SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

In the Matter of Kevin P. Wigenton, an Attorney at Law (D-131-10) (068659)

Argued November 30, 2011 -- Decided April 3, 2012

PER CURIAM

This attorney disciplinary matter concerns Kevin P. Wigenton of Red Bank, who was admitted to the practice of law in New Jersey in 1992. The Office of Attorney Ethics (OAE) charged Wigenton with multiple instances of knowing misappropriation of client trust funds and escrow funds, and with acting with a conflict of interest by representing the seller while serving as a real estate broker in the same real estate transaction. The charges against respondent were brought after the OAE conducted an initial random compliance audit and then a second audit in the latter part of 2002. They were not the result of grievances by clients or other parties to transactions handled by Wigenton. Wigenton had practiced as a sole practitioner beginning in 1996. Prior to that time, he had worked for the corporation that had employed him full time while he attended law school. He had never worked in a law practice under the supervision of other attorneys.

The ethics charges against Wigenton were presented by the OAE to a Special Ethics Master, who developed an extensive record. The Special Master found that respondent did not knowingly misappropriate either trust or escrow funds, but rather, that he had negligently misappropriated the funds through concededly "terrible" recordkeeping practices that led respondent to the reasonable, but mistaken, belief that he was entitled to the funds at issue. The Special Master found that Wigenton's negligent misappropriation was not a matter of willful ignorance designed to camouflage a more serious intent to take funds to which he was not entitled. The Special Master found that in addition to negligently misappropriating funds, respondent had committed recordkeeping violations and had acted with a conflict of interest in the real estate matter. The Special Master recommended to the Disciplinary Review Board (DRB) that Wigenton be suspended from practice for a period of four months for his unethical conduct.

After an exhaustive review of the record, the DRB agreed with the Special Master that Wigenton had negligently misappropriated client trust and escrow funds and had failed to safeguard funds, in violation of RPC 1.15(a); had failed to comply with attorney recordkeeping requirements; and had committed a conflict of interest contrary to the direction in Advisory Committee on Professional Ethics Opinion 514, 11 N.J.L.J. 392 (Apr. 14, 1983) and in violation of RPC 1.7(b). The DRB concluded that because of mitigating factors present in the record, Wigenton should be censured rather than suspended from practice.

The OAE filed a petition for review of the decision of the DRB, urging that Wigenton be disbarred. The Court granted the petition for review and issued an Order directing Wigenton to show cause why he should not be disbarred or otherwise disciplined.

HELD: Kevin P. Wigenton failed to safeguard and negligently misappropriated escrow and client trust funds, violated attorney recordkeeping rules, and acted with a conflict of interest. For his unethical conduct, he is censured.

1. The Court agrees completely with the conclusion of the DRB that the proofs in the record demonstrate negligent, but not knowing, misappropriation of funds by respondent. In their thorough and detailed reviews of the evidence, both the Special Master and the DRB concluded that respondent reasonably believed he was entitled to the funds. Respondent displayed at worst a woeful lack of knowledge of the actual status of his accounts when he disbursed legal fees and costs to himself. The DRB found his recordkeeping “grossly deficient,” but this was not a situation in which respondent was intentionally ignorant and had a nefarious intent. Moreover, no client or other person was harmed. (pp.4-5).

2. The Court also agrees with the DRB that a censure is the appropriate quantum of discipline for respondent’s

unethical conduct, considering both the mitigating and aggravating factors present in the record. Among the aggravating are respondent's failure to understand his ethical obligations and his total lack of knowledge or use of basic attorney recordkeeping procedures despite his accounting background. The more numerous mitigating factors include the facts that respondent was contrite and cooperative, immediately retained appropriate business professionals to assist him in his practice, discontinued improper business procedures, instituted all required recordkeeping measures, and took an ethics course in trust accounting. Also, despite respondent's recordkeeping deficiencies, during the period covered by the audit, his trust account never was overdrawn, no clients or third parties were harmed, and all other aspects of his transactions took place properly. Finally, the significant amount of time that passed during the proceedings since irregularities were discovered in the first audit in 2002 is one of the most persuasive mitigating factors. (pp. 6-9).

3. In addition to supporting the reasoning of the DRB for imposition of a censure, the Court emphasizes the purpose of attorney discipline: protection of the public and preservation of public confidence in the bar. Those interests are served by a censure of respondent, who was forthright about his errant recordkeeping practices, cooperated in the ethics proceedings, took educational courses, and who has had no further problems in the past ten years. (pp. 9-11).

The ethical violations found by the DRB are **AFFIRMED** and Kevin P. Wigenton is **CENSURED**.

