SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-015
District Docket No. XIV-2002-0563E

IN THE MATTER OF	
KEVIN P. WIGENTON	
AN ATTORNEY AT LAW	

Decision

Argued: June 16, 2011

Decided: July 7, 2011

Maureen G. Bauman appeared on behalf of the Office of Attorney Ethics.

Shalom D. Stone appeared on behalf of respondent.

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

This matter was before us on a recommendation for a four-month suspension filed by Special Master Neil H. Shuster, J.S.C. (ret.). The complaint filed by the Office of Attorney Ethics (OAE) charged respondent with two instances of knowing misappropriation of trust funds, in violation of RPC 1.15(a) (failure to safeguard funds), RPC 8.4(c) (conduct involving

dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979) (counts one and two); six instances of knowing misappropriation of escrow funds, in violation of RPC 1.15(a), RPC 8.4(c), and the principles of In re Hollendonner, 102 N.J. 21 (1985) (counts three through eight); overcharging clients for real estate closing fees, in violation of RPC 8.4(c) (count nine); and representing the seller while serving as a real estate broker in the same real estate transaction, in violation of Advisory Committee on Professional Ethics Opinion 514, 111 N.J.L.J. 392 (April 14, 1983) (Opinion 514) (count ten).

The OAE filed an Amendment to Complaint charging respondent with four additional instances of knowing misappropriation of client and escrow funds (count eleven). Although the Amendment to Complaint also charged respondent with violations of RPC 8.4(a) (violate or attempt to violate the Rules of Professional Conduct), RPC 8.4(d) (conduct prejudicial to the administration of justice), and RPC 3.5(a) and (b) (attempt to influence the trier of fact and to communicate ex parte with the trier of fact), the OAE subsequently withdrew that count (count twelve).

For the reasons expressed below, we agree with the special master's finding that, because respondent reasonably, albeit mistakenly, believed that he was entitled to the funds, the

misappropriations were negligent, not knowing. In our view, a censure is the appropriate level of discipline for respondent's negligent misappropriation of trust and escrow funds, failure to comply with the recordkeeping rules, failure to safeguard client funds, and conflict of interest.

Respondent was admitted to the New Jersey bar in 1992. He has no disciplinary history.

Although many of the facts are not in dispute, the primary issue, whether respondent's misappropriations of funds were negligent or knowing, was vehemently contested. Unquestionably, respondent's recordkeeping was grossly deficient. Correct practice required that he place in his trust account funds received in connection with real estate transactions, such as deposits and mortgage proceeds, and then issue trust account checks to his business account for his earned legal fees and reimbursement for expenses. Instead, respondent removed his fees by "splitting the deposit," that is, depositing checks in his trust account and simultaneously "cashing out" the portion to which he was entitled for his fees and expenses from prior real estate transactions. In other cases, respondent left his earned fees in his trust account. Later, when he received funds from unrelated real estate transactions, he deposited those funds in his business or personal account, reasoning that they would be

offset by the earned fees that he had retained in his trust account. In all instances, the fees were removed only after they had been earned. In addition, rather than maintaining a formal ledger of the fees and expenses that he was owed, respondent kept client files on his desk, in which he jotted down the amounts, or wrote the figures on Post-it® notes. After he received his fees in a particular case, he discarded the notes.

As a result of respondent's practice of keeping fees in his trust account, which he left there for periods up to one month, he believed that his trust account contained earned fees to back the checks written against the newly-received funds. During the time covered by the audit, respondent did not reconcile his trust account.

At the ethics hearing, respondent testified about his professional background. He received a degree in accounting in 1983 from Norfolk State University. Thereafter, he was employed at AT&T for twelve years – five years in finance and seven years in quality control. Although he was admitted to the bar in 1992, he did not begin his law practice until the end of 1996. He attended law school in the evening, while employed full-time at AT&T. After graduating from law school in 1991, he continued working for AT&T until 1996, when he established a solo law

practice in Monmouth County. He, thus, never practiced under the supervision of other attorneys.

About six years after respondent began his law practice, he was selected by the OAE for a random compliance audit, which took place on October 4, 2002. At the audit, Karen Hagerman, OAE senior compliance auditor, noted, on a standard checklist form used at random audits, the following recordkeeping deficiencies:

- trust receipts journal were not fully descriptive.
- trust disbursements journal were not fully descriptive.
- client ledger cards were not fully descriptive.
- a client ledger card was not maintained for each client.[1]
- no quarterly reconciliations with journals and checkbook were performed.
- no running checkbook balance was maintained.
- old outstanding checks needed to be resolved.
- deposit slips lacked sufficient detail.
- trust funds on deposit exceeded obligations (in other words, there was an overage).[2]
- trust account reconciliation certification was required.
- not all legal fees were deposited in the business account.

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[1] Respondent maintained client ledger cards only in real estate transactions.

[2] Hagerman's initial review disclosed a $369 overage in respondent's trust account.

In addition, Hagerman made a preliminary finding that, in numerous cases, respondent overcharged his real estate clients for title and survey costs. On the HUD-1 form, respondent included as title and survey costs an additional amount that was disbursed to him. Hagerman testified that, when she questioned respondent about this practice, he indicated that he had not explained to his clients that he received a portion of the title and survey costs. As seen below, Hagerman's testimony is contradicted both by respondent and by certifications submitted by twenty-one of his clients.

During the audit, respondent explained to Hagerman his practice of deducting his legal fees from certain real estate funds, such as the mortgage proceeds or the cash amount that the client was required to bring to the closing, instead of issuing trust account checks to himself. Hagerman's investigation confirmed respondent's method of withdrawing his real estate fees.

Based on the alleged overcharges to respondent's clients, the inability to identify all client funds required to be in respondent's trust account, and the lack of respondent's business account records, Hagerman scheduled a second audit, accompanied by OAE attorney Lee Gronikowski.

At the December 2, 2002 second audit, respondent told Hagerman that, as she had suggested at the first audit, he had retained an accountant who, after a preliminary review, had determined that his trust account had a $42,000 shortage. The accountant reported to respondent that the shortage resulted from a number of mistakes, such as overdisbursing funds in real estate transactions and depositing funds in his business account, instead of his trust account. Respondent then replenished the $42,000 shortage with his own funds. According to respondent, because he believed that he was accurately tracking the amount of earned legal fees in his trust account and that every transaction had balanced, he was "shocked and amazed" to learn of the shortage.

Hagerman identified one additional recordkeeping violation, at the second audit: rather than depositing a real estate check intact in his trust account, respondent would "split deposits." Hagerman explained that the purpose of the requirement that checks be deposited in trust accounts intact is to maintain a trail of trust funds. She conceded, however, that whether an attorney deposits a check in the trust account in full and then issues a check for an earned fee, or whether the attorney splits the deposit -- removing the fee at the same time that the check

is deposited in the trust account – the amount of funds deposited in the trust account is the same.

After the audit, the OAE and respondent's counsel exchanged a series of letters by which respondent provided numerous documents that the OAE had requested, including trust account reconciliations, trust and business account bank records, client ledger cards, proof of client reimbursements of title and survey costs, and client certifications.

Hagerman reconstructed a portion of respondent's trust account, using bank records, such as statements, deposit slips, and canceled checks, as well as documents from respondent's client files, such as HUD-1 forms. At the start of her reconciliation, respondent had $30,664.26 in his trust account that she did not identify as belonging to a particular client because she did not reconstruct the records from the opening of the trust account.

Hagerman's reconciliation demonstrated that, from May 15, 2001 through February 15, 2002, respondent's trust account had overages ranging from $17,814.80 to $8,574.33. According to Hagerman, respondent's trust account revealed shortages between March 1, 2002 and September 27, 2002. On this last date, the account was short by the largest amount, $45,282.75. Although Hagerman could not explain the reason for the initial shortage,

she asserted that the shortage had increased because respondent had failed to deposit all funds in connection with particular transactions, but still had disbursed all of the funds for those transactions.

Hagerman determined that, at some point, respondent's trust account had a $5,270.08 shortage, while respondent maintained that the shortage was $1,452.87. Hagerman conceded that the complaint's allegation of a $42,000 shortage was based on the amount of funds that respondent had deposited in his trust account, not on her independent findings.

Hagerman also acknowledged that, as to the real estate transactions referenced in the formal ethics complaint, all of the funds had been disbursed; the closing of title had proceeded in a timely fashion; all documents had been properly and timely recorded; and all mortgages, judgments, and liens had been properly satisfied.

Respondent was the only signatory on the trust account and solely responsible for making the deposits in that account. During the audit period, the trust account was never overdrawn.

We now turn to the specific transactions that formed the basis for the allegations of the OAE complaint.

Count One – Deborah Crichlow

Respondent represented Deborah Crichlow, the buyer of property in Long Branch, in a real estate transaction that closed on June 19, 2002. In addition to a mortgage, Crichlow received two grants to assist her in this purchase: a $10,000 grant from Monmouth County and a $3,000 grant from the City of Long Branch. The grants were made in connection with a "Home First-Time Homebuyers Program," whereby the funds must be used solely for the purpose of acquiring affordable housing.

Virginia Edwards, Director of the Monmouth County Community Development Program, explained that the program, funded by the United States Department of Housing and Urban Development, provides up to $10,000 to be used only for a down payment and closing costs to first-time home buyers who meet certain income requirements. The grant funds cannot be used for other purposes. Edwards clarified that payment of the buyer's attorney's fees in connection with the real estate transaction is considered a proper item of closing costs for the use of the grant funds. In the event the entire grant funds are not needed, the excess funds must be returned to the program. Edwards was not aware of any problems with the grants provided to respondent's clients.

Similarly, Jacob Jones, Director of Community and Economic Development, City of Long Branch, testified that the City's

first-time homebuyers program was designed to accomplish home ownership for certain qualified applicants. Jones had witnessed Crichlow's signature on the program documents. He, too, asserted that the grant funds must be used only as a down payment or to defray closing costs. In the Crichlow matter, Jones dealt directly with the client. He neither met with, nor talked to, respondent.

On June 18, 2002, the day before the closing, respondent deposited the $3,000 Long Branch grant check in his personal checking account maintained at Sun National Bank. On June 20, 2002, he deposited the $10,000 Monmouth County grant check in his attorney business account at Sovereign Bank. He then used these funds for personal and business expenses.

For the closing, respondent received in his trust account the $97,178.14 mortgage proceeds for the Crichlow transaction, but disbursed $107,321.38 from his trust account. Hagerman opined that the resulting $10,877.25 shortage was caused by respondent's failure to deposit the $13,000 grant funds in his trust account. The shortage was calculated by subtracting $2,122.75 (respondent's fee and expenses) from the $13,000, for a deficit of $10,877.25.

Respondent provided the following explanation for his deposit of the grant checks in his personal and business accounts.

In addition to the real estate purchase, respondent represented Crichlow in several collection matters that were required to be resolved, as a condition of her mortgage commitment. Respondent's fee for the collection matters was $200 per hour, with a minimum fee of one and a half-hours, or $300. Although respondent did not have a written fee document, his intake sheet for the Crichlow collection matters contained the handwritten notation "$200/hour 1.5 minimum," which referenced his fee arrangement.

Respondent also introduced into evidence a series of letters to and from Crichlow's creditors, as well as authorizations that she signed permitting him to negotiate with those creditors on her behalf. Respondent spent six hours on the Crichlow collection matters, for which he earned a $1,200 fee. By negotiating with Crichlow's creditors, he reduced her outstanding balances of $8,965 to $2,800, thereby saving her $6,165.

Because Crichlow had pre-paid $300 of respondent's fee, she owed him a balance of $900, plus $2,122.75 for fees and expenses in connection with the real estate purchase, for a total amount of $3,022.75. Pursuant to his practice of not issuing trust account checks for his fees, respondent collected this fee by depositing the $3,000 grant check from the City of Long Branch in his personal account. He did so on June 18, 2002, the

scheduled closing date, as confirmed by a fax from the seller's attorney. Unbeknownst to respondent, however, the closing was delayed until June 19, 2002. According to respondent, he deposited the $3,000 check on his way to the closing, only to find out that the closing had been postponed to the next day.

As to the $10,000 Monmouth County grant check, respondent explained that he had intended to deposit it in his trust account, as demonstrated by his notation on the back of the check: "For deposit only Kevin P. Wigenton attorney trust account." But when he prepared the deposit slip, which did not have the account number pre-printed, he inadvertently wrote his business account number, instead of his trust account number. His accountant detected this error when he reviewed respondent's records, after the first audit. Respondent disclosed this mistake to the OAE during the second audit, on December 2, 2002.

