SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-397
District Docket No. XIV-2008-0303E

IN THE MATTER OF	
KIM ANDRE FELLENZ	
AN ATTORNEY AT LAW	

Decision

Argued: March 15, 2012

Decided: May 9, 2012

Melissa A. Czartoryski appeared on behalf of the Office of Attorney Ethics.

Robert Ramsey appeared on behalf of respondent.[1]

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

This matter was before us on a recommendation for disbarment filed by Special Master James M. McGovern, Jr. The complaint filed by the Office of Attorney Ethics (OAE) charged

[1] At oral argument, respondent's counsel requested that respondent, rather than counsel, be permitted to argue the case before us. We granted that request.

respondent with six instances of knowing misappropriation of trust funds, violations 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); two instances of engaging in a business transaction with a client, violations of RPC 1.8(a); commingling personal and trust funds, a violation of RPC 1.15(a); improperly using a trust account, alleged to have been a violation of RPC 1.15(c); failing to comply with recordkeeping rules, a violation of RPC 1.15(d) and R. 1:21-6; and failing to cooperate with disciplinary authorities, a violation of RPC 8.1(b) and R. 1:20-3(g)(3).

For the reasons expressed below, we find that respondent knowingly misappropriated client funds and, therefore, recommend his disbarment.

Respondent was admitted to the New Jersey bar in 1982. In 1987, he was privately reprimanded for engaging in a conflict of interest by representing both the buyer and seller in a real estate transaction without obtaining their consent to the dual representation. In the Matter of Kim A. Fellenz, DRB 87-188 (August 20, 1987).

In five of the six counts charging respondent with knowing misappropriation of client funds, the OAE alleged that, in

addition to disbursing client funds to himself without authorization, respondent withdrew more funds than he maintained in his trust account for a particular client. According to the OAE, therefore, respondent also knowingly misappropriated funds belonging to other clients. Most of the clients named in the complaint testified that they had consented to respondent's use of their funds, either as a loan or as payment of other legal services that he had provided. In addition, respondent claimed that, because his files were lost, he was unable to produce his ledgers, which would have demonstrated that he had not invaded other client funds. He also asserted that, because of ill health, he had not maintained his records properly. Like the special master, we were not persuaded by either the clients' testimony or respondent's explanations.

Count One – Failure to Cooperate with Disciplinary Authorities

This matter came to the OAE's attention when Commerce Bank (now TD Bank) sent notifications to the OAE, on June 10, 11, and 12, 2008, of three overdrafts in respondent's trust account. By letter dated August 8, 2008, respondent explained to the OAE that the overdrafts resulted from his failure to enter, on a ledger sheet, his removal of personal funds of $3,500 from his trust account. In reply, on August 14, 2008, the OAE asked

respondent to explain the purpose for the ledger card on which he recorded his personal funds and to provide a copy of the last monthly trust account reconciliation that he had prepared before the overdraft took place.

Not satisfied with respondent's reply, the OAE conducted a demand audit of his attorney records on October 17, 2008. At that time, respondent asserted that he could not produce client ledger cards. In reviewing respondent's journals, checks, and bank statements, OAE investigator Wanda Riddle noticed that respondent had issued large trust account checks to himself, in even amounts. In her experience, round-numbered checks can indicate an attorney's misuse of funds because checks issued for fees and costs are typically disbursed in uneven amounts.

During the audit, Riddle also discovered that respondent had engaged in comingling by placing in his trust account personal funds from a refinance of his home. Respondent also revealed that he had engaged in loan transactions with clients. After the demand audit, the OAE requested additional documents concerning the refinance, the money in his trust account, and the loan transactions. In a reply, dated October 24, 2008, respondent claimed that the requested client ledger cards and some of the client files had been inadvertently discarded by Ivara Jones, his file worker.

On March 10, 2009, the OAE informed respondent of a second demand audit, scheduled for April 2, 2009. The OAE requested that he bring specific documents to the audit. In a March 12, 2009 reply, respondent submitted some of the information and repeated the allegation that Jones had lost the files and ledger cards. Respondent failed to bring to the demand audit most of the items that the OAE had requested. In particular, Riddle was concerned about respondent's failure to produce the client ledger cards, noting that the OAE had requested them on five occasions.

During the audit, which was tape-recorded, respondent expressed concern about providing the OAE with files containing personal information about his clients. The audit transcript reveals that the OAE presenter explained that respondent was required to produce the information and that the OAE would maintain its confidentiality. Respondent indicated that he was comfortable with the OAE's explanation.

Notwithstanding this discussion during the demand audit, in a May 29, 2009 letter, respondent renewed his concern about providing the OAE with client files that contained confidential information. Although the OAE had assured respondent that he was not only permitted, but required, to produce the files, respondent and the OAE exchanged several letters in which respondent stated that the OAE's file requests were overly broad

and violative of his clients' rights. Ultimately, respondent refused to produce the requested client files.

A third demand audit occurred on November 20, 2009. Before that audit, the OAE had informed respondent of its concerns about bank records that indicated that he had misappropriated trust funds. The OAE also had shown to respondent Riddle's reconstruction of his trust account. Yet, according to Riddle, when respondent was asked specific questions about client trust funds, he continued to represent that he would research the matters and report back to the OAE, failing to appreciate the urgency and importance of the issue.

Although Riddle acknowledged that respondent had provided trust journal sheets, bank statements, and some client files, he failed to produce client files and client ledger cards for some of the matters that were the subject of the knowing misappropriation investigation. Specifically, he did not provide client files in the Mackason, Estate of Kinsey, and Sorour matters, and provided only part of the files in the Gonzales and his refinance matters. He also failed to produce monthly trust account reconciliations, leading Riddle to believe that he had not performed them and resulting in the charge in the complaint that he had failed to comply with recordkeeping rules.

In turn, respondent claimed that he had provided the OAE with all of the documents in his possession, except for client files, based on his concern about client confidentiality. He told the OAE that, without a client authorization or court order, he would not turn over his entire client file.

As to the client ledger cards and other client files, respondent alleged that they had been lost or misplaced. According to respondent, because his law office was small, he maintained many files in an off-site storage facility and had used the services of a man named Ivara Jones to assist him in moving the files.

Jones testified that, in the process of moving files to the storage facility, he had inadvertently either discarded or misplaced them. According to Jones, respondent was a family friend whom he had known since childhood. In addition, respondent had represented him in several cases and had employed him periodically to do work at his home and his office. Respondent had also provided financial assistance to Jones, such as paying for his college textbooks.

Jones asserted that the date that the files were lost or misplaced was either June 27 or July 27, 2010. Yet, respondent had informed the OAE, in letters dated as far back as two years,

October 24, 2008 and March 12, 2009, that Jones had inadvertently discarded client files and ledger cards.

In addition to the trust and business accounts that respondent maintained at Commerce Bank, he had a bank account at Sovereign Bank. Despite the OAE's request, respondent provided no information about the Sovereign Bank account.