JUDGE WEFING (temporarily assigned) filed a separate, **DISSENTING** opinion. Judge Wefing is of the view that a short period of suspension is called for to preserve public confidence in the bar. Judge Wefing does not see respondent's corrective measures, the fortuity that no client was harmed, or the protracted nature of the disciplinary proceedings, singly or in combination, as mitigating the quantum of discipline required.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, HOENS and PATTERSON join in the Court's Opinion. JUDGE WEFING, temporarily assigned, filed a separate, dissenting Opinion.

SUPREME COURT OF NEW JERSEY
D-131 September Term 2010
068659

IN THE MATTER OF

KEVIN P. WIGENTON,

An Attorney at Law

Argued November 30, 2011 – Decided April 3, 2012

On an Order to show cause why respondent should not be disbarred or otherwise disciplined.

Maureen G. Bauman, Deputy Ethics Counsel, argued the cause on behalf of the Office of Attorney Ethics.

Shalom D. Stone argued the cause for respondent (Walder, Hayden & Brogan, attorneys; Mr. Stone and Justin P. Walder, on the brief).

PER CURIAM

This disciplinary matter was commenced by a 2006 complaint filed by the Office of Attorney Ethics (OAE) charging respondent, Kevin P. Wigenton of Red Bank, who was admitted to the bar in this State in 1992, with two instances of knowing misappropriation of trust funds, six instances of knowing misappropriation of escrow funds, and representing the seller while serving as a real estate broker in the same real estate transaction. A 2007 amendment to the complaint, in pertinent

part, added four additional instances of knowing misappropriation of client and escrow funds. The counts related to findings discovered as the result of an initial random compliance audit and a second audit, by the OAE. Both took place in the latter part of 2002, six years after respondent had commenced a solo law practice in 1996. Prior to that time, respondent was not engaged in a law practice under the supervision of other attorneys. Instead, he had continued, after graduation from law school and admission to the bar, to work exclusively within the corporation where he had been employed full-time while attending law school. We note at the outset that there is no claim of client harm involved in this matter. None was pled or even remotely presented during the wealth of evidence produced at the hearing on this complaint.

An extensive hearing record was developed and Special Master Neil H. Shuster, J.S.C. (ret.) ultimately recommended a four-month suspension based on the violations that he found to have been proven by clear and convincing evidence. Most important was the Special Master's finding that respondent did not knowingly misappropriate either trust funds or escrow funds. Rather, in a painstaking analysis of the evidence, the Special Master found that respondent reasonably, but mistakenly, believed that he was entitled to the funds in issue in the misappropriations charges pled. Respondent's admittedly

"terrible" recordkeeping practices were blamed by the Special Master as the progenitor of that mistaken belief, not a willful ignorance designed to camouflage a more serious intent to take funds to which respondent was not entitled. That critical finding led the Special Master to conclude that the OAE proved respondent had committed negligent misappropriation of funds. Recordkeeping violations and a conflict of interest also were found to have been proven by clear and convincing evidence.

The Disciplinary Review Board (DRB) exhaustively reviewed the evidential record, as well as the proposed findings and conclusions rendered by the Special Master, and reached the same conclusion, differing only with respect to the quantum of punishment suitable under the circumstances. In its ninety-nine page decision filed in this matter, the DRB concluded that respondent should be censured for violating RPC 1.15(a) (negligent misappropriation of client trust and escrow funds and failure to safeguard funds), failure to comply with attorney recordkeeping requirements, and committing a conflict of interest contrary to the direction in Advisory Committee on Professional Ethics Opinion 514, 11 N.J.L.J. 392 (Apr. 14, 1983), as well as RPC 1.7(b).

The OAE filed a petition for review seeking respondent's disbarment. We granted the petition for review and issued an Order to Show Cause. We have now reviewed the record and the

parties' briefs, and had the benefit of oral argument. We are fully in accord with the DRB's assessment that the proofs against respondent demonstrate negligent, but not knowing, misappropriation. In our review of attorney-discipline matters, the seasoned judgment of the DRB is important to us, see In re Kushner, 101 N.J. 397, 403 (1986) (stating that "[w]e ordinarily place great weight on the recommendation of the Disciplinary Review Board" (citing In Re Rosen, 88 N.J. 1, 3 (1981); In re Mirabelli, 79 N.J. 597, 602 (1979))), and we have no quarrel with its assessment of the proofs marshaled in the record presented in this particular matter.

Indeed, we note with approval that both the Special Master and the DRB combed the testimony and documentary evidence, count by count, transaction by transaction, and concluded, in careful findings supported with explanation, that respondent reasonably believed he was entitled to the funds. There is no need to repeat that analysis. We emphasize only that the DRB's decision took into proper account the nature of respondent's recordkeeping deficiencies when it concluded: 1) that respondent reasonably believed that he had enough funds in his trust account; and 2) that he displayed, at worst, a woeful lack of knowledge of the true status of his accounts before disbursing legal fees and costs to himself, but not an intentional ignorance that cloaked a more nefarious intent.

See, e.g., In re Johnson, 105 N.J. 249, 260 (1987) ("The intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation.'").

Indeed, the findings by the Special Master and DRB intertwined on those scores. Both concluded that respondent did not realize there was any shortage until his accountant, who was retained between the two audits by the OAE, found them, and both explained their reasons for concluding that respondent's specific recordkeeping errors led to his reasonable, but mistaken, belief that he was entitled, on specific occasions, to withdraw or deduct an incorrect amount from his trust account, or to deposit directly certain funds into his business account believing that his trust account contained sufficient amounts to settle client accounts' needs. Although his accounting methods were, as the DRB put it, "grossly deficient," this was not a case in which a client or third party suffered. The DRB made it a point to note that

> [the OAE's senior compliance auditor] 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.

Finally, the DRB concluded that there was a failure of proof of

a $42,000 shortage in respondent's trust account, and we take no issue with that finding. It is supportable on this record.

In sum, the DRB found that the October 4, 2002, random audit that led to a lengthy give-and-take period in which respondent fully cooperated, was contrite, and did not conceal his improper recordkeeping practices, and a subsequent disciplinary action whose proceedings have cast a shadow over respondent's practice since February 2007, did not produce evidence that any shortage in respondent's trust account was caused by knowing misappropriation. The DRB concluded that the evidence led to findings of the existence of negligent misappropriation, poor recordkeeping, failure to safeguard funds, and conflict of interest. Because we agree with the DRB's assessment of the evidence, we find no benefit in repeating its detailed reasoning.

With respect to the appropriate discipline for the violations committed by respondent, the DRB concluded that a censure was warranted. The DRB explained its reasoning for imposing that quantum of discipline as follows:

> Although respondent was not guilty of knowing misappropriation, he negligently misappropriated funds; failed to comply with recordkeeping requirements; failed to safeguard funds by placing [a client'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.

A reprimand may still result even if the attorney's disciplinary record includes either a prior recordkeeping violation or other ethics transgressions.

* * *

More severe discipline has been imposed when aggravating factors, such as prior discipline or more flagrant conduct, are present.

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 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 case 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. 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.
>
> [(citations omitted)].

We are in synchronicity with the DRB's judgment that a censure is the proper quantum of discipline here. In addition to the DRB's reasoning, we add the following explanation for our agreement that a censure, rather than a suspension, is appropriate.

Were this a case of knowing misappropriation, there would be no distinction as to whether the funds misused were either trust or escrow funds for purposes of determining the quantum of discipline. Disbarment would be the penalty, as we clearly warned in In re Hollendonner, 102 N.J. 21, 28-29 (1985). See, e.g., In re Frost, 171 N.J. 308, 323 (2002); In re Gifis, 156

N.J. 323, 355-56 (1998). But here, respondent's infractions involve negligent misappropriation of trust and escrow funds, and in matters involving negligent misappropriation, it is possible to find cases where a short suspension was deemed appropriate and others where no suspension was required. See Kevin H. Michels, New Jersey Attorney Ethics, § 44:4-2 at 1146-48 (Gann 2012) (citing examples of suspensions as well as reprimands for negligent misappropriation infractions). In the situation we find present here, we return to the oft-expressed purpose of the imposition of discipline on erring attorneys: to protect the public and to preserve public confidence in the bar. See, e.g., In re Harris, 182 N.J. 594, 609 (2005); In re Gallo, 178 N.J. 115, 122 (2003). Punishment for retribution's sake is not the end goal of the attorney disciplinary system. See In re Imbriani, 149 N.J. 521, 530 (1997) ("Retribution is not our objective."). That touchstone guides us and supports the imposition of a censure, and not any period of suspension, in this matter.

A significant period of time has elapsed since the audits that uncovered respondent's admittedly lax recordkeeping practices, which led to his failure to safeguard funds and negligent misappropriation charges. Those practices, once uncovered, have not been repeated. Respondent was cooperative during the investigation, contrite, and did not attempt to

conceal his errant recordkeeping practices. Rather, respondent underwent educational programs and correction of his business and accounting practices such that no errors have been found since.

In past circumstances, we readily have recognized that the passage of time since an ethical infraction occurred can be a mitigating factor. See, e.g., In re Alum, 162 N.J. 313, 315-16 (2000); In re Pena, 162 N.J. 15, 26 (1999). Here the time that has elapsed, with educational improvement efforts by respondent in the interim, and the absence of any other audit problems since the ones that these charges address, inure to respondent's benefit in deciding the quantum of discipline and lead us to conclude that a suspension is not necessary to protect the public. While we sometimes disagree with the DRB's evaluation of the quantum of discipline appropriate to the circumstances, see, e.g., In re Convery, 166 N.J. 298, 308-09 (2001) (imposing six-month suspension for federal misdemeanor conviction, notwithstanding DRB recommendation of reprimand), the censure recommended is adequate discipline for these charges.

In sum, we conclude that this matter will be satisfactorily ended by censuring respondent for the violations found by the DRB and affirmed by this Court.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, HOENS, and PATTERSON join in this opinion. JUDGE WEFING filed a separate, dissenting opinion.

SUPREME COURT OF NEW JERSEY
D-131 September Term 2010
068659

IN THE MATTER OF

KEVIN P. WIGENTON,

An Attorney at Law

Judge Wefing (temporarily assigned), dissenting.

I write separately because I am unable to join my colleagues' conclusion that a censure is the appropriate measure of discipline for respondent. In support of their conclusion, my colleagues cite, among other reasons, the corrective measures respondent has taken, the fact that no client suffered harm, and the length of time it has taken to resolve these proceedings. I do not find these factors persuasive, either singly or in combination.

As to the corrective measures taken by respondent, many are elemental steps that respondent should have assured himself were in place from the first day he opened his practice. It is inexplicable that one with the accounting and business background of respondent would fail to institute such measures.

That no client suffered a loss as a result of respondent's failure to follow elemental principles of recordkeeping is a matter of great fortune, both for respondent's clients and for respondent. In my judgment, such sheer fortuity does not

mitigate the quantum of discipline for respondent's recordkeeping infractions.

Nor can I consider the passage of time a sufficient mitigating factor. My colleagues cite two cases for that principle: In re Alum, 162 N.J. 313 (2000), and In re Pena, 162 N.J. 15 (1999). In my judgment, the manner in which this Court referred to the passage of time in those cases is significantly distinguishable from the present matter. In those cases, the Court dealt with disciplinary charges that had been filed many years after the unethical attorney conduct occurred; the passages of time were not attributable to protracted disciplinary proceedings. In Pena, supra, the conduct at issue took place seven years before a grievance was filed, 162 N.J. at 20, and in Alum, supra, the conduct occurred eleven years earlier. 162 N.J. at 316. In neither case did we find that the length of time needed to conclude the disciplinary matter could serve as mitigation. In Alum, moreover, although we accounted for that eleven-year time span, it did not serve to step down entirely the quantum of discipline. Rather, the Court ordered that the respondent be suspended for one year but then suspended that suspension and placed respondent on probation for that period of time, conditioned on the requirement that respondent "perform legal services of a community nature consisting of the equivalent of one day per week." Id. at 316.

In my judgment, the nature of the recordkeeping infractions at issue in this matter mandates a short period of suspension for respondent in order to preserve public confidence in the bar. Thus, I must dissent.

SUPREME COURT OF NEW JERSEY
D-131 September Term 2010
068659

IN THE MATTER OF :

KEVIN P. WIGENTON, :

AN ATTORNEY AT LAW :

(Attorney No. 008221992) :

O R D E R

It is ORDERED that **KEVIN P. WIGENTON** of **RED BANK**, who was admitted to the bar of this State in 1992, is hereby censured; and it is further

ORDERED that the entire record of this matter be made a permanent part of respondent's file as an attorney at law of this State, and it is further

ORDERED that respondent reimburse the Disciplinary Oversight Committee for appropriate administrative costs and actual expenses incurred in the prosecution of this matter, as provided in Rule 1:20-17.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 3rd day of April, 2012.

CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY

NO. D-131 SEPTEMBER TERM 2010

APPLICATION FOR

DISPOSITION Order to Show Cause Why Respondent Should Not be Disbarred or Otherwise Disciplined

IN THE MATTER OF

KEVIN P. WIGENTON,

An Attorney at Law

DECIDED April 3, 2012

OPINION BY Per Curiam

CONCURRING OPINION BY

DISSENTING OPINION BY Judge Wefing (temporarily assigned)

CHECKLIST	CENSURE	SUSPEND
CHIEF JUSTICE RABNER	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE HOENS	X	
JUSTICE PATTERSON	X	
JUDGE WEFING (t/a)		X
TOTALS	5	1