifty percent of her residuary estate, which amounted to more than $250,000. Cox also named the Pifkos' two grandchildren as the beneficiaries of a $75,000 annuity. The grandchildren of the veterinarian where she was employed were named beneficiaries of her pension.

Another example of Cox's generosity lay outside her will. In Kirspel's May 21, 2014 certification submitted to the Court in connection with respondent's motion for reconsideration of the order of disbarment, she relayed a conversation she had with Von Rhein, on May 15, 2014. Kirspel had called Von Rhein to inform her that respondent had been disbarred.

Kirspel testified that Von Rhein was surprised to learn of the disbarment. During the conversation, Von Rhein told Kirspel that Cox had forgiven a $40,000 loan that she had made to Von Rhein "because of how nice she had been to her." Respondent was not aware of this fact until Kirspel told him.

Kirspel asked Von Rhein if she would sign a certification to that effect because, Kirspel thought, it would "help" respondent. Although Von Rhein initially agreed, she called

Kirspel a little later and said "[w]ell, I gotta think about it because nobody knows and I don't want to be paying taxes on it." Ultimately, after Von Rhein had consulted with her lawyer and some changes were made, she signed the certification.

Because Von Rhein did not testify at the remand hearing, the OAE and respondent's counsel agreed to move her certification into evidence. The certification states, in pertinent part:

> 6. I KNOW that what Michael has said about the gift he received from Doris is true. Although no one ever asked me about this before and I did not offer it, I know it because Doris had done the exact same thing to me. When I purchased my shore home in 2004, Doris loaned me the down payment to assist with the purchase. She later one day out of the blue unexpectedly said to me that because I had been so nice to her and done so much for her, it was no longer to be considered a loan, but a gift, and that I need not repay it. That is the kind of woman Doris was.
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> 7. When the man and woman from the Attorney Ethics came to question me, I told them that although I was not previously aware of Michael's gift, I was not in the least surprised that Doris had given Michael the gift. Doris hadn't told me about the gift to Michael, but that is not the least unusual. She was a very private person. She never mentioned to me of [sic] any of the other gifts she made. I only found out about a couple of them later from some of the people themselves.

8. I learned about the outcome in the Supreme Court from Michael's secretary. She is one of the many people bewildered by what an outrageous error has been committed, and overwhelmed with grief by the effect this has had on a man who is nothing but kind and caring, and especially to the elderly. When Germaine told me I informed her about the gift and said I would sign a Statement about my gift from Doris.

9. I am now 80 years old myself. I have lived a long enough time and I have seen a lot. What happened here is wrong.

[Ex.J5.]

Respondent's Questionable Conduct

Respondent was asked to account for a number of discrepancies that we noted in Luciano I. With respect to his failure to document the gift, respondent testified that, "in retrospect," he should have done so, but he "didn't give any consideration" to it. When asked to explain why he had described the $25,000 payment into the trust account as fees, respondent answered:

> I can't answer that either. I -- I think that I was conflicted in terms of it. At that point in time, I had -- I had been rendering a lot of services to Ms. Cox. I hadn't billed her for any of those services. It was not my intention to bill her again for services, but I think obviously the gift, in my mind, was taking the place of

billing for services, so I think that's why I wrote it on there.

[2T141-13 to 20.]

Respondent conceded that he made no mention of taking the gift in lieu of fees in his October 2009 letter to Lakind, but claimed "It wasn't payment of fees. It was a gift from Ms. Cox."

Respondent did not inform the Cox estate beneficiaries of the gift because it was a gift that she had made to him. If she had died before he had taken the funds, he still would have been entitled to them from the estate. Indeed, the beneficiaries benefited from the gift because, if he had billed his time, "there would have been less money in the estate than minus the $100,000 gift." He denied that his reconstructed records, which showed $80,000 in fees, contradicted that claim. According to respondent, the reconstructed records reflected only the legal services that he was able to document.[8] The records did not reflect everything that he had done for Cox. Respondent explained that he did not document all of his services for Cox because she had gifted the monies to him and because he does not bill people for everything he does.

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[8] Respondent reconstructed the records to document the fees incurred between the last date of service identified on the July 2007 bill and Cox's death, as well as for the handling of the estate. Luciano I, supra, at 14.

With respect to Schedule C on the estate tax return, respondent's testimony was contradictory. He acknowledged that he had answered "no" to the question asking whether Cox had transferred property in excess of $500 without full financial consideration in the three years before her death. On the one hand, respondent maintained that the answer was truthful because there was consideration, that is, the unbilled legal services. Thus, the future services represented the consideration. Moreover, he claimed that "[i]t wasn't a taxable event" and asserted that he still was not convinced that it was required to be identified on Schedule C, as "there was an argument for it, for answering it the way I answered it."

On the other hand, respondent conceded that the answer on Schedule C should have been "yes" and that a $15,000 tax should have been paid as part of the inheritance tax return. The $100,000 "absolutely" should have been identified in a tax document. It should have been filed on a gift tax return, but he "just didn't think about" filing one.

When asked why he did not explain to Lakind, in October 2009, that the monies were paid in consideration of future fees, respondent stated: "Maybe my letter should have said more." He continued:

> I don't think that I didn't tell her that in my office. I don't know that for a

> fact. I may have told her that in my office. It certainly would have been true the day she was in my office as well. I may have told her that. If she asked me, I would have told her that, certainly.
>
> [2T161-7 to 12.]

When asked why he took the gift in January 2008, respondent stated:

> To take it, the funds when she no longer needed them, and there was -- she was coming home from the hospital with Hospice care. She might be passing away, and you know, I mean, look, I could have taken the funds and yes, put them into my account. I could have bought the kids' bonds right away, and then if she lived for two years after that with Hospice, we would have needed the money to pay for her care. There's no question in my mind about that.
>
> My wife's grandmother lived on Hospice in West Orange then she went to the shore for the summer on Hospice then she went to Florida for the winter on Hospice. She kept transferring from Hospice to Hospice. She lived over two years on Hospice when they thought that she was passing away.
>
> [2T169-13 to 2T170-2.]

If respondent had left the funds in Cox's account to serve her needs, "it wouldn't have effectuated the gift to me that she said she wanted to make to me." He explained:

> [I]f it had run through the estate, it's not the same as the gift that she was giving me.
>
> Q. Why is it not the same?

A. Because the gift that she gave me was something that she was giving me while she was alive.

[2T170-18 to 23.]

Clearly frustrated, he added: "I think she would have left me her whole freaking estate if I had asked her to leave it to me, but that's not what happened."

After Cox died, respondent viewed the gift "in the same sense as a gift to the friends that she was making as a part of her estate plan." Her gift to him was placed in the trust account while she was alive and disbursed along with payments to the beneficiaries under her will.

Respondent testified that, if Cox had lived another five years or so, in which case the $100,000 would be depleted, he would have begun charging her for legal services. He asserted that this was consistent with her intention that "you'll know when I don't need the money."

Respondent's Character

The evidence of respondent's good character was legion. Glazer testified that he cares a great deal about respondent and that he was proud to have practiced with him for thirty years. According to Glazer, respondent "has an excellent reputation."

Respondent's disbarment did not change his favorable opinion or the opinions of others.

When asked about respondent's reputation, Kirspel testified: "I don't think you're going to find anybody else like him. There's – he's honest and there's no – no way about it."

In addition to the Von Rhein certification, sixty-three character letters were submitted on respondent's behalf by family, friends, neighbors, colleagues, and clients. Without exception, every letter was glowing in its praise of respondent's character. Two letters stand out.

Ginger Curry wrote about respondent's relationship with an elderly client, Martha Bailey, whom he had assisted in obtaining affordable housing and, when the time came, applying for Medicaid and for admission into a nursing home. Bailey did not drive, and respondent often ran errands for her and took her to the grocery store. When Bailey turned ninety, respondent organized a surprise birthday party for her at the nursing home. According to Curry, respondent "was always so dedicated to Martha because he was all she had."

Another author, Patricia B. Silver, a single mother, stated that she and her two teenaged daughters had lived next door to respondent and his family for thirteen years. The daughters'

father was not a part of their lives. Of respondent, Silver wrote, in part:

> During the past 8 years since my divorce Michael has been there for my daughters; serving as a father figure, encouraging them in sports and school work and teaching them about gardening one of many of Michael's passions.
>
> Michael recently accompanied my daughter Aislin to her interview at Morris County Vocational High School where she was accepted into their Health Care Sciences Academy. I was unable to accompany my daughter because of work constraints. When I asked my daughter who she would feel comfortable attending in my absence, it was Michael that she asked for. Michael graciously made the time to attend in my place.
>
> [Ex.RR14BBB.]

Many of the letters also described respondent as a detail-oriented, conscientious, and meticulous lawyer. Several of them described the acts of kindness that he had performed for his clients, such as going to the store and taking them to various appointments.

Of the eight witnesses who testified regarding respondent's character at the remand hearing, seven had authored letters on his behalf. Those who were asked affirmed that the contents of their letters remained truthful and accurate as of the date of their testimony.

Lyndhurst dentist Ozra Modarres testified that she had known respondent since 1996 and that he had represented her and other family members in many real estate transactions. He also assisted her with landlord-tenant issues. Modarres described respondent as "unbelievably honest and straightforward and compassionate." He "goes way out of his way" to call and writes letters without charge. She could not believe that he had been disbarred.

Susan M. Cox (no relation to Doris Cox), who met respondent when she was five years old, testified that she had known him for nearly fifty years. Respondent represented her and her father in various matters. In addition, "most" of the town's realtors had used respondent's services and recommended him to others.

Cox knew "a lot of the people in [her] surrounding area community that all know him." She described respondent's reputation as follows:

> Michael's reputation in Livingston is [sic] one of the most compassionate people that you can go to, especially if you have a difficult legal situation. Everyone trusts him. Everybody goes to him when they want to have somebody with ease with which to work. He's accommodating. He's flexible, honest. I can't speak highly enough of him.
>
> [2T15-12 to 17.]

Mary Gladish testified that she first met respondent in 1987 while working at a title company, where she was currently the director of title operations. Until the downturn in the real estate market, Gladish had talked to respondent every day. She described him as "very generous" and "very compassionate towards his clients."

When Gladish visited the title company's clients, she made it a point to stop at respondent's office. He always welcomed her with "open arms," and his door was always open. Respondent was always interested in Gladish, a single mother, and her son.

In terms of respondent's work on real estate closings, Gladish testified that, when the title company began to issue "closing service" letters for attorneys, which held the company responsible for any misappropriation of monies, the application process for respondent was waived due to the long-standing relationship between him and the company. According to Gladish, respondent, "[w]ithout a doubt," always dotted his i's and crossed his t's.

Gladish described respondent as a man of honesty and integrity. Of the 10,000 attorneys that Gladish had worked with in nearly thirty years, respondent was "definitely" among the top lawyers in terms of integrity and professionalism.

David Kalb, who operates a medical education advertising agency, met respondent more than twenty years earlier. Respondent had represented the other party in a real estate transaction that was not completed and was forthcoming about the reason that his client could not proceed with the transaction. Thereafter, Kalb retained respondent for other real estate transactions, as did the other signatories to his character letter.

Kalb testified that, often, respondent did not charge for services, such as reviewing contracts for Kalb's business. Kalb has recommended respondent to others.

Kalb described respondent's reputation as stellar. According to Kalb, respondent is "beyond reproach in any way, shape or form." "Without question," he testified, "I trust that man." Kalb testified that "there is no possibility" that respondent would improperly take money from someone.

Keekis Kyriacou, who had known respondent for twenty-five years, insured New York City apartment buildings and owned a restaurant. Respondent represented him in the purchase of his first home, the purchase and sale of a restaurant, and in a condemnation action.

According to Kyriacou, respondent "has a great reputation." He always treated Kyriacou professionally and fairly. Kyriacou

was certain that respondent, who had represented him in transactions involving hundreds of thousands of dollars, would never take money that he was unauthorized to take.

Lourdes Bley, who emigrated from Cuba to the United States in 1968, had worked for Verizon as a service analyst in the human resources department for twenty-six years. She first met respondent twenty-seven years earlier when, upon a realtor's referral, he represented her and her husband in the purchase of their first residence.

Throughout her forty-seven year marriage, Bley's husband purchased houses, which he renovated and either sold or rented. Over the years, Mr. Bley "got very close to" respondent, who handled all purchases and sales of his investment properties. Respondent also handled tenant problems as they arose.

In 2000, at the age of forty-nine, Mr. Bley was involved in an accident, which left him unable to work. Although respondent was a real estate attorney, Mr. Bley insisted on retaining respondent to represent him in a lawsuit.

Mrs. Bley described respondent as "very" courteous, honest, and professional. She considered him "like a family." When her daughter was hospitalized, respondent visited her at the hospital. He also went to the nursing home when Mrs. Bley's mother became a resident. As for Mrs. Bley, in addition to

taking her to Johns Hopkins Hospital for a follow-up appointment, respondent took her to church. Just before her testimony, he had driven her to a doctor appointment. She testified: "And I know that if I call Michael now, even if he's not working and I say, 'Michael, I have a problem,' he come [sic] right away."

Mrs. Bley testified that respondent never billed her for any of the rides or visits. If she believed he was the kind of person who would take someone's money without authorization, she would not testify on his behalf. "[H]e's my friend," she stated.

Lucille Genova testified that she had worked for the State of New Jersey Victims of Crime Compensation Board for thirteen years until "a very bad car accident" ended her career. Respondent, whom Genova had met "many years ago" through her parents, represented her in the lawsuit arising out of injuries she had sustained in that accident.

Genova testified that, after she was taken to the hospital, following the accident, her son called respondent and Glazer, both of whom went to the hospital "almost immediately." According to Genova, "it was like seeing the best friends of my life because I knew that if they were there, everything was going to be all right." Both men told her that they were there for her, which made her feel "better."

While hospitalized, Genova instructed her son to give her checkbook to respondent, and he took care of paying her bills. Respondent took no money from Genova in exchange for the work he did for her. She continued:

> If anything, he brought me coffee. He spent money on me. He would bring me things because he knew that I wasn't crazy about the food, but he helped me. I mean, he would do things like he was family, more than family, like you would care for someone.
>
> [2T74-21 to 25.]

Following Genova's discharge from the hospital, she was required to have her leg x-rayed "almost every week." Respondent was there "every week," holding her hand, and waiting with her until the x-ray was taken.

Respondent helped Genova empty her parents' house after they had passed away. He never asked for anything in exchange.

Genova referred her friends to respondent. One of them was facing eviction from an apartment. Yet, respondent never billed the man, but, instead, "sent him a food basket every so often." That client subsequently retained respondent to prepare his will and, according to Genova, "loves" respondent.

In Genova's opinion, respondent should have been a priest. She explained:

> He'll listen to you, and sometimes I call him up when I was in the middle of all this and I was crying and I was so

> hysterical, and he just had a way, a very calm voice and says to me, "Lucille, just calm down, it will work out. You have to take care because there's no sense you getting sick. Don't worry about it. We'll take care of it. Everything could be done that has to be done."
>
> Because I was just hurting. My mind was all upset because of my parents, they died within six months of each other, and then my aunt died six months after my father. They all lived in the same house and it was just like a horrible time in my life.
>
> . . . .
>
> Let me tell you something, if he knew you right now, he'd invite you to his house for a barbecue. That's what kind of fellow he is, yep. He just makes friends with anyone. He's just a good-hearted sole [sic]. You can't question it. You can't question it.
>
> [2T76-16 to 2T77-9.]

In short, Genova testified that she loves respondent, whom she described as "one of the nicest people [she] ever met in [her] life."

Carl Herman, a New Jersey lawyer since 1976, worked closely with Glazer on capital cases. He knew respondent through his work with Glazer, which involved many meetings at the firm's office.

Over the years, Herman sent residential real estate closing clients to respondent for representation. All of the clients were "very satisfied" with respondent's work. Herman described

respondent as "very hands-on" and as very professional, conscientious, and diligent. Moreover, he testified, every lawyer who knows both Herman and respondent has "the highest respect" for respondent.

Herman had "never personally experienced anything other than the highest ethical conduct on behalf of Michael Luciano." He continued: "That was his reputation. I maintain that opinion today."

Not only did Herman reject the notion that respondent could have knowingly misappropriated funds from a client, but he also claimed that, due to respondent's "good nature," "people kind of took advantage of him." Admittedly, however, Herman was "not familiar with the facts of this proceeding."

THE SPECIAL MASTER'S FINDINGS

The special master noted that some witnesses testified that respondent had informed them of the gift, while others testified that respondent's character "is of the highest regard and that he enjoys a fine reputation in the community."

According to the special master, respondent's credibility was "a crucial factor" and evidence of his "good character and reputation for honesty" must be considered in determining whether

his claim that "Cox had orally gifted the funds to him is credible." The special master explained:

> If it is found that [respondent] possesses good character and is prone to honesty, his statements to others as to the funds being a gift would be considered more persuasive. Likewise, if it is determined that Respondent is generally honest, his testimony regarding the conversation between Ms. Cox and him would be more credible. Such evidence was all but absent at the first Hearing.
>
> If Respondent is found to be believable, his testimony that Ms. Cox gifted him the funds and his testimony as to why the transfer was not documented could be used to defeat a finding of knowing misappropriation. Moreover, if Respondent were found to be credible and of good character, the testimony of witnesses who Respondent told the funds were a gift would be meaningful as opposed to an attempt to "set the table" by a dishonest person.
>
> [SMR28.[9]]

Based on the evidence, the special master found that respondent "is held in high regard and he has good character." "These attributes," according to the special master, "are considered when weighing credibility in making a determination whether the alleged misappropriation was knowing and whether Respondent's belief that the funds were a gift was reasonable."

The special master concluded that, based on "the new evidence" and the credibility of the witnesses, "the totality of

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[9] "SMR" refers to the special master's report, dated February 8, 2016.

the circumstances do [sic] not demonstrate clearly and convincingly that Respondent knowingly misappropriated his client's funds." According to the special master:

> The new evidence including the numerous character witnesses and letters provided context when determining whether Respondent's beliefs were reasonable. After having presided over two Hearings, consisting of a total of four days, and having had the opportunity to observe Respondent throughout that time and weigh his testimony and evaluate that testimony in light of the character witnesses, I do not find his conduct rises to a knowing violation. Based on all of the evidence submitted at both Hearings, I find that the evidence does not support the OAE's burden in light of the clear and convincing standard that Respondent's actions constituted knowing misappropriation as the new evidence submitted by Respondent at the re-Hearing was just enough to push the scales to defeat the OAE's burden of proof below the required clear and convincing standard.
>
> [SMR30.]

In short, "[t]he defense prevented the OAE from establishing knowing misappropriation by clear and convincing evidence in light of the Respondent's reasonable belief that the funds were a gift." The special master also noted, however, that the evidence "supporting the contention of a gift is not overwhelming."

With respect to some of our concerns, expressed in Luciano I, the special master stated:

> Although it remains inexplicable that an attorney of Respondent's experience and character did not document the purported gift in a formal manner, the documentary evidence, albeit inconsistent, along with the compelling character evidence results in this new conclusion. As indicated previously, Respondent did not document that the funds were a gift in his tax returns, nor in the inheritance tax returns filed on behalf of Ms. Cox's Estate. Respondent also did not memorialize the transfer in a separate writing, nor did he document the conversation whereby Ms. Cox gifted to him the funds, although other details are included in the billing records. Nonetheless, Respondent provided explanations regarding these issues and offered other evidence which did document the gift, i.e. notations on checks and check stubs and also witness testimony that Respondent discussed the gift with them. This additional evidence has caused this reevaluation of the findings.
>
> [SMR32.]

The special master recommended that respondent be reinstated to the practice of law.

Following a de novo review of the record, on remand, we accept the special master's finding that the record lacked clear and convincing evidence that respondent knowingly misappropriated $100,000 from his client, Doris A. Cox.

In all cases, including those involving a claim of knowing misappropriation of client funds, the OAE is required to prove its case by clear and convincing evidence. R. 1:20-6(c)(2)(B); In re Mininsohn, 162 N.J. 62, 72 (1999); and In re Pennica, 36

N.J. 401, 419 (1962). Clear and convincing evidence is "evidence that produces 'a firm belief or conviction' that the allegations are true; it is evidence that is 'so clear, direct and weighty and convincing' that the factfinder can 'come to a clear conviction' of the truth without hesitancy." In re Civil Commitment of R.F., 217 N.J. 152, 173 (2014) (citing In re Jobes, 108 N.J. 394, 407 (1987) (quoting State v. Hodge, 95 N.J. 369, 376 (1984)).

The respondent has the "burden of going forward regarding defenses . . . to charges of unethical conduct." R. 1:20-6(c)(2)(B); In re Gifis, 156 N.J. 323, 359 n.8 (1998). After the respondent has done so, the trier of fact considers the facts "in the aggregate, and the fair inferences drawn therefrom," and determines whether the ethics infraction has been proven clearly and convincingly. In re Pennica, supra, 36 N.J. at 423.

In our view, the expanded record renders the OAE's proofs no longer "'so clear, direct and weighty and convincing,' that [we] can 'come to a clear conviction' of the truth without hesitancy." In re Civil Commitment of R.F., supra, 217 N.J. at 173. As the special master found, although respondent's proofs regarding the gift were "not overwhelming," they were enough to weaken the clear and

convincing nature of the OAE's case. On the one hand, Cox is dead and, therefore, the OAE had no direct evidence to support the knowing misappropriation claim. On the other hand, in the absence of a writing, respondent lacked direct evidence that the $100,000 was a gift. Thus, as the special master found, the additional evidence placed on the record by respondent during the remand hearing was enough to undercut the clear and convincing case made by the OAE in Luciano I.

The OAE's burden was to prove that respondent had taken $100,000 from Cox without her authorization. In Luciano I, respondent's failure to document the gift, as well as his subsequent actions, formed the basis for our conclusion that there was no gift and that respondent had not been authorized to take the funds. On remand, however, respondent corroborated his claim that Cox had gifted the $100,000 to him through the testimony of others, including Glazer, along with evidence of his character for truthfulness. He presented evidence regarding the nature of his relationship with Cox, her generosity, especially to those with whom she enjoyed a close relationship (e.g., Von Rhein and the Pifkos), and his reputation for generosity of time and spirit.

The special master found that respondent was a credible witness. We accept that determination. The special master had

the opportunity to observe the demeanor of the witnesses, and, as such, was in a better position to assess their credibility. We, therefore, defer to him with respect to "those intangible aspects of the case not transmitted by the written record, such as, witness credibility. . . ." Dolson v. Anastasia, 55 N.J. 2, 7 (1969). Because the special master "hears the case, sees and observes the witnesses, and [hears] them testify, [he] has a better perspective than a reviewing [tribunal] in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

In addition to the above evidence, of great significance to us is that respondent's claim that the funds were a gift was not recently contrived. Rather, the original hand-written ledger stated that the funds were a gift. When the $100,000 was disbursed, the trust account checks and the stubs contained notations with the word "gift" in them. Respondent told Lakind at the random audit that the funds were a gift. Respondent also stated, during his OAE interview, that the funds were a gift and that he had told Glazer about it. Respondent's statement was confirmed in the OAE's March 2010 memorandum.

When the testimony is considered together with other information, respondent's claim that Cox had gifted him the monies becomes more credible. We consider, for example, the original ledger. The title of the card was "DORIS COX ESTATE/GIFTS." Although the two deposits were not identified as a gift, the subsequent disbursements were identified as "gift." The revised ledger was titled "ESTATE AND GIFTS OF DORIS A. COX," which essentially mirrored the original. Although that ledger was different in some respects, the disbursements continued to be identified as "gift." The revised ledger was certainly more detailed than the original, but the OAE had requested more detail.

In Luciano I, we were presented with a limited record establishing only that respondent had taken $100,000 from Cox, which he claimed to be a gift, without more. Given the lack of support for respondent's claim, particularly, a writing, his irregular handling of the monies, and his failure to report his receipt of funds to any taxing authority, we were constrained to conclude that he had taken the funds without authorization. On remand, however, respondent developed a record that gave context to his assertion that the $100,000 was a gift. Specifically, respondent produced corroborating evidence of the gift in the form of testimony from

his law partner, his secretary, and his family. Although his family members' testimony could be discarded as biased, we cannot discount wholesale respondent's claim and the testimony, in light of the special master's credibility determination. Although this evidence is not enough to convince us that the funds were, in fact, a gift, it is enough to persuade us that the record no longer supports a finding, based on clear and convincing evidence, that respondent knowingly misappropriated his client's money.

Moreover, the testimony about Cox's generosity to those who were devoted to her was overwhelming, as was the testimony about respondent's extraordinary dedication and devotion to others, including Cox, which he demonstrated without any expectation of remuneration from the beneficiaries of his kindness. Thus, the evidence demonstrated that it would not have been out of character for Cox to bestow a substantial monetary gift on respondent.

Now that these additional facts have been added to the record, respondent's actions in the months following Cox's gift, in late July 2007, and when he finally disbursed the funds, in late 2008, many months after Cox's death, appear less nefarious. First, although the gift was made in the summer, respondent and Cox agreed that he would hold onto it until it became clear that

she no longer needed the funds. He did just that. He never billed Cox during that time, and the funds remained intact.

Second, only when it seemed clear that Cox would soon die and, therefore, would no longer require the money, did respondent transfer the monies into the trust account. Certainly, that action was calculated, given respondent's testimony that he withdrew the funds at that time to avoid the risk that they would become estate monies. However, respondent continued to hold the monies intact until he began disbursing the estate's funds. We discern no reason to believe that, had Cox survived and required the monies, respondent would not have applied the funds to the cost of her care.

It is certainly troubling to us that an attorney, who was otherwise so meticulous in his work, did not reduce Cox's gift to a writing; that respondent failed to identify the gift on either the inheritance tax return or his personal income tax return; and that his explanations about the gift appeared to evolve over time. Yet, standing alone, these facts do not establish clear and convincing evidence of knowing misappropriation. It was the absence of a writing or other corroborating evidence establishing the gift, when considered in light of respondent's subsequent actions, that

formed the basis for the conclusion, in Luciano I, that he had knowingly misappropriated Cox's funds.

Admittedly, some of respondent's explanations for his actions remain contradictory, even irreconcilable, such as his failure to identify the gift on the inheritance tax return and his failure to declare the $100,000 as income. Yet, the ultimate question is, not what respondent did with the money or how he described the money or whether he should have paid taxes on the money. Rather, the ultimate issue is whether respondent knowingly misappropriated the funds in the first instance. Given the additional evidence presented on remand, it is no longer necessary to look at respondent's subsequent actions to prove that he was not authorized to take the monies. In the face of the additional evidence that the monies were gifted to him, when considered in the aggregate with the OAE's evidence, we are no longer able to come to a clear conviction, without hesitancy, that respondent knowingly misappropriated $100,000 from Cox.

We are often presented with cases in which attorneys inflict financial harm on elderly clients. See, e.g., In re Casale, 213 N.J. 379 (2013) (attorney received three-year suspension for "egregious misconduct" involving an elderly and sickly widow, who was nearly ninety years old and of questionable competence; among other things, the attorney

represented the woman in the sale of her home to his friend and prepared her will, leaving her residuary estate to his friend, in addition to an advanced medical directive and power of attorney naming his friend as her decision-maker), and In re Tormey, 190 N.J. 578 (2007) (two-year suspension imposed on attorney who represented a seventy-nine-year-old man, who had immigrated to the United States from Portugal, had difficulty speaking and understanding English, and was of questionable competence, in the sale of his home to a friend of respondent, with whom he also maintained a business relationship).

This past December, the Court took the opportunity to express its concerns about "the serious and growing problem of elder abuse." In re Torre, 223 N.J. 538, 547 (2015). In that case, the Court suspended an attorney for one year, after he borrowed $89,250 (about seventy percent of her life savings) from an elderly client and repaid only a fraction of that amount. Id. at 541.

Here, the dissenting members of this Board have based their determination, in part, on their view that Cox's age and poor health rendered her vulnerable and that respondent took advantage of her. We note, however, that there was no evidence of her vulnerability; that age and health alone do

not necessarily render one vulnerable; and that, compared to the record in such cases as Tormey, Casale, and Torre, the record here lacks evidence that respondent took advantage of Cox. In our view, the strong character evidence produced at the rehearing undercuts such a conclusion.

Certainly, a person of honor is not immune from engaging in unethical behavior. Indeed, we do not go so far as to say that respondent has established, by clear and convincing evidence, that Cox had gifted $100,000 to him. We find, however, that, when considering all of the evidence, in the aggregate, the record lacks clear and convincing evidence that respondent knowingly misappropriated funds belonging to his client, Doris A. Cox. We recommend, therefore, that the complaint be dismissed, and that respondent be reinstated to the practice of law.

Finally, we take the opportunity to express a concern. The lack of a writing, demonstrating that Cox gifted the funds to respondent, disturbs us greatly. We note that, in other contexts, such as business transactions with clients, attorneys are required to provide the client with a reasonable opportunity to seek the advice of independent counsel and give informed consent, in writing. RPC 1.8(a). We suggest that, in cases such as the one before us now, a similar rule should apply. In our

view, the absence of such a rule had a substantial evidentiary impact on the OAE's ability to prove its case to a clear and convincing extent.

Members Gallipoli and Zmirich voted to uphold respondent's disbarment, and filed a separate dissent. Vice-Chair Baugh did not participate.

In light of our recommendation that respondent be reinstated, we make no provision for the assessment of costs.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Michael A. Luciano
Docket No. DRB 16-077

Argued: July 21, 2016

Decided: August 15, 2016

Disposition: Restore

Members	Uphold Disbar	Restore	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh						X
Boyer		X				
Clark		X				
Gallipoli	X					
Hoberman		X				
Rivera		X				
Singer		X				
Zmirich	X					
Total:	2	6				1

Ellen A. Brodsky
Chief Counsel