Count Two – Jenise Mackason

Respondent represented Jenise Mackason in a personal injury claim resulting from an automobile accident. The client file number that respondent assigned to the Mackason case was 3312. He received two settlement checks, totaling $45,000, for Mackason. He deposited those checks in his trust account on May 30 and June 1, 2007.

Because respondent had not produced either his client file or client ledgers in the Mackason matter, Riddle used subpoenaed bank records to reconstruct the receipts and disbursements in that case. Her analysis revealed that, although respondent had received only $45,000 on Mackason's behalf, he had disbursed to himself $63,669.99 in connection with that matter, thereby invading other clients' funds. The "memo" portion of the checks that respondent issued referred to either the client name or the client file number, as follows:

Date	Check No.	Check Memo	Amount
06/06/07	5394	Mackason v. Petriello	5,000.00
06/11/07	5397	#3312	7,000.00
06/13/07	5399	#3312	3,000.00
06/14/07	5398	#3312	2,500.00
06/19/07	5400	#3312	2,500.00
06/22/07	5401	#3312	1,500.00
06/29/07	5403	#3312 Adorno	3,533.93
06/29/07	5404	#3312	750.00
07/11/07	5410	#3312 Mackason	1,760.00
07/25/07	5411	#3312 Mackason	6,465.00
08/10/07	5413	#3312 Mackason	2,500.00
08/20/07	5426	#3312 Mackason	2,500.00
08/24/07	5429	#3312 Mackason	2,500.00
10/02/07	5456	#3312 Mackason v. Petriello	8,000.00
10/19/07	5462	#3312 Mackason v. Petriello	4,000.00
10/31/07	5468	#3312 Mackason	2,500.00
11/14/07	5469	#3312 Mackason	7,000.00
01/23/08	5491	Jenise Mackason	661.06

After issuing the above checks, respondent either cashed them or deposited them in his business account or the Sovereign Bank account.

According to Riddle, during the investigation, respondent indicated that Mackason had owed him fees for legal services performed in other matters, in addition to the personal injury case. He did not explain to the OAE why he had disbursed more funds attributable to the Mackason matter than he had on deposit for her.

For his part, respondent claimed that he had advanced funds to Mackason during the pendency of her personal injury case.[2] He further alleged that he had provided other legal services to Mackason, that she had executed a written assignment of her settlement funds to him, and that he could not locate the assignment.

Respondent conceded that, in his verified answer to the formal ethics complaint, he had not asserted that he had lent monies to Mackason or that she had assigned her settlement proceeds to him. Respondent could not recall how much he had advanced to Mackason or the date or dates that he had advanced money to her, explaining that that information would have been stored in the file, which was missing. He claimed that he had lent her funds in cash.

Riddle testified that, during the OAE investigation, respondent never suggested that he had advanced funds to Mackason. In addition, he could not produce any bills for services provided to Mackason in any of the matters.

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[2] When the special master informed respondent that his testimony constituted an admission of a violation of the Rules of Professional Conduct, which prohibit the advancement of monies in connection with pending or contemplated litigation, respondent replied that he had not charged Mackason interest. After the special master pointed out that the violation occurs, regardless of whether interest is charged, respondent asserted that he was not aware that such conduct was unethical.

Respondent claimed that he had maintained a master accounting of funds that he had received from and disbursed to clients. He was then asked why, if he had a master accounting, he had depleted Mackason's funds. He refused to acknowledge that her funds had been depleted.

Mackason testified that, in addition to the personal injury case, respondent had represented her in three or four municipal court matters. She asserted that, because she owed respondent fees for these other matters, she had signed documents transferring her settlement funds to him. When, on cross-examination, Mackason was told that respondent had informed the OAE that he represented her in a contract case, she agreed, but refused to reveal any information about that matter, indicating that it was personal. She could recall neither the amount of the fees that she owed respondent nor the amount of funds that he had advanced to her.

Contrary to respondent's testimony that he had given her cash, Mackason claimed that she had received checks from respondent. Although Mackason asserted that she had signed promissory notes agreeing to repay respondent without interest, she testified that she no longer had those documents.

Count Three – Estate of Alton Kinsey/Bruce Jackson

In 2002, respondent was retained to represent the Estate of Alton Kinsey (the estate), of which Bruce Jackson was a beneficiary. On July 2, 2007, respondent received a check for $10,166.20, representing legal fees from the estate. Although respondent was required to deposit that check in his business account, he instead placed it in his trust account. He immediately removed those funds by issuing two checks to himself, dated July 2 and July 3, 2007, and in the amounts of $9,500.00 and $666.20, respectively, and then cashing those checks.

On August 7, 2007, respondent deposited in his trust account a $34,706.84 check bearing the notation "net distribution Bruce Kinsey Jackson." As in the Mackason matter, because respondent had failed to provide either his client file or client ledgers to the OAE, Riddle reconstructed the disbursements from the subpoenaed bank records. Her analysis revealed that, although respondent had received only $34,706.84 on Jackson's behalf, he had disbursed to himself $56,206.89 in connection with that matter, as indicated by the reference, in the "memo" portion of the checks, to either the client name or the client file number, as follows:

Date	No.	Payee	Check	Memo	Amount
08/27/07	5432	Respondent	#2181	Bruce Jackson	1,500.00
08/29/07	5430	Jackson	#2181	Bruce Jackson	1,000.00
08/31/07	5444	Respondent	#2181	Bruce Jackson	5,000.00
09/04/07	5431	Monmouth Cty	#2181	Bruce Jackson	12,612.00
10/12/07	5458	Respondent	#2181	Bruce Jackson	4,000.00
	5460	Respondent	#2181	Bruce Jackson	350.00
10/19/07	5463	Jackson	#2181	Bruce Jackson	1,000.00
10/22/07	5461	Jackson	None		1,000.00
10/26/07	5459	NJ Treasurer	#2181	Bruce Jackson	70.00
11/21/07	5470	Anthony Pinero	#2181	Anthony Pinero	4,164.38
11/27/07	5471	Respondent	#2181	Estate of Kinsey/ Jackson	3,500.00
12/14/07	5475	Respondent	#2181	Bruce Jackson	3,000.00
12/27/07	5477	Jackson	#2181		9,000.00
01/09/08	5483	Respondent	Bruce	Jackson	1,500.00
01/11/08	5485	Respondent	Bruce	Jackson	1,010.51
03/07/08	5518	Jackson	Bruce	Jackson	2,174.84
03/27/08	5842	Respondent	#2181	Bruce Jackson	4,500.00
05/20/08	5541	Respondent	#2181	Bruce Jackson	825.16

After issuing the checks to himself, respondent either cashed them or deposited them in his business account. Although he told Riddle that Anthony Pinero, the payee of check number 5470, was his cousin, he provided no explanation for issuing that check to Pinero, against Jackson's funds. Moreover, he did not have any funds on deposit in his trust account on Pinero's behalf. Similarly, he asserted that check 5431, payable to Monmouth County, was disbursed in connection with Jackson's child support obligation, but failed to produce any supporting documentation.

From August 27, 2007 through May 20, 2008, thus, respondent disbursed $21,500.05 more than the amount of funds maintained in

his trust account to Jackson's credit. By doing so, he invaded other funds in his trust account.

On February 8, 2008, respondent deposited in his trust account $50,230.07, the proceeds from the refinance of his house. Before he made that deposit, the balance in his trust account in the Jackson matter was negative $14,000.05.

According to Riddle, during the OAE investigation, including her interviews with respondent at the three demand audits, he never claimed that Jackson had lent him money from the estate distribution. Although respondent had asserted that he was due legal fees for representing Jackson in other matters, he never produced documents in support of this claim. Riddle noted that many of the checks that respondent disbursed to himself were round numbers and were issued several days apart. She opined that this pattern was not indicative of an attorney's receipt of legal fees, which is typically done in accordance with a periodic billing period.

For his part, respondent claimed that, because Jackson had a drug problem, he had asked respondent to retain his estate funds in respondent's trust account. According to respondent, he had more funds in his trust account to Jackson's credit than was shown on Riddle's reconstruction because he had received other distributions from the estate, on Jackson's behalf. He claimed

that the first distribution to Jackson amounted to about $100,000, which he deposited in his trust account. He believed that the $34,706.84 check from the estate, with the memo notation "net distribution," was the second payment from the estate to Jackson. He conceded, however, that he had no documentation concerning that deposit and that he had not indicated in his verified answer to the formal ethics complaint that he had sufficient funds to Jackson's credit in his trust account to cover the disbursements.

In addition, respondent stated that, from time to time, Jackson directed him to disburse funds, either to Jackson or on his behalf, for funds owed for child support, to courts, and to creditors. He further asserted that Jackson had authorized him to borrow from the trust funds held on Jackson's behalf. He alleged that he and Jackson separately kept an account of the funds that he received and disbursed for Jackson.

Although respondent claimed that he had represented Jackson in various Superior Court, criminal, civil, and municipal court matters, he produced no fee agreements, invoices, or other documents supporting that assertion. During the ethics hearing, he produced, for the first time, a copy of the fee agreement in connection with the estate matter. When he explained that he had not produced supporting documents because he could not find the

estate file, the special master asked him whether he had documents from the various courts indicating that he had been counsel of record for Jackson in the litigation matters. He replied that he supposed he could obtain those papers, prompting the special master to criticize him for engaging in "discovery by ambush," that is, presenting documents at the hearing without having first produced them to the OAE, during the discovery stage of the case.

At the hearing, respondent also produced, for the first time, copies of file cards in connection with various matters in which he claimed that he had represented Jackson. The checks that he issued did not contain references to any of these other file numbers. The only file number to appear on the checks was file number 2181, the number assigned to the estate.

Jackson testified via telephone from a correction center in Wernersville, Pennsylvania, where he was incarcerated for a drug offense. He asserted that respondent had represented him in several matters, including his father's estate, child support, Superior Court, and municipal court cases. He testified that he received two distributions from his father's estate, in the amounts of $108,000 and $58,000, that he asked respondent to retain those funds to pay his child support and other obligations, such as court costs and fines, that he also lent

money to respondent, that both he and respondent separately kept an account of these disbursements and loans, and that he no longer had that accounting.

Jackson could not recall the amount of respondent's fees for any of the matters in which respondent had represented him or the amount of funds paid to him from the $108,000 estate distribution, after respondent had satisfied his obligations from that fund. According to Jackson, respondent had verbally advised him of his right to independent counsel, when he agreed to lend money to respondent. They did not enter into a written loan agreement. Jackson could not remember whether there was more than one loan or the amount of interest that respondent paid. He also could not recall whether he lent money to respondent from the $58,000 estate distribution.

Count Four – Mohammad Ahmed

Respondent represented Mohammad Ahmed in a personal injury matter, assigning it file number 3588. On December 18, 2007, he deposited into his trust account $26,000, representing the Ahmed settlement proceeds. According to the Ahmed statement of settlement, respondent's fees and costs totaled $7,480.

By January 24, 2008, about one month after receiving the settlement check, respondent had depleted all of the settlement

proceeds by issuing to himself ten checks attributable to the Ahmed matter, in the total amount of $33,321.50. Riddle's reconstruction of the Ahmed account revealed the following disbursements:

Date	Check No.	Check Memo	Amount
12/19/07	5476	Ahmed v. Licari	5,000.00
12/24/07	5478	Ahmed Mohamed	2,000.00
12/28/07	5479	Ahmed v. Licari	3,000.00
01/04/08	5482	Ahmed v. Licari	3,500.00
01/11/08	5486	Ahmed	3,500.00
01/14/08	5487	Ahmed	6,000.00
01/18/08	5488	Ahmed Mohamed	1,900.00
01/24/08	5492	Ahmed Mohamed	1,950.00
01/24/08	5493	Ahmed Mohamed	6,315.00
01/31/08	5496	Ahmed Mohamed	156.50

On January 31, 2008, after respondent either cashed or deposited the above checks in his business account or Sovereign Bank account, the balance of funds in his trust account for Ahmed was negative $7,321.60. As previously noted, respondent was entitled to his fees and costs of $7,480.

On January 23, 2008, respondent issued a $15,250 check to Ahmed for his portion of the settlement proceeds. The check was negotiated on March 31, 2008, resulting in a negative balance of $22,571.60 for the Ahmed matter. In addition, respondent issued a $19,000 check to Jacob Cohen, on December 30, 2007, and a $6,000 check to Bruce Jackson, on January 8, 2008, both referencing file number 3588, the Ahmed matter. During the investigation, respondent had not identified Jacob Cohen or

explained why he had issued a check to Cohen containing a reference to the Ahmed file. As of January 11, 2008, the Jackson account balance in respondent's trust account was negative $14,000.05.

During the OAE investigation, respondent produced an undated document signed by Shueib Mohammed, Ahmed's brother, granting respondent authority to use Ahmed's settlement proceeds for ninety days, in exchange for $1.00. During the investigation, Ahmed confirmed to Riddle that he had granted his brother the authority to lend the settlement proceeds to respondent.

Respondent also provided a power of attorney, prepared and signed in Pakistan, whereby Ahmed authorized Mohammed to pick up his settlement check from respondent. The document also provided that it "is re confirmed that [Mohammed] has full authority to act on my behalf and pose himself as if he is me." The power of attorney is dated March 12, 2008, almost three months after respondent had deposited the settlement proceeds in his trust account. By that time, respondent had disbursed all of the Ahmed funds.

The December 6, 2007 statement of settlement that respondent prepared in the Ahmed matter listed the following disbursements made to medical providers: $1,000 to Atlantic Open

MRI, $520 to Dr. Tartaglia, $1,000 to Dr. Scott Huber, and $750 to Spinal Head Trauma, PC. Riddle's review of the trust account revealed none of these disbursements. Moreover, all of the medical providers confirmed to Riddle that respondent had not paid them, except Dr. Tartaglia, who submitted to the OAE a copy of a June 9, 2009 letter that respondent had sent to him, enclosing a $560 check.[3] Riddle determined that, based on the check number and her familiarity with the sequence of checks issued during that time, respondent had paid Dr. Tartaglia from his business account. According to Ahmed, notwithstanding the medical providers' statements that respondent had not paid them, he never received bills from them.

Both Ahmed and Mohammed testified at the ethics hearing that, because Ahmed was required to travel to Pakistan, he had given Mohammed authority to act generally in his behalf. Ahmed could not recall whether he had provided respondent with a copy of the general power-of-attorney that he had granted to Mohammed. Although Ahmed gave Mohammed the authority to lend the settlement proceeds to respondent, he could not recall when he did so. Ahmed charged no interest, because respondent had

[3] The payment to Dr. Tartaglia was made about eighteen months after respondent had deposited the settlement proceeds in his trust account.

previously provided legal services in several minor legal matters, without billing him.

Essentially, thus, Ahmed claimed that he had given his brother three documents: a general power-of-attorney, an authorization to collect his settlement check from respondent, and a consent to lend the settlement proceeds to respondent. Neither Ahmed nor Mohammed had a copy of the general power-of-attorney.

Count Five – Anne Gonzales

Anne Gonzales retained respondent to represent her in a criminal matter and, subsequently, in a child custody case. On January 23, 2008, Marie Jaffe, Gonzales' mother, issued two checks to respondent: one for $10,000, bearing the notation "Anne Gonzales paid in full," which respondent deposited in his business account, and one for $7,500, bearing the notation "Dr. Mark White Anne and Brandon Gonzales," which respondent deposited in his trust account. These funds were to be used to retain an expert in the custody case. Although respondent did not disburse any portion of the $7,500 on Gonzales' behalf, on May 21, 2008, the balance in his trust account was $6,396.90. By June 2008, the trust account had a negative balance.

On October 23, 2008, about ten months after depositing the $7,500 in his trust account, respondent issued a $1,500 check from his business account to Linda Berry, a court-appointed therapist involved in the custody case. Also on October 23, 2008, he sent the following letter to Gonzales, who was living in Louisiana:

> As per our telephone conference of October 23, 2008, subsequent telephone conferences and your October 21, 2008 fax, please note that I am forwarding the sum of $1,500.00 to the court assigned therapist, Linda Berry. I am applying the $6,000 balance of your escrow to my outstanding bill, copy of which I enclose, which leaves a balance due and owing of $2,344.00.
>
> [Ex.OAE-31].

The October 23, 2008 bill that respondent enclosed to Gonzales, in the amount of $18,284.00, credited her with the $10,000 that Jaffe had paid on January 23, 2008, and with $6,000 paid on October 21, 2008. At the time that respondent sent the letter notifying Gonzales that he had applied the $6,000 escrow balance to his bill, he did not have any funds in his trust account to Gonzales' credit.

For his part, respondent alleged that, well before 2008, he had urged Gonzales to retain a custody expert. Only after the judge declined to return her child to her in Louisiana, did Gonzales agree to obtain an expert, giving respondent $7,500 for

that purpose. The judge, then, determined not to allow Gonzales to offer an expert opinion. The judge ruled that, under no circumstances, would she order Gonzales' child to visit her in Louisiana.

Respondent claimed that, during a telephone conversation with Gonzales, she then agreed to permit him to apply to his bill the $7,500 that had been entrusted to him for an expert. He could not recall the date of this telephone conversation. He did not confirm, in writing, Gonzales' consent to his use of the escrow funds for his bill. According to respondent, when Gonzales later asked him to pay Berry with the funds that had been earmarked for an expert, he reminded her that she had allowed him to apply the $7,500 to his bill. Because Gonzales became upset, respondent agreed to redirect $1,500 from the $7,500 to Berry, resulting in a corresponding increase of $1,500 in the amount that Gonzales owed respondent.

At the ethics hearing, respondent produced a copy of the October 23, 2008 bill to Gonzales that contained the following handwritten note: "Dear Anne – After applying $10,000 last payment made + $6,000 escrow balance would leave balance of $2,344. We'll discuss on Mon." The copy of that bill that respondent had previously provided to the OAE did not contain that handwritten notation. In addition, the copy of the bill

that respondent brought to the hearing did not contain the language crediting Gonzales for the $10,000 paid on account in January or the $6,000 paid on account in October. Respondent could not explain why there were two different versions of the same bill, dated October 23, 2008.

Gonzales testified by telephone from Louisiana, as a rebuttal witness. She confirmed that the $7,500 was given to respondent to retain a custody expert and was to be held in escrow, until used for that purpose. She denied (1) having authorized him to apply any of those funds to his outstanding legal fees; (2) knowing that he had used the $7,500 for his fees; and (3) having received a copy of the October 23, 2008 letter that he had sent to Berry, enclosing her $1,500 fee. Until Gonzales received the October 23, 2008 letter from respondent, enclosing a bill, she believed that he was still holding $7,500 in escrow in her behalf. The October 23, 2007 invoice that Gonzales received from respondent did not contain the handwritten note.

Count Six – David Michel

Respondent represented David Michel in a personal injury matter that was settled for $45,000. The settlement statement, dated January 14, 2008, revealed that respondent's fee was

$14,883.83 and that Michel's portion of the settlement was $29,767.66. Respondent did not remove his legal fees from his trust account.

Also on January 14, 2008, Michel signed a document agreeing to lend his settlement proceeds to respondent for forty-five days, in return for interest in the amount of $500.

Respondent deposited in his trust account two settlement checks for Michel, in the amounts of $15,000 and $30,000, on December 31, 2007, and January 24, 2008, respectively. As of the date of the latter deposit, respondent's trust account contained a $14,000.05 shortage for Bruce Jackson and a $7,165.00 shortage for Mohammad Ahmed.

Riddle opined that respondent chose to leave his legal fees in his trust account and to borrow Michel's portion of the settlement proceeds to make up for the shortages in his trust account. She further asserted that the shortages resulted from respondent's disbursing more funds from his trust account than he had for a particular client.

In addition, on February 8, 2008, respondent deposited in his trust account $50,230.07 from the refinance of his home. From February 11 to February 29, 2008, respondent issued nine checks to himself from the refinance proceeds, for a total of $20,462.41. On February 26, 2008, he disbursed the balance of

the refinance proceeds, $29,767.66, to Michel, representing Michel's portion of the settlement proceeds. Respondent conceded that one of the reasons that he had placed the proceeds of his refinance in his trust account was to use those funds to repay the loan to Michel.

Respondent issued five additional checks from the refinance proceeds, resulting in a $10,000 overdisbursement of those funds. All of the checks that respondent issued to himself were either cashed or deposited in his business account or in the Sovereign Bank account. The $10,000 shortfall caused the invasion of clients' funds.

Michel confirmed that he had agreed to lend his loan proceeds to respondent. Respondent did not advise Michel to consult independent counsel about the loan. He had no other funds on deposit with respondent, apart from the $45,000 settlement proceeds.

Count Seven – Yvonne Sorour

Respondent settled a personal injury matter for Yvonne Sorour for $75,000, which was paid by means of three checks. Sorour signed the settlement statement and a limited power-of-attorney, authorizing respondent to endorse the settlement check and deposit it in his trust account. On July 31, 2008, however,

respondent deposited the first $30,000 settlement draft in his business account, rather than his trust account.

Respondent's legal fees for the Sorour matter were $23,394.53. Sorour's portion of the settlement proceeds was $46,789.07. On October 3, 2008, two months after the deposit of the first settlement check in his business account, respondent issued a business account check in the amount of $10,000 to Sorour. As previously noted, respondent had deposited settlement proceeds of $30,000 in his business account, on July 31, 2008. Because respondent's fees were $23,394.53, he should have held the $6,605.47 balance intact in his business account on Sorour's behalf. Respondent's September 30, 2008 business account bank statement revealed that, on at least nine days in September 2008, his business account balance was below $6,605.47. The only disbursement from the business account related to the Sorour matter was the $10,000 check to Sorour issued on October 3, 2008. Respondent used the remainder of those funds for his personal and business expenses.

On August 4 and September 23, 2008, respondent deposited two settlement checks, in the amounts of $30,000 and $15,056.38, respectively, in his trust account. On September 16, 2008, the balance in that account was $36,064.18. According to Riddle's reconstruction of respondent's trust account, on September 16,

2008, he should have maintained the following funds in that account:

Client	**Amount**
Anne Gonzales	$7,500.00
Yvonne Sorour	30,000.00
Shelone Brodie	10.00
Dominique King	640.29
Rozita & Wilnord Andre	3,743.10
Laura Boehler	6,709.71
Total	$48,303.20

Therefore, the trust account had a shortage of $12,239.02 ($48,303.20 minus $36,064.18).

On September 18, 2008, respondent issued to Sorour a trust account check in the amount of $20,000. By that time, he had deposited the second Sorour settlement check, in the amount of $30,000. He disbursed $15,000 to Sorour by a trust account check dated October 2, 2008. By that time, the last Sorour settlement check ($15,000) had been deposited.

During the OAE investigation, respondent never indicated that Sorour had lent her settlement proceeds to him. Respondent's verified answer to the formal ethics complaint did not allege that he had borrowed funds from Sorour.

At the ethics hearing, however, Sorour testified that she had given respondent written authorization to borrow her settlement proceeds. She could not recall when she had agreed to the loan. She claimed that she no longer had the loan document,

having misplaced it when she moved to a different residence. She charged no interest for the loan. Respondent had not informed her of her right to seek independent counsel, before she agreed to the loan. At the time of the ethics hearing, respondent continued to represent Sorour in other matters.

Although the settlement statement provided that Sorour was to receive $46,789.07 from the settlement and although she received only $45,000 (a difference of $1,789.07), Sorour testified that she had received all of the funds to which she had been entitled.

The settlement statement also reflected a $2,500 payment to Dr. Robert Dennis. On December 1, 2009, Dr. Dennis sent a letter to the OAE indicating that, although he had received a $2,500 retainer, because the matter had been settled without the need for his testimony, he had returned $2,475 to respondent. Riddle's investigation revealed that Dr. Dennis' October 31, 2008 refund check to respondent in the amount of $2,475 was negotiated.

In turn, respondent alleged that, in November 2008, he had tendered cash to Sorour, representing both the $1,789.07 balance of the settlement proceeds and the $2,475 refund from Dr. Dennis. He claimed that, because Sorour was involved in a divorce matter at the time, she had asked respondent to give her cash so that her husband would not learn about her receipt of

these funds. According to respondent, Sorour received $45,000 in checks, but had requested the smaller amounts to be paid in cash to conceal those funds from her husband. Respondent conceded that he had not advised Sorour to seek independent counsel, before entering into the loan agreement with her.

Respondent's Defenses and Mitigation

Respondent claimed that the client loans to him were necessary due to cash flow issues. He asserted that, although he had not advised his clients to seek the advice of independent counsel, he had entered into written loan agreements with each client. He testified as follows, concerning the loans:

> I sometimes mixed the ledgering together, in other words, because the client may have lent me the funds, those funds were then assigned to me on a loan basis, and at some point in time they were repaid usually with my own funds, sometimes with funds borrowed from other clients in order to repay the loans, but in each case there was a signed agreement from the client indicating that they consented to the loan, and that they were being paid, either paid a fee for the use of their funds or there would be a reduction I think in one or two cases in the counsel fee that I normally would have taken on a particular case.
>
> [5T38-17 to 5T39-4].[4]

[4] 5T denotes the transcript of the February 17, 2011 ethics hearing.

In addition, respondent asserted that, during the time of the conduct alleged in the ethics complaint, he suffered from high blood pressure, coronary artery disease, congestive heart failure, diabetes, and high cholesterol. In 1997, he suffered a heart attack, after which two stents were inserted. He underwent two hip replacements and rotator cuff repair. The twelve pills per day that he is required to take to treat his illnesses render him lethargic, making it difficult for him to maintain his records properly. Nonetheless, he continued, and continues, to accept new cases and was not instructed by any of his doctors to reduce his practice.

Dr. Edna I. E. Hunter, a retired school principal, testified as a character witness for respondent. She described his community service, specifically his work for the West Side Community Center and the NAACP. He also was a Sabbath school teacher for his church. Hunter, who served as respondent's office receptionist, observed that respondent provided financial assistance to many members of the community, who came to his office asking for favors. She asserted that respondent enjoyed an excellent reputation in the community for truthfulness and honesty.

The special master determined that respondent knowingly misappropriated client funds, as alleged in the complaint, with

the exception of the Gonzales matter. The special master further found that respondent improperly entered into business transactions with clients, commingled personal and client funds, failed to comply with recordkeeping rules, and failed to cooperate with disciplinary authorities.

As to the latter finding, the special master rejected respondent's position that the duty to preserve confidential information excused his failure to produce his client files to the OAE. He found that it strained credibility that the client files and ledger cards that respondent claimed were lost were the same ones that the OAE had requested. Although the special master found Ivara Jones to be a credible witness, he observed that he testified that he had lost the files in June or July 2010, well after the ethics investigation had begun. Not only did the special master conclude that respondent had failed to cooperate in the investigation, he further determined that respondent's actions "were obstructionist and caused an incredible outlay of time and effort to recreate his trust account."

In count two, the special master found respondent's testimony concerning the loans to Mackason not credible, based on a lack of documentary evidence in support of his claim. The special master found it significant that respondent issued checks to himself in even amounts; that he cashed some of the

checks; and that he refused to explain to the OAE the purpose of the account that he maintained at Sovereign Bank, where he deposited some of the checks. The special master found that respondent was without remorse and did not understand the concept that an attorney must treat client funds differently from his own funds.

In the Estate of Alton Kinsey/Bruce Jackson matter (count three), the special master noted that respondent failed to produce any documentation to support his claim that he had performed legal services for Jackson that would justify his issuance of checks to himself from Jackson's trust account funds. Because Jackson alleged that respondent had explained that he had the right to seek independent counsel, whereas respondent testified that he was not aware of this requirement, the special master questioned Jackson's credibility. The special master found that, in any event, respondent deposited in his trust account $44,873.04 from the estate and that he issued checks payable to both himself and Jackson totaling $21,500 more than he had received, thereby invading other clients' funds.

In count four, the Ahmed matter, the special master found that the March 12, 2008 power-of-attorney, whereby Ahmed gave his brother, Mohammed, authority to pick up his settlement check, did not authorize him to lend the proceeds to respondent;

that respondent depleted Ahmed's funds before that power-of-attorney was executed and he, thus, knowingly misappropriated Ahmed's settlement proceeds; and that respondent used other clients' monies to fund the disbursements attributed to the Ahmed matter.

As previously mentioned, the special master did not find that the OAE had produced clear and convincing evidence of knowing misappropriation in the Gonzales matter, count five. The special master could not "square the credibility of either" respondent or Gonzales. The special master determined that, although Gonzales testified emphatically that she had not authorized respondent to apply to his fees a portion of the escrow funds earmarked for an expert witness, there was a misunderstanding on respondent's part on this issue. The special master concluded that respondent believed that he had the right to apply the escrow funds to his fees. The special master, thus, dismissed count five.

In count six, the Michel matter, the special master determined that respondent placed the proceeds from his personal refinance in his trust account to replace client monies that he had misappropriated. The special master noted that, even if he were to accept respondent's testimony that he used the refinance proceeds to repay Michel, respondent overdrew that account by

$10,000. In addition to finding respondent guilty of knowing misappropriation of client funds, the special master found that respondent engaged in an improper business transaction with Michel by failing to inform him of his right to independent counsel and that he failed to comply with recordkeeping requirements by failing to perform trust account reconciliations.

Finally, in the Sorour matter, count seven, although the client testified that she had agreed to lend her settlement proceeds to respondent, the special master found that the absence of the loan agreement detracted from her credibility. He further noted that she continued to be represented by respondent in other matters. He also determined that Sorour should have received $46,789.07 from the settlement proceeds, plus the $2,475 that Dr. Dennis had refunded. Because respondent disbursed only $45,000 to Sorour, the special master found that she was owed $4,264.07. In addition to the knowing misappropriation violation, the special master found that respondent entered into a prohibited business transaction with Sorour.

In assessing respondent's mitigating evidence, the special master observed that respondent did not produce medical proof establishing a link between his health conditions and the

charged misconduct. He also noted that the character evidence provided by Dr. Hunter is inconsequential in a knowing misappropriation case.

The special master described respondent's conduct at the ethics hearing as "exceedingly confrontational," noting that he interpreted adverse evidentiary rulings as a personal attack. The special master asserted that he gave respondent substantial leeway to produce both documents and witnesses at the hearing, despite the lack of any prior notice to the OAE.

In addition, the special master concluded that respondent was not credible; that his testimony was evasive, his recollection of events poor, and his demeanor combative; that his statements were contradicted by his own testimony and that of his own witnesses; and that he was not forthright, candid, or remorseful.

The special master recommended that respondent be disbarred.

Following a de novo review of the record, we find that the special master's conclusion that respondent was guilty of knowing misappropriation is fully supported by clear and convincing evidence. Respondent misappropriated funds of some of the clients named in the complaint, as well as other clients whose funds were invaded, when he disbursed more funds

attributable to a particular matter than he had on deposit in that case. He also failed to cooperate with the OAE, engaged in improper business transactions with clients, commingled personal and trust funds, and failed to comply with recordkeeping rules.

Respondent clearly failed to cooperate with the OAE's investigation. Although he initially provided his client files to the OAE, at some point he took the position that he would not continue to do so out of concern about breaching client confidentiality. Notwithstanding the OAE's explanations, both by letter and at the demand audit, that respondent was required to comply with its request for information and documents, and despite respondent's statement at the demand audit that he was "comfortable" producing his client files, he obstinately refused to turn over the files.

As the OAE pointed out to respondent, R. 1:20-3(g)(3) provides that attorneys shall "produce the original of any client or other relevant law office file for inspection and review, if requested . . ." RPC 8.1(b) prohibits a lawyer from failing to respond to a lawful demand for information from a disciplinary authority (although it also provides that it does not require disclosure or information otherwise protected by RPC 1.6). In addition, RPC 1.6(d)(3) permits a lawyer to reveal information necessary to comply with other law.

Moreover, respondent failed to produce other materials, such as client ledger cards and financial records, claiming that they had been lost or misplaced. Ivara Jones, a sporadic employee in respondent's office, testified that he had been responsible for losing or misplacing the files, when he moved them from respondent's office to a storage facility. That move, however, took place in June or July 2010, well after respondent's October 24, 2008 and March 12, 2009 letters, informing the OAE of Jones' inadvertent loss of these files.

Unquestionably, respondent, thus, failed to cooperate with disciplinary authorities, a violation of RPC 8.1(a).

As to the knowing misappropriation charges, respondent engaged in a pattern of receiving funds on behalf of clients, using the monies for his own purposes, and issuing checks, attributable to those files, in excess of the funds on deposit for those clients. He admitted that he used one client's funds to pay another client, a process known as "lapping." See In re Brown, 102 N.J. 12 (1986). Although he claimed that his clients had consented to lend their funds to him, the record does not support respondent's position in several instances.

In the Mackason matter, respondent had deposited settlement proceeds of $45,000 in his trust account by June 1, 2007. Within a few days, June 6, 2007, he began depleting those funds by

issuing to himself checks in round amounts. He then either cashed those checks or deposited them in his business account or in the Sovereign Bank account. By January 23, 2008, not only had he disbursed the entire $45,000 settlement to himself, but he had also issued a series of checks, attributable to the Mackason matter, for an additional $18,669.99, or a total of $63,669.99, thereby invading other clients' funds. None of these disbursements were for the benefit of his client, Mackason, who received no distribution of the settlement proceeds.

Respondent maintained that Mackason was not entitled to any of the settlement proceeds because he had advanced monies to her, during the pendency of her personal injury claim and because she owed him legal fees for other services that he had provided to her.[5] He also asserted that she had assigned, in writing, her right to receive the settlement funds to him. Although Mackason purported to corroborate respondent's version of events, we find that all of these claims must fail, for the following reasons.

Significantly, respondent failed to plead in either his original or amended answer the defense that Mackason had

[5] As the special master remarked, attorneys who advance funds to clients in connection with litigation violate RPC 1.8(e). Because respondent was not charged with an infraction of that rule, however, we refrain from finding a violation in this regard.

executed a written assignment of her settlement proceeds. During the OAE investigation, he did not indicate to Riddle that he had lent funds to Mackason. At the ethics hearing, he could not remember any of the details about these advanced funds, such as the amounts and dates of the loan or loans.

Mackason's testimony, too, was vague. She would give no details about the other matters in which respondent had represented her, including the amount of the fees to which respondent was entitled. She asserted that the legal services involved three or four municipal court matters. When she was told that respondent had claimed that he had also represented her in a contract matter, she agreed, but refused to provide any information about it, protesting that it was personal. Like respondent, she could not recall any of the particulars about the loans. Moreover, her testimony contradicted respondent's in one respect – although he claimed that he had lent her cash, she stated that he had given her funds by check. She could produce neither the promissory notes that she claimed that she had signed, nor the written assignment of settlement proceeds.

We find, thus, that respondent's and Mackason's testimony that she had authorized his use of her share of the proceeds for allegedly owed legal fees was unworthy of belief and that he knowingly and impermissibly availed himself of her share of the

settlement proceeds (approximately $30,000, or two-thirds of the $45,000 settlement proceeds).

Even if we were to find that testimony credible, however, the fact remains that respondent disbursed to himself, on account of the Mackason matter, $18,669.99 in excess of the funds on deposit for Mackason. In doing so, respondent invaded other clients' funds contained in his trust account. Not once did respondent allege that this $18,000 over-disbursement was the result of a mistake on his part, caused by poor recordkeeping or inadvertent circumstances.

In the Estate of Alton Kinsey/Bruce Jackson matter, on July 2, 2007, respondent deposited into his trust account a $10,166.20 check from the estate, bearing the notation "counsel fees." He should have placed that check in his business account, the rightful account for the deposit of legal fees. On July 2 and July 3, 2006, he removed those fees by issuing two checks, totaling $10,166.20, and cashing them.

On August 7, 2007, respondent deposited in his trust account a $34,706.84 check issued by the estate, containing the notation "net distribution Bruce Kinsey Jackson." From August 27, 2007 to January 11, 2008, respondent issued a series of checks to himself and to Jackson, or for Jackson's benefit, totaling $14,000.05 more than the $34,706.84 he had received for

Jackson, thus invading other clients' funds to that extent. Arguably, respondent had access to the settlement proceeds of $29,767.77 that his client, David Michel, had lent him, plus the $50,230.07 from his refinance proceeds that he had placed in his trust account. However, it was not until January 14, 2008 that Michel agreed to lend respondent his settlement proceeds and February 8, 2008 that respondent deposited his refinance funds in his trust account. Those funds, therefore, were not available to him from August 2007 to January 2008, when the $14,000 over-disbursement occurred. Indeed, his deposit of the Michel and refinance monies in his trust account indicated his awareness that he had depleted funds and needed to replenish them.

Respondent gave three explanations for his use of a portion of the Jackson funds: (1) Jackson had lent him money; (2) Jackson owed him legal fees for other matters; and (3) he had received more funds for Jackson's benefit from the estate than the amount that appeared on Riddle's reconstruction. We find respondent's proofs for these assertions to be woefully inadequate.

At the ethics hearing, respondent alleged that Jackson had permitted him to use his funds and that both he and Jackson separately kept an accounting of monies that respondent borrowed. Respondent provided no documentary evidence of these

loans, such as a promissory note or a loan agreement. According to Riddle, during the OAE investigation, which included three interviews, respondent never suggested that he had borrowed money from Jackson.

Moreover, although respondent stated that he had represented Jackson in other matters and, thus, was entitled to legal fees for those services, he never produced a bill, a fee agreement, a court document indicating that he was attorney of record, or any other evidence to support this claim. He produced file cards that contained Jackson's name and various client file numbers; however, the only client file number that respondent inserted in the memo portion of the checks that he issued was associated with the estate matter. If respondent had removed his fees from his trust account in connection with other legal matters, he should have written the corresponding client file number on the check.

Finally, although respondent asserted that he had received two distributions, $100,000 and $58,000, for Jackson, he produced no check, deposit slip, or other document to establish his claim. Unlike the client files and ledger cards that purportedly were misplaced or lost, respondent's banking records were at his disposal or could have been obtained by subpoena. Yet, he never provided documentary evidence that he had received

funds to Jackson's credit, beyond the $34,706.84 that appeared on Riddle's reconstruction.

Jackson, too, could not recall details of the loans that he had extended to respondent. He did not remember whether he had lent money to respondent only once or on more than one occasion, whether he had extended a loan from the second $58,000 distribution, or the amount of interest that respondent had paid, if any. He confirmed respondent's testimony that respondent had made payments for him, such as child support, but he claimed that he no longer had the contemporaneous accounting that he had kept. He also had no recollection of the amount of fees that respondent charged for the other legal matters.

The special master found Jackson's credibility suspect. For example, although respondent clearly was not aware of his obligation, under RPC 1.8(a), to advise clients of their right to independent counsel before entering into a business transaction, such as a loan, Jackson testified that respondent had verbally informed him of this right.

We conclude, thus, that the evidence clearly and convincingly established that respondent knowingly misappropriated Jackson's funds. As in the Mackason matter, even if we were to believe respondent's and Jackson's testimony about the authorized use of Jackson's funds, respondent's withdrawal

for himself of $14,000 in excess of what he had in his trust account for Jackson remains unexplained. Respondent did not allege that the over-disbursement was the product of shoddy accounting practices or any other inadvertent reason. He claimed that he had received $158,000 more for Jackson, a sizeable amount, but he produced no corroboration whatsoever for his shallow assertion. The record is barren of any documentation, as inadequate as it might have been, that would tend to support respondent's contention in this context. We, therefore, find that his use of the $14,000 was a knowing, deliberate invasion of other clients' funds.

In the Ahmed matter, respondent received settlement proceeds of $26,000, but disbursed much more than that sum from his trust account. First, he issued checks to himself for $7,321.60 more than he had received. Although the Ahmed account was already in a negative status, respondent drew a check for $15,250 to Ahmed for his portion of the settlement, increasing the deficit to $22,571.60. Thereafter, respondent drew checks for Jacob Cohen for $19,000 and for Bruce Jackson for $6,000, both against the Ahmed funds. He did not explain why he had issued checks to Cohen and Jackson that were attributable to the Ahmed matter.

As to Ahmed's funds, respondent produced two documents in support of his claim that he had his client's consent to the use of the entire settlement proceeds. In a March 12, 2008 power-of-attorney, Ahmed authorized his brother, Mohammed, to pick up his settlement check because Ahmed was in Pakistan at the time. The power-of-attorney contained a provision "reconfirming" that Mohammed had full authority to act on Ahmed's behalf. By March 12, 2008, respondent had disbursed all of Ahmed's funds.

Respondent also relied on an undated document whereby Mohammed purportedly gave consent to respondent's use of Ahmed's settlement funds for ninety days. Both Ahmed and Mohammed testified that they had consented to that loan. In addition, they both claimed that Ahmed had also granted Mohammed an earlier, general power-of-attorney, although neither they nor respondent had a copy of that document.

It is possible that Ahmed had granted respondent the authority to use his funds. Although the March 12, 2008 power-of-attorney post-dates respondent's use of Ahmed's money, that document also "reconfirm[ed]" Mohammed's full authority to act on Ahmed's behalf, thus implying that Mohammed had been granted that power in an earlier document.

Because of the possibility that Ahmed consented to respondent's use of his funds, the record does not contain clear

and convincing evidence that respondent knowingly misappropriated them.

Respondent did, however, knowingly misappropriate other client funds by issuing checks totaling $47,000 ($73,000 minus $26,000) more than he had on deposit to Ahmed's credit. In addition, he failed to pay a total of $2,750 to the medical providers listed on the settlement statement and did not reimburse those monies to Ahmed.

Respondent also violated RPC 1.8(a) by borrowing money from a client, without advising him to seek independent counsel.

The facts in the Gonzales count present a different issue from the issue in the other matters. Respondent received $7,500 to be held in escrow for the payment of an expert to be retained for a child custody case. When it became apparent that the funds could not be used for that purpose, respondent applied them to his outstanding legal fees. Later, when $1,500 was needed for Berry, a court-appointed therapist, respondent issued a check for that purpose from his business account, increasing the balance of his outstanding fees by that amount.

Respondent claimed that his use of the $7,500 escrow funds for his legal fees was pursuant to Gonzales' consent, which was given by telephone. Gonzales, however, testified that she had not authorized respondent to apply the escrow funds to his fees.

She was emphatic that she believed that the $7,500 remained in respondent's trust account and were available to pay Berry.

The special master found that respondent believed that he had the right to apply the escrow monies to his fee. Attorneys who have taken their fees from their trust account without the clients' consent have not been found guilty of knowing misappropriation. More simply stated, if the attorney is entitled to the fee, the attorney's unauthorized removal of the fee is considered failure to segregate funds in dispute, a violation of RPC 1.15(c).

Here, respondent believed that he had Gonzales' consent to apply to his fees the funds that were no longer needed to retain an expert. The special master, thus, properly dismissed this count of the complaint.

The Michel matter also differs from the others because respondent produced a written loan agreement, thus precluding a finding of knowing misappropriation of Michel's funds.

In that case, on January 14, 2008, Michel agreed to lend his $29,767.66 settlement proceeds to respondent for forty-five days. Respondent deposited the settlement checks in his trust account on December 31, 2007 and January 24, 2008. On February 8, 2008, respondent also deposited in his trust account $50,230.07 that represented proceeds from his personal

refinance. Respondent used the refinance funds to cure shortages in the Jackson and Ahmed matters and to satisfy the $29,767.66 loan from Michel. He admitted that one of the reasons that he deposited his refinance proceeds in his trust account was to repay Michel.

As in the other matters, respondent proceeded to disburse more money than he had in his trust account for a particular matter. After repaying Michel, respondent issued five checks to himself from his trust account, overdisbursing his refinance proceeds and invading other clients' funds. Respondent, thus, knowingly misappropriated funds belonging to other clients.

Respondent also entered into a loan agreement with a client, without complying with the requirements of RPC 1.8(a), commingled personal and client funds by depositing the refinance proceeds in his trust account, a violation of RPC 1.15(a), and failed to perform monthly trust account reconciliations, a violation of RPC 1.15(d).

In the Sorour matter, on July 31, 2008, respondent deposited in his business account a $30,000 check, representing part of the proceeds of Sorour's $75,000 settlement. On numerous dates between the date of that deposit and October 3, 2008, when respondent disbursed $10,000 to Sorour, the balance in respondent's business account was below $6,605.47, the amount he

should have held intact for her. He used the funds for his business and personal expenses.

Respondent deposited the remaining settlement checks, totaling $45,056.38, in his trust account on August 4 and September 23, 2008. His trust account balance as of September 16, 2008 was only $36,064.18, when he should have had $48,303.20 in that account on behalf of six clients.

Despite respondent's failure to indicate, either during the investigation or in his answer to the complaint, that he had borrowed Sorour's funds with her consent, at the hearing, Sorour testified that she had lent her settlement proceeds to him. Although she claimed that the authorization was in writing, Sorour did not have a copy of it. Like respondent's other clients, Sorour could not recall the details of the loan. She acknowledged that respondent had not informed her of her right to independent counsel.

A discrepancy existed between the amount of Sorour's proceeds and the amount that she received. The settlement statement indicated that Sorour's share was $46,789.07, yet, respondent disbursed only $45,000 to her by check, a difference of $1,789.07. In addition, because Dr. Dennis' testimony was not needed, he reimbursed $2,475 of his retainer to respondent, who did not issue a check for this amount to Sorour.

Respondent claimed that he had refunded the $4,264.70 ($1,789.07 plus $2,475) to her in cash, because she was involved in a divorce and wanted to conceal her receipt of those funds from her husband. In our view, this explanation does not ring true. It does not appear logical that Sorour would have no objection to receiving $45,000 by check, but instructed respondent to pay her the much smaller amount of $4,264.70 in cash. Moreover, Sorour testified that she never received any funds from respondent, whether by check or cash, other than the $45,000.

The evidence established clearly and convincingly that respondent knowingly misappropriated $4,264.70 of Sorour's funds, as well as the other clients' funds that he failed to maintain, as evidenced by the shortage in his trust account on September 16, 2008.

In summary, respondent knowingly misappropriated funds belonging to Mackason, Jackson, and Sorour, as well as other unidentified clients whose funds he invaded by creating shortages in his trust account. Respondent engaged in a pattern of lapping, borrowing funds from one client to pay obligations owed to another client. He also failed to cooperate with the OAE, engaged in prohibited business transactions with clients, commingled personal and client funds, and failed to comply with

the recordkeeping rules. He, thus, violated RPC 1.8(a), RPC 1.15(a) and (d), RPC 8.1(b), RPC 8.4(c), and the principles of Wilson.

Because respondent knowingly misappropriated client funds, under In re Wilson, supra, 81 N.J. 451, he must be disbarred. We so recommend to the Court. In light of the disbarment mandate for the knowing misappropriation of clients' funds, we need not address the issue of the appropriate level of discipline for respondent's other ethics infractions.

Member Doremus 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 Kim A. Fellenz
Docket No. DRB 11-397

Argued: March 15, 2012

Decided: May 9, 2012

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Clark	X					
Doremus						X
Gallipoli	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	8					1

Julianne K. DeCore
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Chief Counsel