On June 20, 2002, the same date that respondent deposited the $10,000 grant check in his business account, the Crichlow $97,178.14 mortgage proceeds were deposited in his trust account. The OAE, thus, contended that, because respondent had made a trust account deposit on the same day that he had deposited the Crichlow funds in his business account, the business account deposit had been conscious, not inadvertent. The OAE, however, did not produce a deposit slip for the

mortgage proceeds and, thus, did not negate the possibility that the $97,178.14 had been wired into respondent's trust account, rather than deposited by respondent.

At the time of the Crichlow $10,000 deposit, respondent's business account balance was $12,860.89. According to respondent, those funds were sufficient to cover his business expenses.

Crichlow's December 6, 2004 certification indicated that she was satisfied with respondent's services in both the real estate and collection matters.

The complaint charged respondent with the knowing misappropriation of the two grants, thereby causing an invasion of other clients' funds to satisfy the Crichlow closing obligations.

Count Two – Lynette Redd

Respondent represented Lynette Redd, the buyer of property in Asbury Park, in a real estate transaction that closed on April 26, 2002. Redd received a $5,000 grant check from the City of Asbury Park, which respondent deposited in his personal checking account at Sun National Bank, on April 23, 2002, and used it for his own purposes. As seen below, respondent asserted that he had earned fees from other completed real estate transactions and had used the Redd grant check as a means to pay himself those fees.

In addition, as did Crichlow, Redd received a $10,000 grant from Monmouth County in connection with the first-time homebuyers program. According to Hagerman, on May 2, 2002, respondent deposited only $200 of the grant funds in his trust account, received a "cash out credit" for $9,800, and applied those funds toward a personal line of credit at Sovereign Bank.

On cross-examination, however, Hagerman admitted that, at the same time that respondent deposited the $10,000 grant check, he also deposited loan proceeds of $151,177.33 in connection with an unrelated real estate transaction:

> Q. [T]he allegation in the complaint that Mr. Wigenton took $9,800 in cash from the grant check is not entirely accurate, correct? There were two checks, correct?
>
> A. There were two items that were on the deposit slip, yes. . .
>
> Q. In connection with the Johnson, Martin Bennett transaction, Mr. Wigenton received a lender's check dated April 29, 2002, in the amount of $151,177.33, correct?
>
> A. Correct.
>
> Q. And in connection with the Redd transaction, Mr. Wigenton received the $10,000 grant check, correct?
>
> A. Correct.
>
> Q. On May 2, 2002, Mr. Wigenton deposited both checks together into his attorney trust account, correct?
>
> A. Less $9,800.

Q. Correct. So he simultaneously withdrew $9,800 from the deposit of two checks.

A. Correct.

Q. It wasn't from one check, it wasn't from the other check; it was from both checks together.

A. Correct.

[3T126-7 to 3T127-13.][3]

Hagerman asserted that, because respondent received $69,505.33 in connection with the Redd transaction ($69,305.33 from the mortgage proceeds and $200 from the $10,000 grant check), but disbursed $84,305.33, a $14,681.70 shortage resulted. Hagerman's reconciliation indicated that the trust account shortage increased from $6,289.87 to $15,874.51 as a result of the Redd transaction.

LaJuana Denise Brown, employed by the Department of Community Development, City of Asbury Park, testified that the homebuyer's program, similar to the Monmouth County program, provides financial assistance to those who qualify based on income and household size criteria. The funds must be used solely for the purpose of acquiring a home. Brown was not aware

[3] 3T denotes the transcript of the June 5, 2009 ethics hearing.

of any problems arising from the grants awarded to respondent's clients.

At the April 26, 2002 closing, respondent issued a $264.53 check to Monmouth County, representing excess funds that he returned to the first-time homebuyer's program.

The complaint charged that respondent's knowing misappropriation of the two grants caused the invasion of other clients' funds, which respondent used to close the Redd transaction.

As previously noted, respondent's defense to the knowing misappropriation allegations is that he reasonably believed that he had funds of his own in his trust account from earned fees that he had not removed and that he paid himself his fees by depositing corresponding real estate funds, some related to the particular case and others unrelated, in his personal account.

As to respondent's April 23, 2002 deposit of the $5,000 grant check in his personal account, he alleged that he had earned fees from three other matters. Specifically, on March 8, 2002, about six weeks before the Redd transaction, respondent represented Joanne Valentine in the purchase of property from Artisan Group, Inc. Respondent's fees and expenses were $1,437.75.

Respondent also represented the estate of Louis Draper. On March 28, 2002, respondent confirmed, in a letter, that his retainer was $2,250. The OAE and respondent stipulated that he deposited in his trust account a $12,863.24 check on behalf of the Draper estate and disbursed $10,613.24, deducting his $2,250 retainer. The net result of this transaction was the addition of $2,250 in legal fees in respondent's trust account.

In addition, respondent represented Lori Harris in a refinance that closed on March 29, 2002. Respondent's fees and expenses were $1,233.75.

Respondent, thus, was entitled to collect $4,921.50: $1,437.75 from the Valentine matter, $2,250 from the Draper estate, and $1,233.75 from the Harris transaction. Although, by depositing the $5,000 Redd grant check in his personal account, respondent received $78.50 more than he was due, he could not explain that small discrepancy. He speculated that he was due fees from another case, but, explained that, because his bookkeeping was flawed, he could not identify the matter.

In turn, the OAE introduced into evidence respondent's April 30, 2002 business account bank statement indicating that, on April 4, 2002, he had deposited $4,921.50 in that account, from a source other than the Redd grant check. The OAE, thus, maintained that, because respondent had previously been

compensated for his fees in the three other matters, he was not entitled to the $5,000 Redd grant check. Respondent could not identify the purpose of the $4,921.50 deposit.

As to respondent's May 2, 2002 withdrawal of $9,800 from the deposit of both the Redd $10,000 grant and the Johnson/Martin $151,177.33 mortgage proceeds, respondent claimed that he was entitled to collect $14,032.25 for his representation of four clients.

Specifically, on April 23, 2002, respondent handled Yosetty Nunez's real estate purchase from Artisan Group, Inc. Respondent's fees and expenses for that transaction were $1,572.75. Also, the parties stipulated that, on April 24, 2002, respondent represented Davis Enterprises, LLC, in the purchase of property from Ruth Hopkins and Cecil Lloyd. Respondent's fees and expenses for that transaction were $1,339.75. The OAE and respondent further stipulated that respondent represented Ramona Johnson and Shalonda Martin in their purchase of property from Frederick Bennett, which closed on April 30, 2002. Respondent's fees and expenses for that transaction were $1,669.75. Finally, the OAE and respondent stipulated that respondent represented Rose Wilson in her sale of property to T&T Realty Associates,

LLC, on May 1, 2002. Serving as the realtor, respondent earned a $9,450 real estate commission.[4]

In connection with two of the transactions, Nunez and Davis, respondent received checks totaling $171,874.39, from which he removed $2,732.50, at the time of the deposit of those funds. In the Johnson/Martin matter, respondent received $1,491.45 at the April 30, 2002 closing. In addition, as noted previously and alleged in the complaint, respondent received $9,800 when he deposited the Redd grant and the Johnson/Martin mortgage proceeds.

The amounts that respondent was due from the completed representation and the amounts that he collected, based on the above transactions, are summarized as follows:

Amounts Due

Client	Date	Amount
Nunez	4/23/02	$1,572.75
Davis Enterprises	4/24/02	$1,339.75
Johnson/Martin	4/30/02	$1,669.75
Wilson	5/01/02	$9,450.00
Total		**$14,032.25**

Amounts Received

Client	Date	Amount
Nunez/Davis	4/24/02	$2,732.50
Johnson	4/30/02	$1,491.45
Johnson/Redd	5/02/02	$9,800.00
Total		**$14,023.95**

[4] The complaint did not allege any impropriety in connection with respondent's role in the Wilson transaction.

Count Three – Christina D'Angelo

On December 28, 2001, respondent and his wife, Susan Wigenton, closed on the sale of their Tinton Falls home to Christina D'Angelo. Although D'Angelo had given respondent two deposit checks, one for $1,000 and one for $5,000, the OAE found no evidence of the $1,000 check. Respondent, however, voluntarily admitted to the OAE that he had received both checks.

On December 10, 2001, eighteen days before the closing, respondent deposited the $5,000 deposit check in his personal savings account at Sun National Bank. Nine days later, on December 19, 2001, respondent obtained a $60,000 bank check, using funds from his savings account. The bank check was issued to Stone Hill, LLC, the developer of a home that the Wigentons bought on December 21, 2001. Hagerman maintained that D'Angelo's $5,000 deposit check was included in the $60,000 bank check:

> The balance in [the savings] account as of 12/10/01, after the $5,000 was deposited was $61,000 and change so if that 5,000 had not been deposited, he wouldn't have been able to withdraw 60.
>
> [1T148-16 to 19].[5]

Respondent, however, contended that the significant date of his savings account balance is the date he obtained the $60,000

[5] 1T denotes the transcript of the June 1, 2009 ethics hearing.

bank check, December 19, 2001, not the date he deposited D'Angelo's check, December 10, 2001. In that regard, the following exchange took place between Hagerman and respondent's counsel:

> Q. As of December 18th or 19, 2001, meaning, before the withdrawal of the $60,000, the balance in the savings account was $65,354.27, correct?
>
> A. Correct.
>
> Q. As of December 20, 2001, meaning after the withdrawal of the $60,000, the savings account had a balance of $5,354.27, correct?
>
> A. Correct.
>
> Q. So Mr. Wigenton did not need the $5,000 D'Angelo deposit to make the $60,000 withdrawal, correct?
>
> A. I disagree.
>
> Q. Isn't it correct that had the $5,000 never gone into this account and had Mr. Wigenton then withdrawn the $60,000 as he did, there would still have been a balance of $354.27? . . .
>
> A. Mathematically, that works out, yes, sir.
>
> Q. Now, when you testified on Monday, you testified that upon deposit, upon the deposit of the $5,000, the balance was $61,000, correct?
>
> A. I believe I testified as of December 10th of 2001, the balance was $61,000. . . .
>
> Q. You were implying that Mr. Wigenton would have been unable to withdraw the $60,000 had

he not deposited into the Sun account the $5,000 check from Miss D'Angelo.

A. Correct. . . .

Q. [T]he question is how much money was in the account right before he made that withdrawal, correct?

A. Correct. . . .

Q. But when you testified, you didn't mention that when he withdrew the $60,000, there was more than 65,000 in the account, correct?

A. Correct.

[3T159-2 to 3T161-20.]

A review of the bank statements reveals that, on December 20, 2001, respondent's savings account balance was $65,354.27; after he withdrew the $60,000, his balance was $5,354.27; and, from December 10, 2001, the date of the $5,000 D'Angelo deposit, to December 28, 2001, the date of the D'Angelo closing, the savings account balance was never below $5,000.

Hagerman asserted, however, that, on December 18, 2001, ten days before the closing, respondent had deposited $3,475 in his savings account and that $2,000 of that deposit represented real estate deposits for the two Robbins matters discussed below. Maintaining that those funds did not belong to respondent, Hagerman concluded that respondent had invaded the Robbins deposits, when he issued the $60,000 check to Stone Hill. As

seen below, respondent claimed that he had deposited the two Robbins real estate deposits in his savings account as reimbursement of his earned legal fees in several unrelated matters. In other words, he contended that those funds belonged to him.

According to Hagerman, although respondent deposited only $176,724.09 in his trust account for the D'Angelo closing, he disbursed $186,048.34 from that account, thereby creating a $9,324.25 shortage. Hagerman acknowledged, however, that the HUD-1 form properly credited D'Angelo with the $6,000 deposit and properly debited that amount to the Wigentons. She also conceded that the $5,000 check that respondent deposited in his personal savings account did not contribute to the overall alleged $42,000 shortage because, as the seller, respondent was entitled to receive those funds at the D'Angelo closing.

In addition to selling the property to D'Angelo, respondent represented her at the closing. Respondent discounted his legal fee, charging D'Angelo $395. Although he orally recommended that she obtain independent counsel, D'Angelo elected to retain respondent. Respondent, however, did not advise D'Angelo, in writing, to retain other counsel. He acknowledged that he should have done so. In a November 21, 2004 certification, D'Angelo confirmed that, although respondent had orally advised her to

retain independent counsel, after talking to her father, a mortgage loan officer, she had chosen to retain respondent. The complaint did not charge respondent with violating RPC 1.8 (*conflict of interest; business transaction with client*).

According to respondent, at the time that D'Angelo tendered the deposit, she had not yet retained him. He, thus, claimed that, because he had received the deposit in his capacity as the seller, not as an attorney, he did not have to place the funds in his trust account.

The complaint charged respondent with having knowingly misappropriated the $5,000 deposit. Respondent denied that he had used any of D'Angelo's deposit to purchase his Stone Hill home, pointing out that, at the time of the $60,000 withdrawal, more than $5,000 remained in his savings account. He further claimed that, at the time of the $60,000 disbursement to Stone Hill, he had in excess of $222,000 in liquid assets, in various other personal accounts and investments.

Count Four – Ramona Young

Respondent represented Ramona Young in the sale of property in Tinton Falls to Paul Kirvan and Patricia Murphy. The closing of title took place on May 31, 2001. Respondent received the buyers' $2,000 deposit check, dated May 11, 2001, payable to

"Kevin P. Wigenton Trust Account," which he deposited in his personal checking account on that date. Respondent then used the $2,000 for personal and business expenses.

At the May 31, 2001 closing, respondent issued a $2,000 trust account check to Young, representing the buyers' deposit. According to the complaint, the issuance of the check to Young invaded other clients' funds because the $2,000 had not been deposited in respondent's trust account. The complaint alleged that this $2,000 shortage contributed to the $42,000 overall deficiency in respondent's trust account.

In his defense, respondent claimed that he had placed the $2,000 deposit check from the Young real estate transaction in his checking account as partial payment of his $2,750 fee from an unrelated matter, the estate of Anna Lou Frazier. On May 11, 2001, respondent disbursed the majority of the estate assets to the respective heirs, thus concluding most of the legal services for the estate. As noted above, on May 11, 2001, respondent placed the $2,000 Young deposit check in his personal bank account. According to respondent, that check was payment of his fee in the Frazier estate. Respondent's deposit slip for that item bears his handwritten notation "Frazier Estate."

Although respondent's fee for the Frazier estate was $2,750, he took a fee of only $2,000 from the Young deposit

because the estate work had not been completed at that time. Respondent received the $750 balance of his fee at a later date.

On May 31, 2001, the closing date, respondent received his $750 fee for the Young sale from the buyers' attorney, which he deposited in his personal checking account on June 1, 2001.

Count Five – James Henderson

Respondent represented James Henderson in the sale of property to Charles and Joanne Roesing. Respondent received a June 29, 2001 check for $10,000 from the Roesings, representing the real estate deposit. On July 20, 2001, respondent deposited $8,000 from the $10,000 check in his trust account, receiving $2,000 as a "cash out credit." On that same date, July 20, 2001, respondent deposited the $2,000 in his personal account.

Almost one year later, on July 11, 2002, the closing date, respondent issued a $10,000 check to Henderson, as payment of the buyers' deposit. Hagerman asserted that, because respondent deposited only $8,000 of the $10,000 buyers' deposit, he invaded other clients' funds when he issued the $10,000 check to Henderson.

Because title issues had developed, the Henderson closing was delayed by almost one year. By that time, Henderson had retained another attorney, Cathy Frank, who handled the closing.

Respondent, thus, did not receive a fee for his pre-closing services in the Henderson transaction. On July 10, 2002, Frank indicated that the closing was scheduled to take place the next day and asked respondent for a check for the deposit. Respondent did so on July 11, 2002.

Here, too, respondent alleged that his removal of the $2,000 from the Henderson deposit represented a reimbursement due him from a client in an unrelated transaction that had closed on July 20, 2001. Respondent and the OAE entered into the following stipulation regarding that unrelated matter:

> Mr. Wigenton represented Lyneth Sanderson in connection with the sale of 138 Bridge Avenue, Red Bank, to Joseph and Lola Meluso. The Sanderson-Meluso transaction closed on July 20, 2001. Exhibit KPW-168A is a copy of the HUD-1 for the Sanderson-Meluso transaction.
>
> [Ex.J-4¶62].

Prior to the closing, on May 2, 2001, respondent had issued to Sanderson a $2,000 check from his personal checking account. The check represented a loan to Sanderson to permit her to obtain car insurance.[6] Respondent deposited the $2,000 check in Sanderson's account at Shrewsbury State Bank, writing the

[6] The complaint did not allege any wrongdoing on respondent's part in connection with the Sanderson transaction, namely, a conflict of interest.

deposit slip on her behalf. He also represented Sanderson in an immigration matter and, at her request, reviewed a personal injury matter for which she had retained another attorney. His fee for both of those matters was $1,000.

Respondent and the OAE stipulated that respondent received a $7,000 deposit in connection with the Sanderson-Meluso transaction, which, as noted above, closed on July 20, 2001. On that date, respondent disbursed a $4,000 trust account check to Sanderson, representing her portion of the $7,000 deposit, after the deduction of the $2,000 that she had borrowed from respondent and his $1,000 fee for the immigration and personal injury matters. Respondent left this $3,000 fee in his trust account.

Respondent claimed that he removed $2,000 from the $10,000 Henderson deposit on July 20, 2001, as reimbursement for the loan to Sanderson, whose closing occurred on that date. The deposit slip by which respondent deposited the $2,000 that he had removed from the Henderson check bears respondent's handwritten notation "Sanderson," indicating that he considered the check as payment of funds due from her.

During the OAE investigation, respondent provided the OAE with a certification from Sanderson, indicating that respondent

had lent her $2,000 from his personal bank account. The OAE did not contact Sanderson.

Count Six – Robbins to Quigley
Count Seven – Robbins to Dene

Because respondent's defenses in these two matters are related, these two counts will be discussed together.

Respondent represented Brian Robbins in the sale of property in Red Bank to Patricia Quigley. The closing of title took place on February 4, 2002. Quigley paid a $12,500 deposit via three checks – two checks totaling $11,500, dated November 27, 2001, which respondent deposited in his trust account, and a $1,000 check, dated November 5, 2001, issued by a realtor, which respondent deposited in his personal savings account on December 15, 2001.

On February 5, 2002, the day after the closing, respondent issued a $12,500 trust account check to Robbins, in payment of Quigley's deposit. The complaint alleged that, by depositing only $11,500 in his trust account and then withdrawing $12,500 from the trust account, respondent invaded other client funds to close the Robbins transaction.

Respondent also represented Brian Robbins in the sale of another Red Bank property to Vincent Dene. The closing took place on April 15, 2002. On December 4, 2001, Dene issued a

$1,000 check payable to respondent's trust account, representing a deposit for the Robbins property. Eleven days later, on December 15, 2001, respondent deposited the Dene check in his personal savings account.

On April 15, 2002, respondent issued a $1,000 trust account check to Robbins in payment of Dene's real estate deposit. According to the complaint, respondent's check to Robbins invaded other client funds because he had not placed Dene's deposit check in his trust account.

In the Robbins to Quigley matter (Count Six) and the Robbins to Dene matter (Count Seven), respondent asserted that, because he had not removed from the trust account his fees from prior unrelated transactions, he had deposited in his personal bank account the two $1,000 deposits in the Robbins matters.

Specifically, on December 14, 2001, respondent represented St. Stephen AME Zion Church in the purchase of property from Asbury Shores, Inc. Respondent's fees and expenses for that transaction were $1,907.75. Also on December 14, 2001, respondent represented Lenise Young in the purchase of property from Joyce Treacy. His fees and expenses for that transaction were $1,382.75. Thus, for both the St. Stephen and Young matters, respondent had earned $3,290.50 in fees.

The OAE stipulated that respondent had not removed his fees and expenses via a trust account check for any of the real estate transactions that occurred before the audit.

On December 15, 2001, when respondent placed the two $1,000 Robbins deposits in his personal bank account, he also deposited a third $1,000 check, which represented the deposit in connection with his representation of Joy Valentine in a separate real estate transaction. Also on December 15, 2001, respondent deposited three checks in his trust account in connection with the St. Stephen, Young, and Crichlow matters. Respondent removed $290.50 from those three deposits.

In sum, on December 15, 2001, respondent collected $3,290.50 in fees: $3,000 from the two Robbins and Valentine deposits and $290.50 that he removed from the trust account deposit in the St. Stephen, Young, and Crichlow matters. $3,290.50 is equal to the amount of fees and expenses that respondent was entitled to collect from the St. Stephen and Young matters, both of which had closed the day before, on December 14, 2001.

In a November 30, 2004 certification, Robbins provided details about the various matters that respondent handled on his behalf, including the above two real estate transactions; specified the funds that he received from respondent in

connection with those transactions; and expressed his satisfaction with respondent's representation. The OAE acknowledged that, although the Robbins certification had been provided during the investigation, no attempt had been made to contact Robbins or to determine the truthfulness of his statements.

Count Eight – Deidre Harris

Respondent represented Deidre Harris in the sale of South Belmar property to Donald Stoll. The closing took place on September 27, 2002. Stoll paid a deposit of $10,400 via two checks, a $9,400 check dated July 17, 2002 and a $1,000 check dated July 24, 2002. On July 29, 2002, respondent placed in his trust account $8,600 of the $9,400 check from Stoll, thus keeping $800 for himself. On August 1, 2002, respondent placed the $1,000 deposit check in his personal account. As seen below, respondent claimed that he was entitled to collect a $1,000 fee from another matter.

Respondent disbursed the $10,400 by issuing two checks on the day after the closing, September 28, 2002: a $9,275 check to Harris and a $1,125 check to himself for his legal fee in the

Harris matter.[7] According to the complaint, respondent invaded other client funds to the extent of $1,800, the difference between the deposit of $8,600 in his trust account and his disbursement of $10,400 from that account.

Respondent introduced into evidence his file copy of the $9,400 check that he had received from Stoll. That page bears respondent's handwritten notation:

10,400
8,600
1,800

According to respondent, the note reflects that he received $10,400 as a deposit for the Harris transaction, that he deposited $8,600 in his trust account, and that he had earned $1,800 in legal fees from another matter. Although respondent could not identify a particular client matter in connection with the $1,800 fee, he asserted that it was his practice, at that time, to list deposits and fees on papers kept in his files.

During the OAE investigation, the OAE received a confirming certification from Harris. Nevertheless, the OAE did not contact her.

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[7] This check represents the very first instance of respondent's issuance of a trust account check for his legal fees, contrasted with his practice of leaving earned fees in the trust account. After respondent received notice of the October 4, 2002 audit, he contacted an accountant, who advised him that he should collect his fees by issuing trust account checks to himself.

Count Nine – Closing Costs Overcharges

As previously mentioned, during the initial OAE random audit, Hagerman determined that respondent had overcharged real estate clients for title and survey charges. The complaint charged that respondent "marked up" the cost of title insurance or surveys by $100 to $300, kept the overcharges, failed to disclose to his clients the actual cost of the title and survey charges, and misled his clients into believing that he was charging them only the actual costs.

Hagerman cited as an example the Crichlow matter. In that case, respondent issued a check in the amount of $883 for title insurance. His client ledger card has an entry of $175 on a line marked "Title." Those two figures total $1,058, the amount listed on the HUD-1 for title insurance. In fact, only $883 of that amount was for title insurance. The $175 balance represented respondent's fee for reviewing the title. Hagerman took the position that respondent kept track of the overcharges, at the time of the real estate closings.

On August 17, 2004, well before the complaint against respondent was filed, respondent provided to the OAE certifications from nine clients, indicating that he had disclosed to them, at their respective real estate closings, that additional attorney's fees were included with the title or

survey costs listed on the HUD-1.[8] Although respondent invited the OAE to verify this information with those clients, the OAE did not.[9] The OAE did not produce any documentation contradicting those clients' statements.

The complaint alleged that respondent's overcharges violated RPC 8.4(c). At the ethics hearing, the OAE presenter conceded that, if respondent had reviewed the title and the survey in a particular real estate transaction; if he had disclosed his additional fee to the client; and if the client had agreed to the fee, respondent's conduct would not have violated any RPC.

Respondent described as follows his practice concerning his real estate fees, in representing the buyer. During an initial consultation, he would give his client a range of fees, such as $900 to $1,200. Immediately before the closing, he would tell the client the amount of certified funds to bring to the closing and would indicate the amount of his fee. During the closing, he would review the HUD-1, line by line, with the client. Whenever

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[8] Respondent attached to his answer, which was admitted in evidence as a joint exhibit, certifications from fourteen clients, who confirmed that respondent had disclosed to them the additional fee.

[9] Hagerman later testified that, although she tried to contact D'Angelo and Crichlow, she was unsuccessful.

he reached the line with the entry for title and survey fees, he would disclose to the client that his fee for reviewing the title or survey was included in the sum with the title or survey costs. Although he would not always indicate the amount of the fee that was included with the title or survey cost, at every closing, he would disclose that his fee was included in that item.

Respondent could not recall how he had developed this system, indicating that it had always been his practice to handle real estate closings in this manner. He explained that, when he began practicing law, a friend who was in the mortgage business had supplied him with a stack of HUD-1 forms. He added that, rather than being taught about real estate transactions by an experienced attorney, he "learned by doing."

Respondent denied that he had signed inaccurate HUD-1 forms or had allowed his clients to do so. According to respondent, he believed that the forms were accurate, despite the fact that he had included his fees with the title or survey charges. He stated that he was not aware of the provision on the HUD-1 that indicated that the form is a true and accurate account of the disbursed funds. He claimed that he learned of that provision from Hagerman, during the audit.

At the second audit, on December 2, 2002, OAE counsel Lee Gronikowski stated that, although he could not direct respondent to refund the legal fees charged for title and survey review, it would be a good idea to do so. Respondent then refunded $11,254 to sixty-three clients, preparing a list containing the name of the client, the date of the closing, the amount of the refund, the date of the refund check, and the check number.

In addition to the above-mentioned nine client certifications, Crichlow certified, on December 6, 2004, that, at the closing, respondent had disclosed to her that most of his legal fees appeared on the HUD-1 form on the line designated for attorneys fees and that additional legal expenses were included with some out-of-pocket costs. She also verified that she had received a $175 refund from respondent.

Count Ten – Robinson Estate

Respondent represented the Robinson estate in the March 16, 2001 sale of property to Chester Bass, Sr. and Chester Bass, Jr. He also was the realtor in the transaction, receiving a $2,160 real estate commission via a check payable to R/E Consultants, which he deposited in his personal checking account.

Before the sale to the Basses, the Robinson estate had attempted to sell the property. Three buyers, however, cancelled

three transactions, during the inspection period. As shown by a home inspection report, the property was in very poor condition. After the realtor listing agreement expired, Leona Lee, a co-executrix of the estate, asked respondent to sell the property.

Respondent was able to sell the property, receiving a six percent commission, or $2,160, at the closing. Respondent explained that he listed the commission on the HUD-1 as paid to R/E Consultants, because he wanted to segregate the realty commission from his attorney's fees. Although respondent anticipated that he might have future real estate earnings from other sales, he did not receive other commissions. R/E Consultants was not an incorporated entity.

Lee signed a November 20, 2004 certification praising respondent's services as a lawyer and realtor.

Although respondent conceded that, based on Opinion 514, he should not have acted as both attorney and realtor in the same transaction, he asserted that, as of 2001, he was not aware of that prohibition.

Count Eleven – The Marshall/Jean-Baptiste/Franklin/Ballard Matters

In the amended complaint, the OAE alleged that respondent knowingly misappropriated either client or escrow funds, which he used to pay down a line of credit at Sovereign Bank.

Marshall

Respondent represented the Marshalls, the buyers of property from Cromey.[10] The closing took place on December 31, 2001. On January 2, 2002, respondent deposited in his trust account two checks totaling $67,604.56 in connection with the Marshall purchase and simultaneously removed $6,341.25, for a net deposit of $61,263.31.

Respondent applied the $6,341.25 to his line of credit. The complaint charged that, because respondent's total fees and expenses were $3,747.75, he misappropriated $2,593.50 ($6,341.25 minus $3,747.75). According to the complaint, respondent invaded other client funds when he disbursed more funds than he had on deposit for the Marshall transaction.

Respondent, in turn, testified that he had represented two other clients in real estate transactions, at the end of December 2001. On December 28, 2001, he handled a refinance for Chester Anderson. Respondent's fees and expenses for the Anderson refinance were $1,080.75. On December 31, 2001, respondent represented Eddie Suggs in the sale of property to Rosa Lee Bright. Respondent's fees and expenses for the Suggs sale were $1,512.75.

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[10] The record does not reveal the parties' first names.

Respondent's fees for the Marshall, Anderson, and Suggs matters totaled $6,341.25, the exact amount that he had removed from the Marshall transaction, on December 31, 2001. He contended, thus, that his removal of $6,341.25 from the Marshall proceeds was in payment of his earned fees for the Marshall, Anderson, and Suggs real estate transactions.

Jean-Baptiste

Respondent represented Dorothy Jean-Baptiste in the purchase of property from her parents, Claude and Franz Jean-Baptiste, whom he also represented.[11] The closing took place on February 19, 2002. Respondent's fees and expenses totaled $2,352.75. He removed $4,502.25 when he deposited the $147,585.88 mortgage proceeds check payable to him. The complaint alleged that respondent received $2,149.50 more than he should have, using those funds to pay down his personal line of credit. According to the complaint, because respondent disbursed more funds than he had received for the Jean-Baptiste matter, he invaded other client funds.

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[11] The complaint did not charge respondent with a conflict of interest in this matter. Although respondent testified that the parties had asked him to represent both sides, the record does not indicate whether he made the disclosures or obtained the consents required by RPC 1.7.

On February 15, 2002, four days before the Jean-Baptiste closing, respondent represented Stephen Hergenrother in a refinance. Respondent's fees and expenses totaled $1,713.75. On February 14, 2002, respondent represented Leslie and Doreen Gayle in a refinance as well. Respondent's fees and expenses for that transaction were $820.75.

Although respondent's fees and expenses for the Jean-Baptiste, Hergenrother, and Gayle transactions totaled $4,887.25, he removed only $4,502.25 from the Jean-Baptiste mortgage proceeds. Respondent explained that, seven years after these transactions had taken place, he could not recall why he had not fully drawn his fees and expenses for the three matters. He conceded that, although he believed, at the time, that his practice of paying his fees from unrelated transactions had been effective, his failure to reconcile his account prevented him from finding errors.

Franklin

In this transaction, respondent represented William Franklin in the purchase of property from Horizon. Although Franklin bought the property, he had arranged to allow its occupant, Wassyl Iwasykiw, to remain in possession, as long as Iwasykiw paid the mortgage and other carrying charges.

Iwasykiw's attorney, Aldan Markson, referred to Franklin as an "accommodation lender" to hold the property for Iwasykiw's benefit. According to Markson, Franklin received a $20,000 "bonus" for this transaction.

On February 14, 2002, respondent received a $5,000 check from Markson's law firm, Schwartz, Barkin & Mitchell, for a deposit toward Franklin's purchase of the property. On March 1, 2002, respondent applied this check toward his line of credit. On March 25, 2002, respondent issued a $5,000 trust account check in connection with the Franklin purchase. The complaint alleged that, because respondent did not place the $5,000 deposit in his trust account, he invaded other client funds when he issued the $5,000 check. According to the complaint, because respondent had already received his $5,000 legal fee from another source, he was not entitled to any portion of the $5,000 deposit.

In the Franklin matter, unlike in connection with the other allegations of knowing misappropriation, respondent could not specifically identify the client matters in which he had earned legal fees of $5,000 to warrant his removal of that sum from the Franklin funds. He explained that he was able to identify his fees in real estate matters because he typically prepared client ledger cards in those types of cases. In addition, because he

had followed Lee Gronikowski's suggestion of refunding fees to real estate clients, he had compiled that information relatively soon after those transactions had occurred. He stated that, in other types of cases, however, such as personal injury, criminal, municipal court, and estate matters, he was not able to ascertain the names of specific client matters in which he had earned legal fees. Moreover, respondent claimed that, because the amended complaint was not filed until 2007, five years after the audit had taken place, he could not identify a specific matter in which he had earned fees of $5,000. He added that he and his accountant had reviewed his records, in an unsuccessful attempt to obtain this information.

Respondent reiterated that his practice at that time was to take only fees that were due him. He further noted that his fees, including referral fees, in personal injury cases often exceeded $10,000.

Furthermore, respondent denied that he needed the Franklin funds to pay down his line of credit. He asserted that, at that time (March 2002), he was required to pay only $70 or $80 per month toward that account, he was not having any financial problems, and he had more than $200,000 in liquid assets.

Ballard

Respondent represented the estate of Marie Ballard in the sale of property to Dean and Danielle LaCorte. In connection with that sale, on August 30, 2001, the estate took back a $6,000 mortgage that was due one year later. The LaCortes paid the mortgage in full on February 26, 2002. On May 6, 2002, respondent recorded a satisfaction of mortgage. The complaint charged that, on March 1, 2002, respondent applied the $6,000 mortgage pay-off to his line of credit. The complaint further alleged that, when respondent distributed $5,701.27 to the Ballard estate heirs, on March 7, 2002, he invaded other client funds because he had not deposited the $6,000 mortgage pay-off in his trust account.

As with the Franklin matter above, respondent could not identify a specific client matter in which he had earned a $6,000 fee to justify his use of the mortgage pay-off check from the LaCortes. He claimed, however, that he had properly disbursed $6,000 to the heirs of the Ballard Estate.

Mitigating Factors

Even before the first audit took place, respondent took steps to learn about the audit process. Based on recommendations of colleagues, he contacted Robert Gelman, the developer of

"Trust Accounts Made Easy," a trust account program. After respondent described his practice of netting his fees from deposits, Gelman explained the proper procedure to him. Thus, on September 28, 2002, before the October 2, 2002 audit occurred, respondent issued a trust account check for his fees in the Harris to Stoll real estate transaction mentioned above.

After the audit, respondent made substantial changes to his banking and recordkeeping practices. He purchased a software package, "Easy Soft," which he had been using for more than six years, at the time of the ethics hearing. He hired a bookkeeper and retained Joe Boyle, a certified public accountant, to review his records. He disclosed all of his fees on the HUD-1 section designated for legal fees, rather than including a portion of the fee for title or survey review on the section for those respective costs. He closed his trust account and opened a new one to "get a fresh, clean start." He placed all checks in his trust account intact, discontinuing his practice of splitting deposits. He obtained pre-printed deposit slips for his trust and business accounts. He took an ethics class on trust accounts. He instituted a tickler system to remind him of files with trust funds. He and his bookkeeper performed three-way reconciliations of his trust and business accounts every month.

He maintained detailed client ledger cards, cash disbursements journals, and cash receipts journals.

In addition, as respondent pointed out, other than the matter now before us, no ethics grievances have been filed against respondent. All of the transactions taking place during the audit period closed in a timely manner, all documents were recorded in a timely manner, and all mortgages, judgments, and liens were satisfied in a timely manner. During the audit period, respondent's trust account was never overdrawn and no checks were returned for insufficient funds. No client or third party suffered financial harm.

Other mitigating factors are also present. Respondent cooperated with the OAE. Although he did not have all of the records requested by the OAE because, in his own words, his recordkeeping was "terrible," he provided all documentation in his possession. Indeed, in a series of letters, from May 16, 2003 (about five months after the second audit) to January 17, 2007 (one month before the complaint was filed), respondent, through counsel, provided numerous documents and information to the OAE.

Before or at the time of the ethics hearing, respondent held the following public or community positions, most of which he served without financial compensation:

- Red Bank public defender;
- Neptune public defender;
- Keansburg public defender;
- Conflict alternate public defender for Marlboro, Asbury Park, and Monmouth Beach;
- Acting chair of Ocean-Monmouth Legal Services;
- Court-appointed to represent individuals with Down Syndrome;
- Mentor of children without father figures;
- General Counsel for Asbury Park Housing Authority;
- General Counsel for eight churches;
- Presidential advisory board for paralegal studies and diversity studies at Brookdale Community College;
- Financial Industry Regulatory Authority dispute panel chair;
- Monmouth County condemnation panel commissioner;
- Monmouth Bar Foundation Trustee;
- Graduate attorney of the C. Willard Heckel Inn of Court;
- Graduate attorney and Barrister of the Haydn Proctor American Inn of Court;
- Trustee of deceased attorney's law practice, as appointed by ethics committee chair;
- Monmouth Bar Association Trustee;
- Monmouth Bar Association Municipal Court Committee Co-Chair;
- Monmouth Bar Association Professional Committee Member;

- Monmouth Bar Association Nominating Committee Member;
- Prevention First board member;
- Red Bank Zoning Board of Adjustment member;
- Monmouth County Urban League board member.

In addition to the above positions, respondent voluntarily provides pro bono services to members of the community who are unable to afford legal services.

Respondent presented substantial evidence about his character. The following attorneys testified at the ethics hearing on his behalf: Donald Robinson, Karol Corbin Walker, Charles Uliano, Albert Rescino, Kathleen Sheedy (the Secretary of the District IX Ethics Committee), Edward J. McKenna, Richard O'Connor, James Nelson Butler, Jr., Robert Honecker, and Bobby Brean Stafford. They all praised respondent's reputation for integrity, honesty, and candor. In addition, they all expressed disbelief that respondent would knowingly violate the RPCs or knowingly misappropriate client or escrow funds. For example, Donald Robinson testified:

> A. In my opinion, based on my experience with him, my client's experiences with him when I referred him, his reputation in the community, he's 100 percent incapable of knowingly violating any of the professional conduct rules.
>
> Q. Including taking funds to which he was not entitled, sir?

> A. Oh, no. No, it's beyond my comprehension that he would be capable of knowingly do [sic] that.
>
> [6T21-20 to 6T22-3].[12]

In addition, Edward J. McKenna, a former chair of the District IX Ethics Committee, was asked whether his knowledge of respondent's alleged concealment of his fees for title and survey review services would change his opinion of respondent's integrity. In reply, he asserted:

> I know there is a common practice of attorneys doing specifically what you just referred to and they thought it was entirely appropriate to take the cost of title insurance and add a fee on top of that and to do the same thing with the surveys, okay? Why they would think that, I don't really know but I know an awful lot of attorneys that did it. . . . I do know of many attorneys that did do that as a common practice on every one of their real estate transactions. They thought it was acceptable.
>
> [6T94-3 to 18].

Moreover, Mary Pat Angelini, the Executive Director of Prevention First, a nonprofit organization in Monmouth County that teaches anti-drug and anti-alcohol policies to children, testified that respondent served on the Board of Trustees. She

[12] 6T denotes the transcript of the June 30, 2009 ethics hearing.

opined that respondent's reputation for honesty, integrity, and moral character in the community was excellent.

Respondent also produced twenty-two character reference letters from clients, attorneys, and non-attorneys (including some from witnesses who also testified as described above) attesting to his character, integrity, and community service.

Respondent's Additional Defenses

In addition to respondent's defenses to the specific allegations of the complaint previously discussed, respondent contended that the OAE was overaggressive, incorrectly presented facts, and was not objective. To that end, the special master permitted respondent to present evidence in connection with count twelve of the amendment to the complaint, although it had been withdrawn.

Count twelve alleged that respondent sent to the prior special master, Marvin N. Rimm, J.T.C. (ret.)[13] a character reference letter from Robert Harrison and that respondent directed Bobby Stafford, an attorney, to forward a character letter directly to Judge Rimm. On August 14, 2007, about three

[13] At the time that the Amendment to Complaint was filed, Judge Rimm was the special master in this matter. Special Master Shuster was appointed after Judge Rimm's health issues caused him to resign.

weeks before the filing of the September 6, 2007 amended complaint, Hagerman conducted telephone interviews of both Harrison and Stafford. According to Hagerman's interview notes, Harrison told Hagerman that he had received a July 5, 2007 letter from respondent asking Harrison to write a letter on respondent's behalf, to address the letter to Judge Rimm, and to send the letter to respondent. Harrison "faxed" respondent's July 5, 2007 letter to Hagerman.

As to Stafford, respondent also asked him to write a character letter to Judge Rimm. Hagerman's notes of their telephone conversation reveal that she asked Stafford whether it was proper to send a character letter directly to a judge before a hearing. Stafford replied that he "thought it was how you all do things"[14] and indicated that his secretary may have sent the letter.

The following exchange took place between the special master and Hagerman:

> Q. Is it your position as the investigator in this case that prior to the filing of the amended complaint of Count Twelve, that Mr. Wigenton asked both Mr. Harrison and Mr. Stafford to send character reference letters directly to Judge Rimm . . . ?
>
> A. Yes.

[14] Stafford was located in Virginia.

Q. And what do you base that on?

A. The conversation that I had with both Mr. Stafford and Mr. Harrison.

Q. All right. And had you seen this KPW-218 before the amended Count Twelve was filed?[15]

A. That was what Mr. Harrison provided to us.

Q. So you had that before the amended Count Twelve was filed.

A. Correct. . . .

Q. But you inferred . . . that Mr. Wigenton instructed them [Stafford and Harrison] to send it directly to Judge Rimm, not in accordance with these instructions. That was your understanding or interpretation at that time?

A. Yes.

[2T189-21 to 2T191-9].[16]

Despite the instructions contained in KPW-218, the letters from Stafford and Harrison were sent directly to Judge Rimm.

In addition to questioning Hagerman's credibility, respondent also brought to light various errors that she had made during the investigation. For example, in the D'Angelo

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[15] KPW-218, which was not admitted into evidence, was identified at the hearing as respondent's July 5, 2007 letter to Harrison instructing him to send the character reference letter to respondent.

[16] 2T denotes the transcript of the June 3, 2009 ethics hearing.

matter, Hagerman indicated in her report that a $6,200 check that D'Angelo brought to the real estate closing was not deposited in respondent's trust account. However, during cross-examination, Hagerman conceded that those funds had been deposited in respondent's trust account. Moreover, in at least six client ledger cards that Hagerman attempted to recreate and that were unrelated to the specific allegations of the complaint, she erroneously attributed checks to certain client matters. For example, a $12,287.92 check that respondent issued in connection with the Turner Estate appeared on a client ledger card for an unrelated Brinson-from-Turner real estate transaction.

The Special Master Findings

The special master determined that the evidence did not demonstrate clearly and convincingly that respondent had knowingly misappropriated client or escrow funds. The special master found that respondent "reasonably believed, incorrectly so, that he was entitled to utilize the funds in the manner in which he did to pay himself attorney's fees and costs to which he was entitled. . . . Respondent never believed that there was any shortage in his accounts until his own accountant's findings." Indeed, the special master pointed out that it was

respondent's accountant, not the OAE, who discovered the shortage:

> While certainly OAE determined at the first random audit visit in October, 2002, that there were clear irregularities which had to be investigated further, it was really Respondent's accountant who determined a shortage which OAE clearly has relied upon in order to support, in part, the claims of knowing misappropriation. Clearly, this was because Respondent's records were in such disarray that even the experienced OAE investigator could not easily reconcile the accounts.
>
> [SMR60-SMR61.][17]

The special master concluded that respondent's conduct represents a "classic case" of negligent misappropriation.

In pointing to what he termed respondent's "lax recordkeeping," the special master observed that, in some of respondent's explanations of fees due him, the dollar numbers were not always exact. For example, although, in the Crichlow transaction, respondent believed that he was due $3,022.75 from prior unrelated matters, he used the Crichlow $3,000 check to pay his fees, thus receiving $22.75 less than he was owed. The special master found this discrepancy to be "symptomatic of Respondent's lax recordkeeping." Similarly, the special master

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[17] SMR refers to the September 2, 2010 report of the special master.

noted that, in the Redd matter, although respondent was due $14,032.25 in four real estate transactions, he received a total of $14,023.95. Again, the special master remarked that "the arithmetic is not exact."

Indeed, during summations, the OAE pointed out that, despite respondent's contention that he had deposited the $5,000 Redd grant check in payment of $4,921.50 due to him from prior fees, he had previously deposited that exact amount in his personal account. Although the OAE contended that respondent had been paid twice for the same fees, the special master questioned whether the OAE's position, in fact, supported respondent's contention that he did not "know what he was doing in his bookkeeping" because "he kept his records in a terrible fashion, assuming he kept records."

The special master rejected the allegation that respondent had overcharged clients by marking up title and survey costs and keeping the additional amounts for himself. He remarked that respondent's practice of charging a separate fee for title and survey review may have been consistent with the custom of other attorneys at that time. He also noted that respondent's testimony that he had explained the separate fees to each client was confirmed by the certifications of several clients and that

the OAE neither interviewed any of the clients nor produced any contradictory evidence.

The special master found, however, that, because the HUD-1 forms did not accurately reflect the title and survey charges or respondent's legal fees, respondent "violated" the certification on the HUD-1 statement. While characterizing respondent's practice in this regard as "poor and misleading," as well as "inappropriate," the special master nevertheless did not find a violation of RPC 8.4(c).

The special master also found that respondent violated Opinion 514, which prohibits a lawyer from acting as broker and attorney for either party in a real estate transaction, even with full disclosure.

In recommending the appropriate quantum of discipline for respondent, the special master took into account the following aggravating factors: (1) respondent's complete lack of knowledge of the proper handling of books and records and attorney trust and business accounts; (2) his failure to understand his responsibilities under the RPCs, court rules, and ethics decisions; and (3) his accounting degree and his prior employment in the finance industry.

The special master considered the following mitigating factors: (1) no client suffered financial harm; (2) no client

complained about respondent's representation; (3) all real estate documents were properly and timely recorded and all funds were appropriately disbursed; (4) as demonstrated by the certifications, respondent's clients are very supportive of him; (5) on his own volition, respondent retained an accountant, both before and after the initial random audit, to correct the deficiencies in his accounting and recordkeeping; (6) he deposited $42,000 in his trust account to remedy the shortage; (7) he voluntarily refunded more than $11,000 to sixty-three real estate clients, although those fees may have been properly earned; (8) he cooperated with the OAE by providing, to the extent possible, all records and documents requested; (9) he has no prior or subsequent disciplinary problems; (10) several "esteemed members of the Bar and the community" vouched for respondent's good character and reputation as an attorney and for his work in the community; (11) he was contrite; and (12) he did not conceal his improper recordkeeping.

Finding that respondent's conduct requires more than an admonition or a reprimand, the special master recommended a four-month suspension.

Following an independent, de novo review of the record, we find that the special master's conclusion that respondent was guilty of negligent, not knowing, misappropriation, is fully

supported by clear and convincing evidence. The special master also correctly determined that respondent had not violated RPC 8.4(c), but that he had engaged in a conflict of interest, in violation of Opinion 514.

Respondent claimed, and the special master found, that he did not knowingly misappropriate trust funds because, based on his practice of removing his earned fees from real estate monies, rather than via trust account checks, and based on his failure to comply with the recordkeeping rules, he reasonably believed that he had sufficient funds of his own in his trust account.

In In re Johnson, 105 N.J. 249, 260 (1987), the Court expressed confidence that, "within our ethics system, there is sufficient sophistication to detect the difference between intentional ignorance and legitimate lack of knowledge." Nevertheless, discerning whether an attorney's conduct amounts to negligent or knowing misappropriation in a particular case can be challenging. Because of the grave consequences that befall attorneys found guilty of the latter, the standard of proof — clear and convincing evidence — must be fully satisfied.

Recognizing the severity of a finding of knowing misappropriation, the Court stated in In re Konopka, 126 N.J. 225 (1991):

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

See also In re Barlow, 140 N.J. 191, 196 (1995): "We have been equally resolute in requiring proof of respondent's state of mind by clear and convincing evidence."

In addition, in In re Simeone, 108 N.J. 515, 521 (1987), the Court asserted:

> Of course, poor accounting should not, and does not, establish a *Wilson* defense, In re Fleischer, 102 N.J. 440, 447 (1986); but poor accounting is not a Wilson violation absent evidence of a knowing misappropriation.

The Court did not disbar the attorney in In re Johnson, supra, 105 N.J. 249, who admitted that he had misused clients' funds, but contended that the misuse was entirely unknown because he was inexcusably inattentive to his recordkeeping responsibilities. The attorney claimed that he was so busy building a law practice, working more than ninety hours a week, that he lost control of his office, improperly relying on his staff to maintain his attorney records. Noting that "not a word of respondent's recitation [was] contradicted," id. at 258, the

Court concluded that his misappropriation was negligent, rather than knowing.

The Court rejected the OAE's argument that the attorney in Johnson had to know that he was out of trust and that he was invading clients' funds. The Court found that the attorney's "calamitous method of doing business [was] just as reasonable an explanation of the situation . . . as the one the OAE would have us accept . . . ." and that "[t]he evidence about respondent's state of mind [was] no more compelling in the direction of knowledge than it is in the direction of unhealthy ignorance." Ibid. The Court concluded that this case showed much more than shoddy bookkeeping, in that the attorney was "spectacularly misguided in his all-consuming effort to build a practice at the expense of other considerations . . . ." Id. at 259. The Court found no evidence of "defensive ignorance" or "intentional and purposeful avoidance of knowing what is going on in one's trust account." Id. at 260.

Similarly, in In re Orlando, 104 N.J. 344 (1986), the attorney received his client's settlement proceeds in connection with a civil lawsuit. Id. at 346. The client filed a grievance because Orlando took four months to disburse the settlement funds to her. Id. at 347. The ensuing audit revealed that the attorney had no trust records, ledgers, receipts, or journals.

Ibid. In addition, the audit disclosed that, during the time that Orlando should have held the client's settlement proceeds intact, plus other funds in connection with an unrelated real estate transaction, his trust account had negative balances. Ibid. The Court agreed with us that the attorney's recordkeeping was negligent:

> [O]ur independent review of the record reveals no evidence of a knowing misappropriation of clients' funds. Rather, the record reflects that respondent was seriously and inexcusably inattentive to the accounting and bookkeeping details of his voluminous real estate practice, but did not knowingly misappropriate clients' funds.
>
> [Id. at 350.]

In contrast, in In re Fleischer, In re Shultz, and In re Schwimmer, 102 N.J. 440 (1986), the attorneys commingled personal and trust funds and, ultimately, invaded clients' funds by exceeding the disbursements against their funds. The Court rejected the attorneys' defense that poor accounting procedures prevented them from knowing the amount of their own funds in the trust account:

> It is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using clients' trust funds. Lawyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds.
>
> [Id. at 447.]

Finding overwhelming evidence that the attorneys had knowingly misappropriated clients' funds, the Court ordered their disbarment.

Against the above backdrop, we must determine whether respondent's conduct in this matter was negligent or knowing.

In the Crichlow matter, the OAE alleged that respondent was guilty of two instances of knowing misappropriation – once on June 18, 2002, when he deposited the $3,000 Long Branch grant check in his personal account and, again, on June 20, 2002, when he deposited the $10,000 Monmouth County grant check in his attorney business account.

Respondent explained that he deposited the $3,000 check in his personal account because he had earned at least that much in legal fees and expenses in representing Crichlow. He submitted considerable documentary evidence to substantiate his representation of Crichlow in collection matters that were required to be resolved as a condition of her mortgage. These documents included his intake sheet, which described the terms of the fee agreement; letters to and from the various creditors, demonstrating that respondent was negotiating the debts on Crichlow's behalf; and a certification in which Crichlow confirmed that she was satisfied with respondent's services in both the collection and real estate matters.

Respondent testified, without rebuttal, that his legal fee for the collection matters was $1,200, that Crichlow had paid a $300 retainer, and that she owed him $900 at the time of the closing. The OAE did not dispute that respondent's fees and expenses for the Crichlow real estate transaction were $2,122.75 or that he had not received that fee by means of a trust account check.

When respondent deposited the $3,000 Long Branch grant check in his personal account, thus, he had earned a total of $3,022.75 in fees and expenses from Crichlow. Although the rules required that he deposit that check in his trust account, and then issue a check for his fees and expenses to his business account, respondent's failure to comply with the appropriate recordkeeping rule did not amount to knowing misappropriation.

The fact that the grant check was deposited in respondent's personal account the day before the closing does not change this analysis. Although respondent had not earned the fee until the closing occurred, the OAE offered no evidence that respondent removed his fee from his personal account before June 19, 2002, the day of the closing. Moreover, respondent explained that he had deposited the check in his personal account in the afternoon of June 18, 2002, on his way to the Crichlow closing, and later had learned that the closing had been delayed until the next day.

Under these circumstances, it cannot be said that respondent knowingly misappropriated his fees before they were earned.

As to the $10,000 Monmouth County grant check, respondent testified that he had intended to deposit it in his trust, not his business, account. Again, respondent's testimony is supported by documentary evidence – the check itself bears the notation on the reverse side: "For deposit only Kevin P. Wigenton attorney trust account." Because respondent did not use pre-printed deposit slips, he wrote the account number, inadvertently inserting the business account number. Moreover, at the time that respondent deposited the Crichlow funds, the balance in the business account was almost $13,000, which, according to respondent, was more than sufficient to meet his typical business expenses. Thus, this was not a situation in which an attorney intentionally and improperly deposits monies in his business account because of a shortage in operating expense funds.

The OAE argued that, because the use of the grant checks was strictly limited to fulfilling the purposes of the first-time homebuyers programs, respondent's deposit of those checks in his personal and business accounts increased the seriousness of the impropriety. In this regard, the OAE presented the testimony of representatives of the respective county and city

community development programs. However, respondent's use of those funds either was or was not a knowing misappropriation, regardless of the fact that the checks were earmarked for a particular purpose. All trust funds are designated for specific uses. Furthermore, Edwards confirmed that use of the grant funds to pay attorney's fees, as a component of closing costs, was proper.

Based on the foregoing, we find that the OAE did not present clear and convincing evidence of knowing misappropriation in the Crichlow matter.

In the Redd matter, as in Crichlow, the OAE alleged that respondent knowingly misappropriated two grant checks – a $5,000 check from the City of Asbury Park, which respondent deposited in his personal account, on April 23, 2002, and a $10,000 check from Monmouth County, of which respondent deposited only $200, applying the $9,800 balance to his personal line of credit. This deposit was made on May 2, 2002. Respondent, however, claimed that, because he had not removed from his trust account earned fees in unrelated matters, he had used a "shortcut" and paid himself using the Redd checks, believing that the trust account contained sufficient funds for this purpose.

The OAE stipulated that respondent had not received his fees and expenses via a trust account check for any of the real

estate transactions that occurred before the audit (except for the Harris-to-Stoll matter, which took place several days before the audit, after respondent had consulted with an accountant and learned proper procedures).

In particular, respondent had earned $4,921.50 from several matters that had concluded before his receipt of the Redd funds: $1,437.75 from the Joanne Valentine purchase, on March 8, 2002; $2,250 from the estate of Louis Draper funds, on March 28, 2002; and $1,233.75 from the Lori Harris refinance, on March 29, 2002. He, thus, claimed a belief that, when he deposited the $5,000 Redd grant check in his personal account, on April 23, 2002, he had sufficient funds from the three fees that he had earned in March and had not removed from his trust account. Although respondent's removal of these fees left a $78.50 deficit, respondent conjectured that he had been due another fee that he could not identify, due to his faulty recordkeeping.

On the last day of the hearing, however, the OAE produced a copy of respondent's April 30, 2002 personal bank statement, which revealed an April 4, 2002 deposit of $4,921.50, the exact amount respondent claimed he was due from the Valentine, Draper, and Harris matters. It seems, thus, that respondent had already removed his fees for those matters, when he deposited the Redd $5,000 check in his personal account. Because of his failure to

comply with recordkeeping requirements, however, it appears that respondent was unaware of this prior payment.

Based on respondent's pattern of leaving fees in his trust account and collecting those fees from checks subsequently received in connection with unrelated matters, he asserted — and we find — that he had a good faith, albeit erroneous, belief that he was owed $5,000 in legal fees, when he deposited the $5,000 grant check in his personal bank account.

The OAE also alleged that respondent removed $9,800 from the $10,000 grant check from Monmouth County to Redd. On cross-examination, however, Hagerman acknowledged that, on May 2, 2002, respondent deposited $151,177.33 from the Johnson/Martin real estate transaction at the same time that he deposited the $10,000 grant check, that both items appeared on the same deposit slip, and that respondent had removed $9,800 from both checks, not just from the Redd check.

Respondent, in turn, claimed that he was owed fees from four prior real estate transactions. Specifically, he was due $1,572.75 from the Yosetty Nunez purchase, on April 23 2002; $1,339.75 from the Davis Enterprises purchase, on April 24, 2002; $1,669.75 from the Johnson/Martin purchase, on April 30, 2002; and a real estate commission of $9,450 from the Wilson sale, on May 1, 2002. These fees and expenses total $14,032.25.

Because respondent had received $4,223.95 ($2,732.50 and $1,491.45) before the Redd closing, he was due $9,808.30. Thus, he alleged, when he removed $9,800 from the May 2, 2002 deposit of both the Redd grant check and the Johnson/Martin mortgage proceeds, he believed that sufficient funds had been left in his trust account.

In sum, respondent believed that, because he had left earned fees from prior matters in his trust account, he could directly deposit the Redd funds in his personal account. Based on this erroneous, but reasonable belief, we cannot find that respondent knowingly misappropriated the Redd funds. We note that respondent properly returned to Monmouth County excess funds of $264.53 from the Redd transaction.

In the D'Angelo transaction, on December 28, 2001, respondent and his wife sold their home to D'Angelo. Respondent received $6,000 as a deposit. The OAE did not allege any impropriety as to the initial $1,000 deposit. However, the OAE charged that respondent was guilty of knowing misappropriation when, on December 10, 2001, he placed the $5,000 deposit in his personal savings account. For a number of reasons, we are unable to agree with the OAE's position.

On December 10, 2001, respondent deposited the D'Angelo $5,000 deposit in his personal savings account, bringing the

balance in that account to $61,879. As respondent pointed out during the ethics hearing, the key date in determining whether D'Angelo's funds remained intact in his savings account is the date that he withdrew $60,000 for the purchase of the Stone Hill property. On December 19, 2001, nine days after the D'Angelo deposit, respondent obtained a $60,000 cashier's check from the funds in his savings account, which he used to purchase the Stone Hill home. The day before the $60,000 withdrawal, the balance in the account was $65,354.27. After the withdrawal, the balance was $5,354.27. Respondent, thus, did not use D'Angelo's $5,000 deposit, when he obtained a cashier's check for the Stone Hill property.

Moreover, respondent's January 10, 2002 savings account statement indicates that, from December 10, 2001, the date of the D'Angelo deposit, to December 28, 2001, the date of the D'Angelo-from-Wigenton purchase, the balance in the savings account exceeded $5,000. D'Angelo's funds, thus, remained intact in the savings account, during the entire eighteen days between the date of the deposit and the real estate closing.

In addition, respondent introduced evidence that, at the time of the $60,000 disbursement to Stone Hill, he had liquid assets in various other personal accounts and investments in excess of $222,000. Respondent, thus, contended that, because he

had other resources, he did not need D'Angelo's funds to purchase the Stone Hill property.

To be sure, respondent had sufficient funds from which to draw $5,000, if necessary, for the Stone Hill transaction. This circumstance is not conclusive, however, because, indeed, people of wealth are as capable of stealing as people without financial resources. However, the existence of other available funds does negate one potential motive — financial need — for misappropriating funds.

In short, because respondent left D'Angelo's funds intact, the record does not support a finding of knowing misappropriation. We find, however, that he violated RPC 1.15(a) (failure to safeguard funds) by placing those funds in his personal account, instead of his trust account.[18]

In five other matters, respondent represented the sellers in real estate transactions, received buyers' deposits, and placed those deposits in his personal bank account. The complaint alleged that, by failing to hold these escrow funds in

[18] As indicated previously, respondent represented D'Angelo in a transaction in which he was the seller. In her certification, D'Angelo confirmed respondent's testimony that he had orally advised her to obtain independent counsel. Because the complaint did not charge respondent with a conflict of interest, we do not find that violation. See R. 1:20-4(b).

his trust account, respondent knowingly misappropriated them. The complaint further charged that, by issuing trust account checks for the full amount of the deposit, when respondent had not placed the entire deposit in his trust account, he invaded other clients' funds. Respondent, in turn, claimed that he had been owed fees in other matters and applied the deposit checks toward these earned fees. We determine that this reasonable, albeit apparently erroneous, belief that respondent had earned fees remaining in his trust account, negates a finding of knowing misappropriation in these five matters.

Specifically, on May 11, 2001, respondent placed in his personal account the buyers' $2,000 deposit in connection with the Young-to-Kirvan/Murphy transaction. Twenty days later, he issued a trust account check to Young in payment of the buyers' deposit. Respondent claimed that, in his trust account, were earned fees from the Frazier estate, an unrelated matter, to cover the $2,000 trust account check to Young. On May 11, 2001, the same date as the deposit of the Young check, respondent concluded the bulk of the Frazier estate work by disbursing funds to the heirs. Respondent's fee in the Frazier estate was $2,750. Respondent asserted that he deposited the Young check in his personal account in payment of most of his fee from the Frazier estate. This testimony is supported by the corresponding

deposit slip, on which the notation "Frazier Estate" appears next to the $2,000 Young deposit.

In connection with respondent's representation of James Henderson, he received $10,000 as deposit funds from Charles and Joanne Roesing. On July 20, 2001, he deposited in his trust account $8,000 from the Roesing check, retained the $2,000 balance as a "cash out credit," and deposited the $2,000 in his personal bank account.

On July 11, 2001, respondent issued a $10,000 trust account check to Henderson. On July 20, 2001, the same day that he placed in his personal account $2,000 from the Henderson deposit, he represented Lyneth Sanderson in the sale of property to the Melusos. Sanderson owed respondent $2,000 that he had lent to her for car insurance, plus an additional $1,000 for legal services in other matters. At the Sanderson closing, therefore, respondent received a $7,000 check on Sanderson's behalf, issued a $4,000 check to her, and left $3,000 in his trust account as payment of the loan and his fees.

As in the Young/Frazier estate matter, respondent's testimony is supported by the equivalent deposit slip, on which the notation "Sanderson" appears next to the $2,000 Henderson deposit. Moreover, in a certification, Sanderson confirmed the

loan that she had received from respondent, as well as other details of the representation.

Respondent represented Brian Robbins in the sale of two pieces of property, receiving a $1,000 deposit in each transaction. On December 15, 2001, respondent deposited in his personal account $1,000 from each buyer, Patricia Quigley and Vincent Dene. On February 5 and April 15, 2002, respondent issued $1,000 trust account checks to Robbins, in payment of the respective Quigley and Dene deposits. Respondent claimed that he was owed a total of $3,290.50 from his representation of St. Stephen AME Zion Church and Lenise Young, in two separate real estate purchases that occurred on December 14, 2001, the day before the Robbins deposits. When respondent deposited the two Robbins deposits, on December 15, 2001, he deposited another $1,000 check in connection with his representation of Joy Valentine. From yet another deposit, on December 15, 2001, related to the St. Stephen, Young, and Crichlow matters, respondent removed $290.50. Respondent was due $3,290.50 in fees from the St. Stephen and Young matters, which had closed on December 14, 2001, and received that sum via the Robbins and Valentine deposits ($3,000) and the removal of $290.50 from another deposit. He, therefore, received the exact amount that he had been owed.

In the Deidre Harris matter, on July 29, 2002, respondent placed $8,600 of the $9,400 deposit check of the buyer, Donald Stoll, in his trust account, removing $800. Three days later, on August 1, 2002, respondent deposited an additional $1,000 deposit from Stoll in his personal account. Although respondent claimed that he was owed $1,800 in fees, when he received these funds, he could not identify a particular client matter in connection with that fee. He produced, however, his file copy of Stoll's $9,400 check, on which he had written figures indicating that he had received $10,400, had deposited $8,600 in his trust account, and was due $1,800 in legal fees. In addition, he asserted that it was his practice, at that time, to list deposits and fees on papers kept in his files and to remove funds only when he was due fees.

In the above five matters, as in other allegations of the complaint, respondent used a "shortcut" to remove his fees. At the conclusion of real estate transactions, he should have issued trust account checks for his fees and expenses and deposited those checks in his business account. Instead, he left those funds in his trust account. When he later received funds in connection with unrelated real estate transactions, he used those opportunities to pay his prior earned fees. We, thus, do not find by clear and convincing evidence, that respondent

knowingly misappropriated client or escrow funds in these five matters.

The amended complaint charged respondent with four additional instances of knowing misappropriation, alleging that he used the monies to pay down a line of credit.

On December 31, 2001, after respondent removed $6,341.25 from funds received in connection with his representation of the Marshalls in their real estate purchase, he applied the money to his line of credit. The OAE alleged that respondent knowingly misappropriated $2,593.50, the $6,341.25 less his $3,747.75 fees and expenses. In turn, respondent claimed that he was due fees from the following transactions: $1,080.75 from the Anderson refinance, $1,512.75 from the Suggs sale, and $3,747.75 from the Marshall purchase. Those three fees total $6,341.25, the exact amount that respondent removed from the Marshall funds.

In the Jean-Baptiste real estate transaction, respondent removed $4,502.25 from the mortgage proceeds. Because respondent was entitled to fees and expenses of $2,352.75, the OAE alleged that he knowingly misappropriated $2,149.50. Respondent, however, claimed that his fees in the Jean-Baptiste, Hergenrother, and Gayle transactions totaled $4,887.25, less than the amount that he removed from the Jean-Baptiste funds. He was unable to explain why he had not removed all of his fees,

suggesting that, due to the passage of seven years, he could not recall that information.

In connection with respondent's representation of William Franklin in the purchase of real estate, he received a $5,000 deposit, which he applied to his line of credit. Thereafter, he issued a $5,000 trust account check for the Franklin transaction. Although respondent maintained that he was owed legal fees of $5,000, he could not identify the particular matters in which he had earned the fees. He explained that, at that time, he did not prepare client ledger cards in cases other than real estate matters. In addition, he had been able to identify fees due in real estate matters because he had compiled information in order to refund fees to those clients, as Lee Gronikowski had suggested. He did not have those records available in non-real estate matters. He further noted that, because of the passage of time (the amended complaint was filed five years after the audit), he could not identify the specific client matter for which he had removed his fee from the Franklin funds.

Similarly, respondent could not recall the client matter in which he had earned the fees that he had removed from the Ballard matter. In that case, respondent received $6,000 to pay off a mortgage to the Ballard estate. He used those funds to pay down his line of credit. Although he claimed that he had earned fees to

justify his use of the $6,000 from the Ballard estate, he was not able to identify the specific matter.

In these four matters, we again find that the proofs do not support a finding of knowing misappropriation. In the Marshall and Jean-Baptiste matters, respondent provided documents indicating that he had not removed fees from prior unrelated transactions and that those fees equaled the exact amount that he had removed from subsequent funds to pay his line of credit. Although respondent could not identify specific client matters to justify his removal of funds in the Franklin and Ballard estate matters, we note that the allegations of wrongdoing were not filed until 2007, five years after the audit, and that the hearing took place in 2009, seven years after those transactions had occurred. Due to the passage of time, it is not surprising that respondent was unable to recollect details about these matters. Indeed, if not for his compilation of data in connection with his refund of the title and survey charges, respondent most likely would not have been able to provide specific information about the transactions in which he had earned fees in his trust account.

Although at oral argument before us, the OAE compared respondent's conduct to that of the attorney in In re Gifis, 156 N.J. 323 (1998), we find that case inapplicable. In Gifis, the attorney blatantly used real estate deposits and settlement funds

for his own purposes, claiming that he did not need both parties' permission to use the funds. The attorney contended that his use of the deposit was not knowing misappropriation because he was unaware of In re Hollendonner, supra, 102 N.J. 21, and because he honestly, but mistakenly, believed that the funds belonged solely to one of the parties. We rejected these arguments.

Here, respondent did not claim that he had the consent of any of the parties to use their funds. He also did not contend that he should not be bound by the principles of caselaw of which he was not aware. Rather, respondent consistently asserted a belief that the "off-set" system that he regularly used was a proper way to remove his earned fees.

In similar cases, attorneys have been found to have negligently, not knowingly, misappropriated funds. In In re Tompkins, 155 N.J. 542 (1998), the attorney deposited in his business account a $9,000 settlement check on behalf of his client. In the Matter of Donald F. Tompkins, DRB 97-281 (January 16, 1998) (slip op. at 3). The business account was overdrawn at that time. Ibid. Like respondent in the instant case, Tompkins claimed that, although he had intended to deposit the check in his trust account, he had inadvertently deposited it in his business account because the deposit slips were almost identical. Id. at 7. He further asserted that it was not unusual

for his business account to be in a negative status, a fact confirmed by the OAE auditor, who found that, during a fourteen-month period, the attorney's business account was overdrawn on forty-three occasions. Id. at 8. We rejected the OAE's charge that Tompkins was guilty of knowing misappropriation, finding that he negligently misappropriated funds and engaged in "horrendous accounting practices." Id. at 22. Tompkins received a three-month suspension.

See also In re Simms, 170 N.J. 191 (2001) (attorney reprimanded for negligent misappropriation caused by, among other improprieties, mistakenly depositing real estate funds in his business account instead of his trust account) and In re Conner, 193 N.J. 25 (2007) (in two matters, the attorney inadvertently deposited client funds in his business account, instead of his trust account, an error that led to his negligent misappropriation of clients' funds; the attorney also failed to promptly disburse funds to which both clients were entitled; attorney received a reprimand).

The attorney in In re Ichel, 126 N.J. 217 (1991), had been the subject of a random audit, which disclosed various recordkeeping violations. In the Matter of Albert L. Ichel, DRB 90-311 (March 1, 1991) (slip op. at 2). The knowing misappropriation charge related to the attorney's withdrawal of

legal fees from his trust account before either a recovery in personal injury cases or settlement in real estate, estate, or other matters. Id. at 6. The complaint alleged that the attorney did so on approximately ninety occasions and that the above practice caused an overdraft of $1,100 in the trust account. Ibid.

The attorney admitted the $1,100 shortage, but contended that a $27,000 deposit had not been credited until the next day, a fact acknowledged by the OAE presenter; that he believed (as it turned out, erroneously) that he had an $18,000 to $22,000 "cushion" of his own funds in his trust account at the relevant times; and that he had inadvertently overdisbursed $10,000 to the seller in a real estate transaction, an error that was not discovered until the following year. Id. at 7-9.

We determined that the misappropriation was negligent, finding no clear and convincing proof of knowing misappropriation. Id. at 28. Because of the $10,000 error in the real estate matter and because of the attorney's good faith, though erroneous, belief that he had additional funds in his trust account, we could not find that respondent intentionally invaded clients' funds. Id. at 30. We likened respondent's conduct to that of the attorney in In re Librizzi, 117 N.J. 481 (1990). Id. at 32. In that case, the Court found that the

attorney had negligently, not knowingly, misappropriated funds based on his lack of bookkeeping experience and his credible belief that the amount of recording fees that had accumulated in his trust account during a ten-year period exceeded the amount of funds that he had disbursed. Id. at 32-33.

In another case, an attorney's reasonable belief of entitlement to funds saved him from disbarment. In re Cotz, 183 N.J. 23 (2005). In that case, a bank's notification of an overdraft in the attorney's trust account prompted an OAE audit, which revealed an $18,766.33 shortage and resulted in the filing of a complaint charging the attorney with knowing misappropriation. In the Matter of George J. Cotz, DRB 04-359 (December 14, 2004) (slip op. at 3-5). The attorney acknowledged the shortage and provided a basis for his erroneous belief that his trust account contained additional funds. Ibid.

The attorney's friend and client, Frank Gallo, recovered funds in a collection matter. Id. at 5. Gallo instructed the attorney to retain the funds from the collection matter in his trust account to be used in payment of an expected claim that had been filed against Gallo. Ibid. He authorized the attorney to use those funds for his purposes until they were needed for payment. Ibid. Although the attorney took advantage of Gallo's offer, he did not record the loan. Id. at 23. He, thus, either forgot that

he had borrowed $9,000 from Gallo, or, remembered the loan but incorrectly recalled that he had repaid it. Id. at 24. In any event, he was not aware that $9,000 in his trust account belonged to Gallo. Ibid.

In addition, the attorney discovered that the bank where he maintained both his trust and business accounts had been improperly charging his trust account for checks written on insufficient funds in his business account. Ibid. Because he did not review his trust account statements, he was not aware of these improper charges, which amounted to $10,548.67. Ibid.

The attorney, thus, contended that, between the $9,000 Gallo loan and the bank charges in excess of $10,000, he reasonably believed that his trust account contained at least $19,000 more than it actually did and that he was not aware of the $18,766.33 shortage. Ibid. This evidence was not rebutted.

We determined that the attorney reasonably, but mistakenly, believed that he had more funds in his trust account than he actually did. Id. at 33. We found that, based on this reasonable belief, he did not knowingly misappropriate funds. Ibid. As in the matter now before us, in Cotz, the OAE cited In re Mininsohn, 162 N.J. 62 (1999) as a factually similar case. Id. at 31. We disagreed. In the Matter of George J. Cotz, supra, at 32.

In Mininsohn, the attorney removed fees from real estate closings before the closings took place. In re Mininsohn, supra, 162 N.J. at 66. He asserted that he believed that he had maintained a "cushion" of his own funds in his trust account that exceeded the fees that he took. Id. at 71-72. However, the Court determined that "respondent failed to offer evidence to sustain the contention that his belief in the existence of an adequate cushion was reasonable or justifiable." Id. at 74.

Here, like the attorney in Cotz, and unlike the attorney in Mininsohn, respondent provided substantial evidence in support of his claim that, based on his practice of leaving earned fees in his trust account, he reasonably believed that he had sufficient funds in that account to cover his deposit of real estate monies in his personal or business account.

The attorney in In re James, 112 N.J. 580 (1988), followed the same business practices and accounting procedures that he had learned from his legal mentors for twenty-four years without incident. He had been using his attorney trust account as a second business account for client expenses and employee payroll tax escrow funds. Id. at 585. In that case, we found:

> On this record, there is no rationale, short of the disturbing fact that this is the way respondent has always conducted business, to explain respondent's actions. Respondent's personal solvency was never at issue, nor was the success of his law practice. No

> personal motivations taint this record. Plainly and simply, respondent did not know how to manage his attorney accounts appropriately because no one had ever shown him. The record clearly discloses an utter lack of comprehension of what constitutes the proper operation of an attorney's accounts. *See* Matter of Hennessey, 93 N.J. 358, 350 (1983).
>
> [In re James, 112 N.J. 587-88 (1988)].

Similarly, in the instant case, respondent did not know how to manage his attorney accounts appropriately because no one had ever shown him. He established and maintained a solo practice, never working in a law firm setting. Despite respondent's accounting degree and prior employment in the finance field, he was not aware of the requirements of attorney accounting or recordkeeping. Although he is held responsible for that knowledge, his failure to comply with those requirements does not constitute knowing misappropriation.

As to the misappropriation charges, one final point warrants mention. Although the OAE alleged that respondent's trust account had a $42,000 shortage, we find that the record did not contain clear and convincing evidence of the amount of the trust account deficiency. Just before the December 2, 2002 audit, respondent's accountant performed a preliminary review of his records. He reported to respondent that the trust account should have had $42,000 more than it did at that time.

Respondent, in turn, informed the OAE, at the December 2, 2002, audit that his accountant had found a $42,000 shortage and that he had replenished the trust account with his own funds.

Although respondent acknowledged that, at some point, his trust account contained a $1,452.87 shortage, he did not admit that the shortage was $42,000. Despite the OAE's laudable attempt to reconcile respondent's trust account, the poor state of his records rendered that task virtually impossible. His trust account, however, was obviously short by at least $10,000, based on his inadvertent deposit of the Crichlow grant check in the business, not the trust, account.

We find that, through respondent's poor recordkeeping and improper method of removing his fees, he negligently misappropriated at least $10,000 in client and escrow funds.

As to the other charges in the complaint, we find that respondent did not violate RPC 8.4(c). The complaint charged that he "marked up" the cost of title insurance or surveys by $100 to $300, kept the overcharges, failed to disclose the actual cost of the title and survey charges, and misled his clients to believe that he was charging them only the actual costs.

The essence of the charge was that respondent failed to disclose to his clients the actual amount of his attorney's

fees. The proofs on that issue were short of the clear and convincing standard.

Respondent introduced into evidence, without rebuttal, certifications from clients, all indicating that he had explained to them, at their respective real estate closings, that the amount listed on the HUD-1 form for title insurance or survey costs also included his fee for reviewing those items. In addition, Edward McKenna testified, again without rebuttal, that this practice of including legal fees with title or survey costs was a common, although inexplicable, procedure among attorneys in Monmouth County. Finally, the OAE conceded that, if respondent had provided the legal services and had disclosed the additional fee to the client, and if the client had agreed to the fee, respondent's conduct would not be unethical.

Based on the absence of clear and convincing evidence that respondent engaged in dishonesty, fraud, deceit, or misrepresentation, we dismiss the RPC 8.4(c) charge.

Finally, we find that respondent violated the clear prohibition of Opinion 514 by serving as both realtor and attorney in the same real estate transaction. Respondent admitted that he represented the Robinson estate in the sale of property, while he was also the realtor in the transaction. The certification of Leona Lee, a co-executrix of the estate,

confirmed respondent's dual roles. Although Lee consented to respondent's participation as both attorney and realtor, Opinion 514 provides:

> It is our conclusion, therefore, that the inherent conflict of interest in such situations is so overwhelming that, even with full disclosure, an attorney should never participate simultaneously as a broker and as a lawyer for either buyer or seller in a real estate transaction.

Lee's consent, therefore, to respondent's dual role was irrelevant. See also In re Roth, 120 N.J. 665 (1990) (unacceptable conflict of interest is created if attorney claims or accepts commission for participating as a broker in the purchase or sale of real estate if the attorney also represents one of the parties in the transaction). Respondent's participation as both realtor and attorney in the estate of Robinson real estate transaction, therefore, constituted a conflict of interest and violated the principles of Opinion 514, as well as RPC 1.7(b).[19]

Although respondent was not guilty of knowing misappropriation, he negligently misappropriated funds; failed to comply with recordkeeping requirements; failed to safeguard

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[19] At the time of respondent's infraction, RPC 1.7(b) provided that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's own interests.

funds by placing D'Angelo's deposit in his personal account instead of his trust account, notwithstanding the fact that the funds remained intact; and was guilty of a conflict of interest.

The discipline for negligent misappropriation and recordkeeping deficiencies is usually a reprimand. See, e.g., In re Gleason, ____ N.J. ____ (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for

a conflict of interest); In re Fox, 202 N.J. 136 (2010) (motion for discipline by consent; attorney ran afoul of the recordkeeping rules, causing the negligent misappropriation of client funds on three occasions; the attorney also commingled personal and trust funds); In re Dias, 201 N.J. 2 (2010) (an overdisbursement from the attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney's recordkeeping deficiencies were responsible for the misappropriation; the attorney also failed to promptly comply with the Office of Attorney Ethics' requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, it was considered that the attorney, a single mother working on a per diem basis with little access to funds, is committed to and has been replenishing the trust account shortfall in installments); In re Seradzky, 200 N.J. 230 (2009) (due to poor recordkeeping practices, attorney negligently misappropriated $50,000 of other clients' funds by twice paying settlement charges in the same real estate matter; prior private reprimand); In re Weinberg, 198 N.J. 380 (2009) (motion for discipline by consent granted; attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account; because he did not regularly reconcile his trust account records, his mistake went undetected

until an overdraft occurred; the attorney had no prior final discipline); In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated $103,750.61 of trust funds as a result of his failure to reconcile his trust account; the attorney was also found guilty of recordkeeping violations); In re Winkler, 175 N.J. 438 (2003) (attorney commingled personal and trust funds, negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account $4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account); and In re Liotta-Neff, 147 N.J. 283 (1997) (attorney negligently misappropriated approximately $5,000 in client funds after commingling personal and client funds; the attorney left $20,000 of her own funds in the account, against which she drew funds for her personal obligations; the attorney was also guilty of poor recordkeeping practices).

A reprimand may still result even if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions. See, e.g., In re Cipriano, 195 N.J. 288 (2008) (motion for discipline by consent case; attorney negligently misappropriated $49,000 in client funds as a result of poor recordkeeping practices and borrowed

$735,000 from a client without regard to the requirements of RPC 1.8(a); two prior reprimands, including one for engaging in a conflict of interest); In re Toronto, 185 N.J. 399 (2005) (attorney negligently misappropriated $59,000 in client funds and recordkeeping violations; the attorney had a prior three-month suspension for conviction of simple assault, arising out of a domestic violence incident, and a reprimand for a misrepresentation to ethics authorities about his sexual relationship with a former student; mitigating factors taken into account); In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated $13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered); and In re Rosenberg, 170 N.J. 402 (2002) (attorney negligently misappropriated client trust funds in amounts ranging from $400 to $12,000 during an eighteen-month period; the misappropriations occurred because the attorney routinely deposited large retainers in his trust account and then withdrew his fees from the account as he needed

funds, without determining whether he had sufficient fees from a particular client to cover the withdrawals; prior private reprimand for unrelated violations).

If compelling mitigating factors are present, the reprimand may be reduced to an admonition. See, e.g., In re Weston-Rivera, 194 N.J. 511 (2008) (attorney negligently misappropriated client funds in two matters, violated the recordkeeping rules, and charged an excessive fee in eighteen personal injury matters by improperly deducting the fee from gross settlement proceeds and by deducting overhead charges from the clients' share of the proceeds; unblemished career of thirty years was viewed as a compelling mitigating factor); In the Matter of Michael Palmer, DRB 07-382 (March 3, 2008) (attorney negligently misappropriated more than $30,000 in client and escrow funds in five real estate transactions in which he represented the buyer; the attorney was unaware of these invasions because he did not reconcile his trust account; in mitigation, it was considered that the attorney covered all trust account shortages once they were brought to his attention and that he had no prior disciplinary infractions); In the Matter of Michael A. Mark, DRB 01-425 (February 13, 2002) (motion for discipline by consent; attorney negligently misappropriated client funds for a period of two years, as a result of failure to follow proper recordkeeping

procedures; the misappropriation occurred when the attorney erroneously withdrew a legal fee of $4,000, failed to reimburse the trust account for bank service charges in the amount of $100, mistakenly advanced client costs in the amount of $350 from the trust account, instead of the business account, and failed to reconcile the account on a quarterly basis; mitigating factors were the attorney's prompt replacement of the trust funds and his hiring of a CPA to reconstruct the trust records, to correct all recordkeeping deficiencies, and to insure that all client funds were on deposit; prior three-month suspension); and In the Matter of Cassandra Corbett, DRB 00-261 (January 12, 2001) (attorney's deficient recordkeeping resulted in a $7,011.02 trust account shortage; in imposing only an admonition, it was considered that the attorney had reimbursed all missing funds, admitted her wrongdoing, cooperated with the OAE, and hired an accountant to reconstruct her records).

More severe discipline has been imposed when aggravating factors, such as prior discipline or more flagrant conduct, are present. See, e.g., In re Kasdan, 195 N.J. 181 (2008) (censure for attorney who negligently misappropriated client trust funds in one matter, improperly issued trust account checks made payable to cash, and committed a number of recordkeeping violations; the OAE stipulated that the negligent

misappropriation was the result of a mistake on the attorney's part, due to her recordkeeping deficiencies; prior three-month suspension (for, among other things, recordkeeping improprieties) and three-year suspension); In re McDonnell, 202 N.J. 142 (2010) (motion for discipline by consent; three-month suspension imposed on attorney who allowed two clients to deposit funds in and disburse funds from his trust account for loans to third parties and personal expenses; the attorney failed to carefully monitor and control his trust account at the time, causing one of the clients to disburse funds in excess of his deposits; as a result, funds belonging to respondent's clients were invaded; numerous mitigating factors considered); In re LeBlanc, 193 N.J. 478 (2008) (in the attorney's third default matter, a three-month suspension was imposed for negligent misappropriation of clients' funds, failure to promptly disburse funds to third parties, lack of diligence, and failure to cooperate with the OAE; prior censure and reprimand); and In re Armotrading, 193 N.J. 479 (2008) (in a motion for reciprocal discipline, a six-month suspension was imposed for the totality of the attorney's conduct: negligent misappropriation of clients' funds, caused by numerous recordkeeping violations; disbursement of settlement proceeds without first obtaining a release from the client, as directed

by the carrier; and pervasive failure to cooperate with disciplinary authorities; the suspension was largely predicated on the attorney's pattern of willful disregard for the ethics process).

Here, respondent also violated Opinion 514 by serving as both realtor and attorney in a real estate transaction, thus engaging in a conflict of interest. Cases involving conflict of interest, absent egregious circumstances or serious economic injury to the clients, ordinarily result in a reprimand. In re Guidone, 139 N.J. 272, 277 (1994), and In re Berkowitz, 136 N.J. 134, 148 (1994).

In a case similar to respondent's, an admonition was imposed on an attorney for, among other things, engaging in a conflict of interest (RPC 1.7(b)) when she collected a real estate commission on her sale of a client's house; in mitigation, we considered the attorney's unblemished fifteen-year career, her unawareness that she could not act simultaneously as an attorney and collect a real estate fee, thus negating any intent on her part to take advantage of the client, and the passage of six years since the ethics infraction. In the Matter of Carolyn Fleming-Sawyerr, DRB 04-017 (March 23, 2004).

In the matter before us, there are numerous mitigating factors. Respondent contacted an accountant, before the audit occurred, to learn about the audit process. He took the following corrective measures: he bought a software program, which he has used continuously since that time, to keep track of his accounts and records; hired a bookkeeper; retained a CPA; changed his practice of preparing HUD-1 forms so that all of his legal fees are disclosed in the proper location; discontinued his practice of splitting deposits; obtained pre-printed deposit slips for his trust and business accounts; and instituted a tickler system. Respondent performs three-way reconciliations of his trust and business accounts every month and maintains detailed client ledger cards and cash disbursements and cash receipts journals. He took an ethics class on trust accounts.

In addition, all of the transactions taking place during the audit period closed in a timely manner, all documents were recorded in a timely manner, and all mortgages, judgments, and liens were satisfied in a timely manner. During the audit period, respondent's trust account was never overdrawn and no checks were returned for insufficient funds.

Moreover, no client or third party suffered financial harm. Respondent cooperated with the OAE. No ethics grievances have been filed against him. He held an extraordinary number of

public or community positions and engaged in pro bono services. He also submitted substantial evidence, both testimonial and documentary, by respected members of the bar and the community, as to his honesty, integrity, and high moral character.

We find one of the most persuasive mitigating factors to be the significant amount of time that has passed since these infractions took place. See In re Verdiramo, 96 N.J. 183 (1984). This ethics matter has proceeded at a slow pace, apparently through no fault of respondent, who, the OAE conceded, was cooperative. The audit occurred in 2002. The complaint was filed in 2006 and amended in 2007. The hearings took place in 2009. The events that are the subject of the complaint, thus, occurred nine to ten years ago. At oral argument before us, respondent's counsel alluded to the deleterious effect that the delay in processing this disciplinary matter has had on respondent's ability to obtain clients.

Nevertheless, despite the mitigating factors, we do not take respondent's conduct lightly. The special master properly considered, as aggravating factors, respondent's failure to understand his responsibilities under the RPCs and his complete lack of knowledge about proper recordkeeping and attorney account requirements. Given respondent's accounting background,

his astonishing failure to observe even rudimentary recordkeeping procedures is a significant aggravating factor.

As previously noted, reprimands are usually imposed for negligent misappropriation and recordkeeping deficiencies. In addition, conflicts of interest are ordinarily met with reprimands. In this matter, although respondent's accounting background is an aggravating factor that could support the imposition of a suspension, because of the substantial mitigation, particularly the significant passage of time, we determine that, for the totality of respondent's conduct, a censure is the appropriate quantum of discipline.

Vice-Chair Frost and Member Clark did not participate.

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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Kevin H. Wigenton
Docket No. DRB 11-015

Argued: June 16, 2011

Decided: July 7, 2011

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman			X			
Frost						X
Baugh			X			
Clark						X
Doremus			X			
Stanton			X			
Wissinger			X			
Yamner			X			
Zmirich			X			
Total:			7			2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel