Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-467
District Docket No. XIV-2017-0262E

In the Matter of	:
Karl A. Fenske	:
An Attorney at Law	:

Decision

Argued: July 16, 2020

Decided: November 23, 2020

Steven J. Zweig appeared in behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for a six-month suspension filed by a special master. The formal ethics complaint charged respondent with having violated RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979), or In re Hollendonner, 102 N.J. 21 (1985) (knowingly misappropriating client or escrow funds); RPC 1.15(c) (failing to segregate

disputed funds); RPC 3.1 (asserting an issue with no basis in law or fact); RPC 3.3(a)(5) (failing to disclose a material fact to a tribunal, knowing that the omission is reasonably certain to mislead the tribunal); RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer – misapplication of entrusted property (N.J.S.A. 2C:21-15)); RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to impose a censure.

Respondent earned admission to the New Jersey bar in 1977. During the relevant timeframe, he maintained a solo law practice in Morristown, New Jersey.

In 1999, respondent received an admonition for failure to safeguard escrow funds, in violation of RPC 1.15(a). In re Fenske, 158 N.J. 144 (1999). In that matter, he represented the buyer in a real estate transaction, and served as the escrow agent for his client's earnest money deposit. When a dispute arose between his client and the seller, respondent released the deposit to his client without the seller's authorization and without legal right to do so. Considering the presence of confusion as to the escrow holder and operative contractual dates, we determined that respondent's misconduct constituted the improper

release of escrow funds, rather than knowing misappropriation. In the Matter of Karl A. Fenske, DRB 98-211 (May 25, 1999).

The charges in this matter stem from respondent's misconduct in connection with a purchase and sale agreement for undeveloped real estate in Chatham Township, New Jersey (the Property). Respondent, his siblings, and his parents' estates hold title to the Property, purportedly as members of McDonfen Group, LLC (McDonfen), an entity created in 1999. In November 2012, however, McDonfen's corporate charter was revoked for failure to file an annual report for two consecutive years. Respondent denied, both in this ethics matter and in underlying litigation, that he had served as an attorney, either in behalf of himself or McDonfen, at any point in respect of the transaction. During the ethics hearing, respondent submitted into evidence a statement from his brother corroborating his claim that he had not represented the family or McDonfen.

On February 16, 2016, McDonfen entered into a contract (the Contract) to sell the Property to entities controlled by Sam Gershwin, a principal of Coddington Communities, LLC, and John Sims, a principal of Builder Marketing Services. The Contract designated both corporate entities as buyers and provided them separate signature blocks. The Contract was negotiated between respondent and the buyers, via multiple drafts and correspondence,

from early 2015 until its final execution, and stated, on its face, that it was "prepared by" respondent. Respondent admittedly served as the point of contact with the buyers, but maintained that he routinely discussed all aspects of the transaction and the Contract with his siblings.

The primary issue in this matter is the effective date of the Contract. The Contract provided that, once "signed," or, upon "full execution," the buyers would post a $25,000 initial deposit (the Initial Deposit) with respondent and trigger a 120-day due diligence period within which they could conduct an environmental study of the Property (the Due Diligence Period). During the Due Diligence Period, the buyers had the right to terminate the Contract for any reason, in which case the Initial Deposit would be fully refunded. According to Sims and Gershwin, the Contract was not fully executed until February 16, 2016, when Gershwin signed and initialed it, and when the final material elements had been negotiated, including the length of the Due Diligence Period and the amount of the Initial Deposit, which was reduced from $50,000 to $25,000. Sims had signed the contract in January 2016, although the exact date of his execution of the contract was subject to dispute.

When Gershwin signed the Contract, he revised the date on the first page to February 16, 2016 and initialed the change; he also revised a date in paragraph five of the Contract from January to March 2018, to reflect the anticipated

closing date, based on a two-year governmental approval period set forth in the Contract; only then did Gershwin sign and date his respective signature block. In a February 18, 2016 e-mail to respondent, Sims enclosed the fully-executed Contract and stated "[p]lease find contract attached." Following Gershwin's signing, the buyers retained environmental consultants to conduct their due diligence.

During the relevant timeframe, respondent maintained an attorney trust account (ATA) and a personal bank account with Provident Bank. The buyers posted the $25,000 Initial Deposit, via separate $12,500 checks, which Sims and Gershwin provided on February 16 and April 19, 2016, respectively. Respondent deposited both checks in his ATA, in a subaccount created for McDonfen. Although the Contract neither contained a stand-alone escrow provision nor expressly required respondent to safeguard the Initial Deposit in his ATA, the Contract stated that the Initial Deposit would not be released to the seller until the expiration of the Due Diligence Period, at which point those funds could be used in a limited manner, to pay the carrying costs for the Property.

During the ethics hearing, respondent acknowledged that he previously had served as an escrow agent in real estate transactions and, thus, understood the role and fiduciary duties of an escrow agent. Respondent further admitted that he served as escrow agent in respect of the Contract, and that he had neither

notified nor requested the permission of the buyers prior to his eventual use of a portion of the Initial Deposit funds.

The Contract set forth the mailing address for McDonfen as respondent's law office address and provided that the closing for the transaction would take place at respondent's law office. The buyers regarded respondent as the attorney for McDonfen and the escrow agent for the Initial Deposit and, thus, accepted his signature on the Contract in behalf of McDonfen.

On May 19, 2016, Sims provided respondent with wetlands delineation reports, on which the buyers ultimately relied in determining that the Property was unsuitable for their plans for residential development. Respondent was intimately familiar with the wetlands limitations on the Property, and testified at length regarding his mother's prior executive role for the Department of Environmental Protection (DEP); his knowledge of the publicly-available wetlands maps for the Property and his own, prior employment at the DEP; the dozens of prior, failed attempts by his family to sell the Property, dating back to the 1970s; and the fact that the failures primarily were attributable to the wetlands issues on the Property. Respondent's brother's letter submitted into evidence also recounted their family's dozens of failed attempts to sell the Property.

Respondent further testified that the Contract was the first of such agreements to sell the Property that he individually had negotiated and signed, because, prior to his parents' deaths, his family had retained law firms to handle the other contracts. On May 20, 2016, the day after receiving the buyers' negative wetlands reports, respondent disbursed $3,720.10 of the Initial Deposit funds to Chatham Township, to pay the Property's municipal taxes.

On May 23, 2016, via e-mail, Sims formally notified respondent that, due to the results of the wetlands delineations, the buyers were terminating the Contract. The buyers' position was that the Due Diligence Period did not expire until June 15, 2016, and, therefore, their termination of the Contract was effective and mandated the return of their entire Initial Deposit. During the ethics hearing, respondent asserted that Sims' termination notice was deficient, claiming that he did not have the authority to act in behalf of Gershwin.[1] Respondent admitted, however, that he informed neither Sims nor Gershwin of that position.

On June 20, 2016, despite having received the sellers' termination notice almost one month earlier, respondent disbursed an additional $940 of the Initial Deposit funds to himself, as claimed reimbursements for maintenance of the

[1] This assertion is at direct odds with respondent's unsuccessful theory of the partnership between Sims and Gershwin that he asserted during the litigation between the parties, as detailed below.

Property. The buyers testified that, following their cancellation notice to respondent, he "stalled" the return of the Initial Deposit by engaging in "radio silence."

On August 19, 2016, respondent further disbursed $20,363.53 to himself, representing the balance of the Initial Deposit funds, and deposited those funds in his personal account at Provident Bank. That same date, respondent met the buyers for lunch and gave them sealed envelopes containing $20,363.52, via two checks of equal amounts drawn on his personal account, representing the Initial Deposit, reduced by his disbursements for the Property's tax and maintenance costs. According to the buyers, during the meeting, those checks were not opened, and respondent did not reveal that he had disbursed and used a portion of the Initial Deposit.

That same evening, and again on September 7, 2016, Sims inquired, via e-mail, why respondent had returned only a portion of the Initial Deposit, despite the termination rights granted to the buyers, in the Contract, during the Due Diligence Period. Sims even offered to negotiate a payment plan for the balance. In a September 23, 2016 reply, respondent claimed that the buyers had been aware that the Initial Deposit could and would be used to pay taxes and other maintenance costs for the Property and suggested that the buyers exercise their right to litigate the issue. Respondent made no assertion regarding the effective

date of the Contract or the expiration date of the Due Diligence Period. Respondent additionally claimed that he could have disbursed even more of the Initial Deposit, but had not done so, out of "consideration" to the buyers.

On January 10, 2017, Anthony Sposaro, Esq. filed a lawsuit against respondent and McDonfen in behalf of the buyers, seeking the return of the $4,636.48 balance of the Initial Deposit. On April 13, 2017, following a March 28, 2017 trial, the Honorable Louis S. Sceusi, J.S.C., held that the Contract became effective on February 16, 2016. The judge rejected respondent's contrary positions, which he asserted for the first time during the litigation, that (1) the Contract had become enforceable either on October 13, 2015, due to an e-mail from Sims stating that the draft contract was "ok," but that the buyers had "questions and points needing clarification," which they had highlighted and printed in red; or (2) the Contract had become enforceable on January 14, 2016, due to the operation of a legal partnership between the buyers, whereby Sims could bind Gershwin with only Sims' signature or even an acceptance via e-mail. The court, thus, entered a judgment against respondent and McDonfen, in favor of the buyers, for $4,730.48, which respondent promptly satisfied, but filed an appeal of the ruling. As discussed below, the Appellate Division affirmed the judgment. The Morris County Assignment Judge referred

respondent to the OAE for potential violations of the RPCs in connection with the Contract transaction.

During the ethics hearing, respondent admitted that, before the litigation commenced, he had not informed the buyers of his position that the effective date of the Contract was prior to February 16, 2016, let alone October 13, 2015. Moreover, he admitted that he had not informed the buyers that, in his view, the Due Diligence Period had expired before June 15, 2016, and that the sellers, thus, had become entitled to use the Initial Deposit funds.

Gershwin testified that he would not have signed the Contract in February 2016 if he had suspected that respondent would assert that the Due Diligence Period had begun in October 2015 or January 2016. The buyers unequivocally denied that they had formed a partnership in respect of the Property. To the contrary, they both testified that they would have formed a partnership only if the Contract had survived the Due Diligence Period, and emphasized their separate Initial Deposit checks, their separate signature blocks, and their independent review of the Contract drafts.

In his initial reply to the ethics grievance, respondent stated:

> I had the right to do everything I did in this transaction. I carefully avoided any representation that I was acting as an attorney. I was open and honest in all my dealings with the other party. Although I parked their deposit in my trust account, it was only for convenience, not because I was obligated to do so . . . . The only

> malfeasance in this matter is subjecting me to an ethics investigation to punish me for asserting my private rights to litigate a dispute and appeal a wrongfull [sic] verdict.
>
> [OAEEx.47.]

During a November 29, 2017 interview, respondent conceded to the OAE that he had negotiated the transaction with the buyers and had been the primary drafter of the Contract, but asserted that he had done so as an individual owner of the Property, not as the attorney for the sellers. He continued to argue, despite the language of the Contract and the outcome of the trial with the buyers (his appeal was pending at the time), that the Contract had become effective in October 2015, and that the buyers were able to bind each other through their unilateral actions, which occurred primarily via e-mail. Again, respondent took this position, despite his contrary contention that Sims did not have the authority to bind Gershwin in respect of the Contract termination notice. Respondent maintained these positions throughout the ethics proceedings. Moreover, he claimed that he had deposited the Initial Deposit funds in his ATA only for convenience, rather than an obligation pursuant to the Contract. Respondent further asserted, without corroborating evidence, that the buyers had been aware of his disbursement of the Initial Deposit funds for taxes and maintenance for the Property.

Respondent acknowledged that he held the Initial Deposit as an escrow agent, had created a ledger card for the McDonfen ATA subaccount, and could not use the Initial Deposit funds for expenses beyond the scope of the Contract, like "fly[ing] to Bermuda or anything like that." Moreover, he acknowledged that, in a December 31, 2015 e-mail to Sims, he had stated "sorry I have not gotten back to you. I will look at your suggested changes [to the Contract] and questions and try to respond next week. Maybe we can sign the damn thing next week at lunch." In a January 8, 2016 e-mail to Sims, respondent answered four questions that Sims had posed, in October 2015, regarding the Contract's language. During the ethics hearing, respondent conceded that "[a]ny contract requires a meeting of the minds," yet, again claimed that the Contract was final and enforceable before all parties had signed it, and that the December 2015 and January 2016 e-mails were not evidence of continued negotiations of the final, enforceable Contract.

In May 2017, respondent appealed the adverse trial court ruling, but, on November 27, 2018 the Appellate Division affirmed the trial court. The Appellate Division specifically held that respondent's assertion that Gershwin and Sims were partners, with legal authority to bind each other, was meritless, and that no meeting of the minds between the buyers and the sellers had occurred until February 16, 2016, when the Contract was fully executed. During the

litigation between the parties, respondent failed to disclose that he had held the Initial Deposit funds in his ATA, until he supplemented the record with that admission, during his appeal.

During the ethics hearing, respondent again admitted that, prior to his use of the Initial Deposit funds, he had not informed the sellers of his position that the Due Diligence Period had begun in October 2015 or that he had begun to disburse the Initial Deposit, in May 2016, to pay carrying costs for the Property. The buyers unequivocally denied that they had authorized the disbursement or use of the Initial Deposit funds. Respondent denied the OAE's allegation that his purpose for transferring the balance of the Initial Deposit to a personal account was to conceal from the buyers the fact that those funds had been in his ATA. Respondent further denied that he made misrepresentations to the trial court, maintaining that, during the trial, he simply failed to recall that he had initially placed the Initial Deposit in his ATA.

Based on these facts, the OAE asserted that respondent's failure to disclose to the trial court that he had deposited the Initial Deposit in his ATA violated RPC 3.3(a)(5), RPC 8.4(c), and RPC 8.4(d); that respondent's failure to inform the buyers or Sposaro, their counsel, that he had placed the Initial Deposit in his ATA violated RPC 8.4(c); that respondent's defense of the sellers' lawsuit violated RPC 3.1; that respondent's failure to inform the buyers that the

refund checks he provided to them on August 19, 2016 were not for the full amount of the Initial Deposit violated RPC 8.4(c); that respondent's disbursement of the Initial Deposit funds prior to the expiration of the Due Diligence Period violated RPC 8.4(b) and, specifically, constituted the misapplication of entrusted funds, in violation of N.J.S.A. 2C:21-15; that respondent's disbursement of the Initial Deposit funds prior to the expiration of the Due Diligence Period constituted the knowing misappropriation of escrow funds; and that respondent violated RPC 1.15(c) by failing to segregate the Initial Deposit funds, which were in dispute.

In mitigation, respondent testified regarding his more than twenty years of service in support of Alcoholics Anonymous, including with prison populations; his creation of, and participation in, numerous environmental conservation groups; his forty years of service as an elected committee member, political candidate, and campaign manager in Morristown; his authorship of the first Environmental Commissions Handbook; his status as a church elder and founder of Drew University Swim Masters; and his service as a volunteer civil mediator in Morris County.

Respondent also submitted a character letter from the Chaplaincy Program of the Morris County Correctional Facility, which detailed his fifteen years of service to the program, in various officer positions, and his personal service to

the inmate population; a character letter from Richard J. Douglas, who recounted his close to twenty-year relationship with respondent, and their joint efforts to take Alcoholics Anonymous meetings into prison twice a week; a character letter from Michael Murphy, who detailed his close to fifty-year relationship with respondent, and respondent's noble efforts, as a recovering alcoholic, to dedicate time and effort to helping others with alcohol addictions; letters from Drew University, thanking him for his continuing status as a benefactor to the school; and a character letter from Jon Huston, who detailed respondent's willingness to tackle challenging legal matters, and his status as a "good, capable lawyer who has been given a bad rap."

Finally, respondent submitted materials reflecting his mother's status as a 2019 honoree of exemplary conservation leadership, and a 2015 Martindale-Hubbell document reflecting his rating as a "BV Distinguished" attorney.

In its November 15, 2019 post-hearing submission to the special master, the OAE contended that it had proven every charge against respondent by clear and convincing evidence. In respect of the Wilson and Hollendonner charge, the OAE emphasized that respondent had acknowledged his role as escrow agent for the transaction, had placed the Initial Deposit in his ATA in recognition of his fiduciary duty, and had disbursed portions of the Initial Deposit, for the sellers' use, without the buyers' consent or authorization. Moreover, relying

primarily on the decisions of the trial court and Appellate Division, detailed above, the OAE argued that respondent had demonstrated no reasonable, good faith belief of entitlement to the Initial Deposit escrow funds.

The OAE further emphasized that respondent disbursed portions of the Initial Deposit for the sellers' benefit without having informed the buyers of his position regarding the effective date of the Contract or the resulting expiration date of the Due Diligence Period. The OAE also stressed that respondent disbursed $940 of the Initial Deposit funds after Sims effectively had terminated the Contract, conduct it characterized as "surreptitious," and, thereafter, had failed, for months, to notify the buyers of his purportedly justifiable use of the Initial Deposit.

In respondent's September 13, 2019 post-hearing submission to the special master, he denied that he was guilty of misconduct and argued that the OAE had failed to prove any of the charged RPCs by clear and convincing evidence. He further contended, despite the language of the Contract and the court rulings to the contrary, that Sims effectively had bound the partners/buyers to the Contract in October 2015, or, in the alternative, in January 2016; that no one anticipated the need for Gershwin to also execute the Contract; that the Contract, even without Gershwin's signature, satisfied the New Jersey Statute of Frauds; and that he had the right to disburse the Initial Deposit escrow funds.

In his March 27, 2020 brief to us and during oral argument, respondent reiterated his position that he had not knowingly misappropriated the buyers' escrow deposit. During oral argument, he acknowledged that he improperly commingled personal funds with trust funds by placing the Initial Deposit in his ATA, and conceded that a "short suspension" may be appropriate, but requested leniency if we find that he committed misconduct, given his mental health during the relevant time period.

In respect of his mental state, respondent recounted that, from 2008 through 2010, he underwent a contentious divorce, lost "almost all of" his assets, and was left "homeless and destitute," sleeping in the attic of his law office to date. Respondent asserted that, because internet searches of his name reveal his divorce and his prior admonition, his "clientele are basically only people without computers." In sum, he claimed that he has almost no fee-generating legal work by which he can sustain himself.

Finally, respondent listed additional community service that he has performed throughout his career, and other accolades he has received, including serving on the Morristown Board of Adjustment; volunteering as a soccer coach for the Morristown Red Storm; volunteering as a baseball coach for the Morristown youth league; serving as an elder for the Morristown Presbyterian Church; leading Alcoholics Anonymous, New Vernon; founding Paramount

Triathlon Club; serving as a Special Civil Part mediator, Morris County; serving as a member of the Great Swamp Watershed Association and Friends of the Great Swamp; writing the DEP Environmental Commissioner's Handbook; serving as an elected member of the Morristown Democratic Committee; and being the father of three adult children, all with college degrees.

The special master found Sims and Gershwin to be more credible than respondent in respect of most disputed facts. Specifically, the special master emphasized that, despite respondent's asserted defense that the Contract became effective in October 2015, or, alternatively, January 2016, respondent's December 2015 and January 2016 e-mails to Sims tended to prove otherwise. The special master wholly rejected respondent's contention that the Contract became effective in October 2015, but allowed respondent some benefit of the doubt regarding his alternative assertion – that Sims had signed the Contract in January 2016 and, thus, arguably had bound Gershwin and led respondent to reasonably believe that there was a meeting of the minds.

Regarding respondent's defense that he held a reasonable, but mistaken, belief that Sims and Gershwin were partners in respect of the Contract, the special master concluded that "the three participants in the [C]ontract never discussed specifically the levels of formality needed to execute a binding agreement . . . . Both sides of the negotiations proceeded with the assumption

that the other was acting in good faith." Moreover, the special master found no clear and convincing evidence that respondent lied during his testimony at the ethics hearing.

In that context, the special master found insufficient evidence that respondent had perjured himself before the trial court and, thus, violated RPC 3.3(a)(5), RPC 8.4(c), and RPC 8.4(d). Specifically, the special master determined that there was no clear and convincing evidence that respondent was dishonest by failing to volunteer that he had placed the Initial Deposit in his ATA, or by designating the seller as McDonfen, despite the prior revocation of its corporate charter.

The special master dismissed the OAE's allegation that respondent violated RPC 8.4(b) by misusing the Initial Deposit funds. The special master found that, because no criminal charges had been brought against respondent, the OAE had "overreached" in bringing the charge.

Likewise, the special master dismissed the RPC 3.1(b) charge, finding insufficient evidence to conclude that respondent had engaged in frivolous litigation or presenting an unreasonable defense.

Turning to the RPC 1.15(a) and Wilson and Hollendonner charge, the special master found that respondent acted as an attorney in respect of the Contract and was actively representing McDonfen, citing, as corroborating

evidence, respondent's purported recognition of his role as McDonfen's attorney, via his placement of the Initial Deposit funds in his ATA. Based on this threshold determination, the special master noted that respondent disbursed Initial Deposit funds, although he had been alerted, on May 19, 2016, that the buyers likely were about to terminate the Contract, and then disbursed additional Initial Deposit funds, although the buyers had terminated the Contract on May 23, 2016. The special master noted, however, that, despite the trial court's and Appellate Division's rulings to the contrary, respondent still asserted the defense that he believed the Due Diligence period had expired prior to the buyers' termination of the Contract, and, thus, he may have had a reasonable belief of entitlement to the Initial Deposit funds.

The special master concluded that respondent's first disbursement of Initial Deposit funds, without notice to the buyers, and his second disbursement of Initial Deposit funds, four weeks after receiving a termination notice from Sims, and again without notice to the buyers, was deceptive conduct that violated RPC 8.4(c). The special master emphasized that, following those disbursements, respondent avoided "truthful disclosure" of his conduct to the buyers by failing to reply to their communications for three months, after which respondent attempted to conclude the transaction via partial repayment of the Initial Deposit, again without affirmative disclosure of his conduct. The special

master also found respondent's transfer of the Initial Deposit funds from his ATA to a personal checking account to be "further evidence of deception," and noted that respondent stalled the buyers another five weeks before finally admitting that he had disbursed a portion of the Initial Deposit funds – additional violations of RPC 8.4(c).

The special master concluded, however, that the OAE had failed to prove, by clear and convincing evidence, that respondent had knowingly misappropriated the Initial Deposit funds, again citing respondent's asserted belief that the Contract had become effective in January 2016. Rather, the special master found that the OAE had proven only violations of RPC 1.15(a) (failure to safeguard), RPC 1.15(c) (failure to segregate disputed funds), and yet another violation of RPC 8.4(c), specifically in respect of respondent's disbursement of additional Initial Deposit funds subsequent to receiving the buyers' termination notice, and transfer of the funds from his ATA to a personal checking account prior to providing the partial refund checks to the buyers.

Highlighting respondent's prolonged, deceptive conduct regarding his use of a portion of the Initial Deposit funds, the special master recommended that respondent be suspended for six months.

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

The record supports the finding that respondent violated RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) on multiple occasions. We, thus, concur with the special master's determinations regarding those violations. We consider that respondent previously has been disciplined for the improper disbursement of escrow funds and, thus, should have had a heightened awareness of his fiduciary duties in his acknowledged role as the escrow agent for the transaction. Despite that awareness, respondent's first disbursement of Initial Deposit funds, without notice to the buyers, and his second disbursement of Initial Deposit funds, four weeks after receiving a termination notice from Sims, and again without notice to the buyers, was deceptive conduct that violated RPC 8.4(c). As the special master emphasized, following those disbursements, respondent avoided "truthful disclosure" of his conduct to the buyers by repeatedly failing to reply to their communications, for three months, after which he clumsily attempted to conclude the transaction via partial repayment of the Initial Deposit, in sealed envelopes, again without affirmative disclosure of his use of the Initial Deposit funds. As the special master also found, respondent's inexplicable transfer of the Initial Deposit funds

from his ATA to a personal checking account was "further evidence of deception," following which, respondent stalled the buyers for another five weeks, before finally admitting he had disbursed a portion of the Initial Deposit funds – additional violations of RPC 8.4(c) – and aggressively suggesting that the buyers sue him.

We also concur with the special master's determination that there is insufficient evidence to conclude that respondent's failure to disclose to the trial court that he had placed the Initial Deposit in his ATA violated RPC 3.3(a)(5), RPC 8.4(c), and RPC 8.4(d); that respondent's failure to inform the buyers or the buyers' attorney that he had deposited the Initial Deposit in his ATA violated RPC 8.4(c); and that respondent's defense of the sellers' lawsuit violated RPC 3.1. Simply put, there is insufficient evidence in the record to find that respondent made knowing misrepresentations, rather than simply failing to recall where he had deposited the Initial Deposit funds. Moreover, respondent was entitled to defend himself in the civil litigation, and the arguments he made, although unsuccessful, were neither frivolous nor deceptive.

We further determine to dismiss the charges that respondent violated RPC 1.15(a) and (c) by disbursing and using the Initial Deposit funds. Unlike Wilson and Hollendonner charges, discussed below, those RPCs specifically require, as an element, that the attorney's misconduct occur in the course of the

representation of a client. Despite the special master's conclusion to the contrary, we find that the record contains insufficient evidence that respondent was representing himself, McDonfen, or his siblings in respect of the Contract. Although the buyers may have assumed that respondent was the attorney for the sellers, the record does not contain clear and convincing evidence that he was serving in the capacity as an attorney in respect of the contract.

Finally, we find that respondent's conduct in respect of disbursing portions of the Initial Deposit constituted the improper release of escrow funds, rather than knowing misappropriation and, thus, dismiss the Wilson and Hollendonner charges. Consequently, we further dismiss the charge that respondent violated RPC 8.4(b) (criminal conduct – misapplication of entrusted property), based on our dismissal of the knowing misappropriation charge.

In sum, we find that respondent committed multiple violations of RPC 8.4(c). We determine to dismiss the charges that he violated RPC 1.15(a) and the principles of Wilson and Hollendonner; RPC 1.15(c); RPC 3.1; RPC 3.3(a)(5); RPC 8.4(b); and RPC 8.4(d). We next address the appropriate quantum of discipline for respondent's misconduct.

Attorneys have escaped disbarment for their improper or premature release of escrow funds when, as in this case, they have held reasonable, although mistaken, beliefs that, for one reason or another, the release of the

escrow funds was appropriate. See, e.g., In re De Clement, 214 N.J. 47 (2013) (motion for discipline by consent; reprimand for attorney who failed to safeguard funds in which a client or third party had an interest, and released a portion of $75,000 he had agreed to hold in escrow, in connection with a joint venture agreement between his client and a third party, without first obtaining the third party's consent; no escrow provision governed the attorney's actions, but the $75,000 check deposited by the attorney included a notation identifying it as an escrow deposit, and the joint venture agreement identified the attorney as the escrow attorney; the attorney, however, was never provided a copy of the joint venture agreement, and improperly relied on his client's assurance that he was allowed to use a portion of the escrow funds to cover expenses associated with the joint venture); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold, in trust, a disputed fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order; the attorney claimed that she believed that a subsequent court order had entitled her to the entire fee, and, thus, she had made a mistake, rather than knowingly defied a court order; those defenses were rejected); and In re Milstead, 162 N.J. 96 (1999) (reprimand for attorney who disbursed escrow funds to a client, in violation of a consent order).

We are troubled by respondent's improper release of escrow funds, considering his prior, although remote, admonition for strikingly similar misconduct. Moreover, he committed multiple violations of RPC 8.4(c) in his dealings with Sims and Gershwin.

Attorneys found guilty of misrepresentations to third parties have generally received reprimands. See, e.g., In re Walcott, 217 N.J. 367 (2014) (attorney misrepresented to a third party, in writing, that he was holding $2,000 in escrow from his client as collateral for a settlement agreement; violations of RPC 4.4(a)(1) and RPC 8.4(c)); In re Chatterjee, 217 N.J. 55 (2014) (attorney misrepresented to her employer, for five years, that she had taken steps to pass the Pennsylvania bar examination, a condition of her employment; compelling mitigation present); and In re Liptak, 217 N.J. 18 (2014) (attorney misrepresented to a mortgage broker the source of the funds she was holding in her trust account; attorney also committed recordkeeping violations; compelling mitigation present).

Here, in mitigation, respondent's disciplinary history is limited to his 1999 admonition, and his record of community service, especially his efforts through Alcoholics Anonymous and the Chaplaincy Program of the Morris County Correctional Facility, is compelling. There is no aggravation for us to consider.

On balance, we determine that a censure is the quantum of discipline necessary to protect the public and preserve confidence in the bar.[2]

Vice-Chair Gallipoli and Members Joseph and Zmirich found that respondent knowingly misappropriated escrow funds, voted to recommend his disbarment, and filed a separate dissent.

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

Disciplinary Review Board
Bruce W. Clark, Chair

By: **/s/ Ellen A. Brodsky**
Ellen A. Brodsky
Chief Counsel

[2] Member Petrou further determined that the circumstances of the modification of the contract date, after it was signed by respondent, takes this case outside the realm of a knowing misappropriation. Respondent testified in the underlying civil proceedings that the 120-day period for drawing on the escrow account should be based upon the October 15, 2015 date as originally prepared, rather than the later handwritten date made without his express approval. Member Petrou reasoned that this mistaken analysis and conclusion by respondent should not bring this case within the realm of a knowing misappropriation proven by clear and convincing evidence. Further, the relatively small amount involved, taken for an actual expense incurred by respondent, supports the notion that he merely acted negligently in analyzing the contract and understanding his rights, rather than having knowingly placed his legal career in jeopardy.

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Karl A. Fenske
Docket No. DRB 19-467

Argued: July 16, 2020

Decided: November 23, 2020

Disposition: Censure

Members	Censure	Disbar	Recused	Did Not Participate
Clark	X			
Gallipoli		X		
Boyer	X			
Hoberman	X			
Joseph		X		
Petrou	X			
Rivera	X			
Singer	X			
Zmirich		X		
Total:	6	3	0	0

/s/ Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel