SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 12-053, 12-054, 12-055, and 12-056
District Docket Nos. XIV-2007-0135E, XIV-2007-0134E, XIV-2008-0308E, and X-2007-0022E

IN THE MATTERS OF	
RANDI KERN FRANCO	
AND	
ROBERT ACHILLE FRANCO	
ATTORNEYS AT LAW	

Decision

Argued: June 21, 2012

Decided: August 7, 2012

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Respondents appeared pro se.

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

These matters came before us on recommendations for several different forms of discipline for respondents' violations of various RPCs, filed by Special Master William A. Krais. Specifically, the special master recommended that respondent Randi Kern Franco (Randi) be disbarred for the knowing misappropriation of escrow funds in a real estate transaction. He also recommended that she receive separate three-month suspensions for (1) entering into certain business transactions with a client without taking the necessary precautions prescribed by RPC 1.8(a) and (2) recordkeeping violations and negligent misappropriation of client funds.

As for respondent Robert Achille Franco (Robert), the special master recommended the imposition of an admonition for what he described as respondent's commingling of a retainer fee and his personal funds, a violation of RPC 1.15, (presumably (a) and (d)); and for his violation of various provisions of R. 5:3-5, specifically, charging a minimum, non-refundable fee in a post-judgment matrimonial action, tendering a retainer agreement to the client that failed to state when bills would be rendered, commencing work on the matrimonial matter in the absence of an executed retainer agreement, and failing to render bills to the client in accordance with the applicable Court Rule. The

special master also recommended the imposition of separate reprimands for Robert's representation of both parties to a loan agreement and for his "passive negligence associated with [Randi]'s many bookkeeping and recordkeeping deficiencies."

For the reasons set forth below, we recommend that Randi be disbarred for the knowing misappropriation of escrow funds. As for Robert, we determine to suspend him for three months for allowing the deposit of a matrimonial client's retainer fee into his personal checking account, charging an unreasonable fee, conflict of interest, and his passive negligence with respect to Randi's recordkeeping improprieties and negligent misappropriation of client funds.

Robert was admitted to the New Jersey bar in 1989. Randi was admitted in 1991. At the relevant times, they practiced law as Franco & Franco, a partnership in Morristown. Neither respondent has a disciplinary history.

All four of these disciplinary matters were heard together by the special master on the following dates: September 20, 22, 23, 27, and 29, 2010, and October 4, 6, and 12, 2010. Respondents appeared pro se.

THE BYRON MATRIMONIAL MATTER (DRB 12-056; District Docket No. X-2007-0022E)

This matter involves Robert's non-compliance with several Court Rules governing family court actions and the deposit of a prospective client's retainer fee into his personal checking account. Because the amended formal ethics complaint was so unclear, the special master directed the presenter for the District X Ethics Committee (DEC) to write a letter identifying the specific rules that Robert had allegedly violated.

According to the DEC presenter, Robert violated R. 1:21-6 (presumably (a)(2)) and RPC 1.15 (presumably (d)), when he deposited into his personal checking account a client's $2750 check, representing the retainer fee in a post-judgment matrimonial matter; violated RPC 1.5 (presumably (a)) by charging the client, Leslie Byron, an unreasonable fee; and violated RPC 1.15 (presumably (d)), based on the following actions and inactions:

- Failing to execute the retainer agreement
- Commencing work on the matter absent a fully-executed retainer agreement

- Failing to provide Byron with a Statement of Client Rights and Responsibilities[1]

- Failing to inform Byron when bills would be rendered

- Failing to render bills to Byron during the alleged engagement

- Requiring the payment of a minimum fee[2]

[Letter from DEC presenter Khaled J. Klele to respondent Robert A. Franco, dated December 18, 2009.]

Robert testified that he had handled matrimonial matters for fifteen to twenty years and that they comprised about thirty percent of his practice. On May 11, 2005, he met with Byron for more than two hours to discuss a post-judgment matrimonial matter. At the end of the meeting, Byron gave him a $2750 check, which represented payment of a retainer fee. Robert endorsed the check, which, he claimed, was mistakenly deposited into his personal checking account by his mother. The mistake

---

[1] According to the DEC presenter, this omission also violated R. 5:3-5(a), (a)(5), and (b).

[2] According to the presenter, this requirement imposed on the client also violated R. 5:3-5(a), (a)(5), and (b).

notwithstanding, he acknowledged that what had happened was unethical.

On May 13, 2005, Robert sent a retainer agreement to Byron, which he asked her to sign and return to him. He also enclosed a case information statement (the CIS), which he requested she complete within the next month. Finally, Robert informed Byron that he would be preparing a notice of motion and supporting certification and asked her to provide him with "the essential elements of relief" that she would be seeking so that he could lay the necessary foundation for the motion. According to Robert, this request provided her with the "ability and latitude to provide . . . any additional information."

As for the required Statement of Clients Rights and Responsibilities (the statement), Robert testified that, although the statement was not mentioned in his May 13, 2005 letter to Byron, its inclusion was "part and parcel of the envelope that goes to the client who's interested in becoming a client of my practice."

According to Robert, he did not hear from Byron, after he sent the May 13, 2005 letter to her. She never executed the retainer agreement and did not send him a completed CIS. She did not provide him with any information pertaining to the

"essential elements of relief," although he stated that she had provided him with "a staggering amount of information" at their initial consultation. She failed to send him a copy of the previous year's tax return, which he also had requested in the letter.

Robert believed that he could begin working on the matter before Byron returned the signed retainer agreement and he did so, because, in his mind, she had met with him, had given him a retainer, and, therefore, he "assumed that she had retained [his] services." He recalled that Byron "wanted to move very quickly on this" and "get" her former husband. As seen below, Byron denied that she had retained him.

Robert was able to work on the motion in the absence of the completed CIS because Byron had provided him with "quite a bit of financial information" at their meeting, all of which "went into preparing the Notice of Motion." According to respondent, he devoted 7.25 hours to Byron's matter, at a $350 hourly rate, resulting in a total fee of $2,537.50.

On August 26, 2005, Byron wrote to Robert, stating "I have finally had a chance to review the retainer agreement and I have decided that I will not be retaining you." In that letter, Byron also asked for the return of the $2750 retainer.

Notwithstanding the absence of a fully-executed retainer agreement, its terms were at issue at the disciplinary hearing. In paragraph 3, for example, the agreement provided that "[t]he Law Firm has agreed to accept no Retainer payment from you." The provision went on to state that the expected cost of filing the motion, replying to opposition, and appearing in court would be $2500. In paragraph 3B, however, the agreement stated: "You agree to pay a minimum of $2,500.00 for legal services regardless of the amount of time actually spent on this case."

Robert acknowledged that he had accepted a retainer from Byron, notwithstanding the agreement's assertion that the firm had agreed to "accept no Retainer payment from you." He pointed out, however, that the agreement also stated that the expected cost of the engagement would be $2500.

When asked about the language expressly stating that Byron would pay a $2500 minimum, "regardless of the amount of time actually spent on this case," Robert countered that the same paragraph also stated that all legal fees would be based on the hourly rate set forth in the agreement. Thus, he denied that, if he had only spent one hour on the case, he would have kept the entire $2500. He stated that, due to Byron's financial circumstances, $2500 was a reasonable minimum fee for her to

pay, in light of the work that he would have to do on her behalf. He added that, if she were a person of means or if the matter were acrimonious, he might have requested a larger retainer.

Robert acknowledged that, notwithstanding paragraph 4's claim that Byron would be billed at the hourly rates set forth in the retainer agreement, the agreement did not identify when the bills would be issued. Moreover, he stated that he had never issued a bill to Byron, even after she had written to him, on August 26, 2005, to inform him that she would not be retaining him.

THE LUNING-TO-LIGIERI LOAN (DRB 12-054; District Docket No. XIV-2007-0134E)

The formal ethics complaint charged Robert with a concurrent conflict of interest, a violation of RPC 1.7(a), as the result of his arranging for a loan from one client to another. The complaint was later amended to include a violation of RPC 1.8(a), based on the creditor client's agreement to reimburse respondent for monies he had spent in purchasing certain supplies for her.

In March 2007, Rebecca Ligieri borrowed $4100 from Aagot Luning. Ligieri testified that, at the time, she and her then

fiancé, John Habenstein, had fallen behind on the rent for her apartment. After she received an eviction notice, Habenstein, who knew respondents, asked them if they knew anyone who would lend money to them so that they could pay their rent.

Ligieri and Luning both testified that Robert arranged for Luning to lend money to Ligieri. The loan permitted Ligieri to bring the rent up-to-date and to remain in the apartment through the end of the lease term. At the time, there was no retainer agreement between Ligieri and the firm or between Habenstein and the firm. According to Robert, he represented only Luning in the transaction. He prepared the March 15, 2007 note on her behalf and witnessed Ligieri's signature.

When the loan was made, respondents were holding in their attorney trust account, the proceeds from Luning's late husband's life insurance policy for, among other things, the payment of certain of her debts. Luning testified that she had authorized Robert to take the loan from the life insurance proceeds.

Under the terms of what Robert described as an interest-free loan, Ligieri received $4100, which she was to repay to Luning, plus a $1000 "fee," within one month (April 15, 2007). When Ligieri repaid the loan, she issued a personal check to

"Robert Franco," dated April 20, 2007, in the amount of $5100, which was deposited into the firm's trust account.

Ligieri testified that Robert did not tell her that he was representing only Luning in the transaction and she did not sign a document consenting to his arranging for the loan, while (purportedly) acting as her attorney in the eviction matter. She acknowledged, however, that Robert had not provided "anything" to her that held himself out as her attorney in the loan transaction.

Ligieri testified that she understood that the $1000 represented interest charged. However, during an interview with OAE investigator Mary Jo Bolling, Ligieri stated that she was not sure why she repaid $1000 more than the amount of the loan. She speculated that the extra money represented a "thank you" to respondents for either arranging the loan or helping her with the landlord-tenant matter. Yet, Ligieri also told Bolling that respondents did not ask her for a fee for arranging the loan and did not bill her for the legal work (presumably, in the landlord-tenant matter).

Luning testified that she loaned the $4100 to Ligieri with the expectation that she would "get $1,000 back," but that, after she received the $1000, she gave it to Robert. Both

Robert and Luning testified that the $1000 reimbursed him for "several different items for Miss Luning" that he had purchased, including paint, a cell phone, and "things of that nature." According to Luning, even though she had sufficient funds to pay for these items, she asked Robert to take care of obtaining them because her husband had written a letter to her, asking that she have Robert "do everything for me." Luning testified that, when she and Robert agreed that the $1000 "fee" would go to him, he did not advise her to seek independent counsel and did not reduce their agreement to writing.

Robert, in turn, testified that, although he and Luning discussed her need for paint and a cell phone, they never discussed that he would purchase them for her. Instead, he "just did it" "out of . . . friendship and kindness," rather than taking the monies from the trust account funds. He referred to the $1000 payment as a gratuity, offered for the purpose of thanking him for his kindness.

Bolling testified that, prior to the filing of the ethics complaint, Robert, who had described the loan as interest-free, never stated that the $1000 was repayment for the purchase of goods for Luning and services provided.

To add further complication to the nature of the $1000 fee, as will be discussed below, the firm's receipts and disbursements journals recorded it as a legal fee in the Ligieri eviction matter. Notwithstanding this characterization, Robert was steadfast in his claim that the payment was not a legal fee but, rather, a "gratuity" for the work he had done on Luning's behalf.

Although it was clear that Luning was a client of Robert at the time of the loan, the question of Ligieri's status as a client turned on whether Robert had represented her in the eviction action. On March 6, 2007, Ligieri wrote to the landlord/tenant court and requested that the eviction proceeding be stayed. After detailing the manner in which she planned to bring the rent current, Ligieri wrote to the court:

> It was my understanding that my attorney on this matter Robert Franco (973-335-6808) spoke with James Segal (Both Landlord and Attorney of the apartment I reside at) on Friday, March 2, 2007 and asked him for an adjournment of this proceeding till March 16, 2007. As of March 6, 2007 I have not been able to speak to Mr. Segal or Mr. Franco to confirm that the adjournment has been filed with the court and currently I am waiting for the paper work from this court that states this.
>
> [Letter from Rebecca Irene Ligieri to the Clerk of the Superior Court of New Jersey, Law Division, Special Civil Part, Landlord

Tenant Section, Somerset County, dated March 6, 2007.]

The letter reflected that copies had been sent to Robert and Segal. Ligieri could not remember whether she had actually given Robert a copy of the letter. Robert testified that she did not.

Ligieri's testimony on the issue of whether Robert had represented her in the eviction proceeding was contradictory. On the one hand, she initially testified that, at the time she wrote the March 6, 2007 letter, its contents would have been true, that is, Robert was representing her in the eviction proceeding. She conceded, however, that there was nothing in writing that proved their attorney-client relationship.

On the other hand, Ligieri testified, quite emphatically, that Robert did not represent her in the eviction proceeding; he did not go to court on her behalf; he did not file any pleadings. According to Ligieri, his sole function was to provide a check to her landlord.

Ligieri explained that the purpose of her March 6, 2007 letter to the court was twofold: (1) to let the landlord know that payment was coming and, thus, avoid eviction and (2) to seek an adjournment. Ligieri testified that, because Robert was not her attorney, she did not ask him to write the letter.

As further proof that Robert did not represent her in the eviction proceeding, on August 14, 2009, Ligieri signed an affidavit, in which she "clarified" that Robert represented Luning in the loan transaction and that, as Luning's lawyer, he had prepared the promissory note. Ligieri expressly denied, in the affidavit, that anyone from Franco & Franco had represented her interests in the loan transaction. Specifically, she "did not seek the counsel of the Law Offices of Franco & Franco" with respect to the loan, and she entered into the loan agreement "on [her] own free will."

Ligieri, who had once worked for a lawyer, claimed that she had received no help in drafting the affidavit. At the ethics hearing, she stood by its contents, none of which she would change.

For his part, Robert testified that he never filed a notice of appearance or a letter of representation on Ligieri's behalf. He did not authorize Ligieri's March 6, 2007 letter to the court in the landlord/tenant matter and did not even see the letter, until the OAE provided it to him, as part of discovery in this disciplinary proceeding.

The $4100 disbursement from the trust account, which brought Ligieri's rent current, was characterized in the firm's

records as "Luning Litig loan to Ligieri." When the loan was repaid, with the $1000 "fee," the May 1, 2007 $5100 deposit into the trust account was characterized as "Ligieri repay to Luning ($4100); Ligieri legal fee." On May 2, 2007, the $1000 "fee" was transferred from the firm's trust account to its business account and characterized as "Ligieri Finance legal fee."

Randi was the person who recorded the $1000 as a "legal fee" in the firm's ledger. Robert testified that he did not instruct Randi to do that and could not explain why she did it. He speculated: "I think she went about doing it herself."

Yet, Robert also testified that, when he received Ligieri's $5100 check, he gave it to Randi and "probably would have said something to the effect that this is Miss Ligieri's repayment" and would have explained the loan transaction to her. He did not know whether he would have told her what to do with the check. However, he denied having told her to record the $1000 as a legal fee in the Ligieri eviction matter.

Randi testified that she was unaware of the Luning-to-Ligieri loan at the time it was made. She stated that it was Robert who issued the $4100 trust account check (no. 2185), which brought Ligieri's rent current.

With respect to the entries into the firm's books, when the loan was repaid, Randi testified as follows:

> [M]y notation into the trust ledger as Ligieri legal fee was nothing more than a descriptive notation on my account. It was absolutely under no circumstances a direction by my husband to note it as Ligieri legal fee. That was my mistake. My misinterpretation. I wasn't even aware of the loan until after it was done. And when the payment came in back in I became aware of it. When the money, the 5100 dollar check came in, it's my handwriting that's on the deposit to the bank. And it was at that time that I became aware of it. And it was my own mistake for lack of a better word in referring to it as a Ligieri legal fee because I really didn't have the exact knowledge of what it was. It was a mistake on my part. It certainly wasn't a direction by my husband to elicit [sic] his legal fee. It has been very clearly established it was not a legal fee by Miss Ligieri as she was not our client at the time.
>
> [7T116-13 to 7T117-6.][3]

When Randi recorded the $5100 as $4100 loan repayment and $1000 Ligieri legal fee, she did not "know for sure" if that was done after she had consulted with Robert. When she wrote "Ligieri finance legal fee transfer," on May 2, 2007, it was

---

[3] "7T" refers to the transcript of the October 6, 2010 hearing before the special master.

because she had learned that it was not a litigation matter but, rather, a finance matter. Randi stressed that the $1000 was a repayment to Luning, even though she had not recorded it that way.

THE TAUGER CONFLICTS (DRB 12-053 and District Docket No. XIV-2007-135E; DRB 12-055 and District Docket No. XIV-2008-0308E)

A. The Real Estate Transactions

The complaints charged both respondents with a violation of RPC 1.8(a) (conflict of interest), as the result of their representation of Norman Tauger in the purchase of a residential property in Boonton, which they subsequently leased from him. Respondents also were charged with a conflict, based on Randi's preparation of a deed that transferred Tauger's ownership of the property from Tauger, individually, to Tauger and Randi, as joint tenants with right of survivorship.

1. The Purchase of the Boonton Property

Tauger testified that he met respondents about seven years earlier, when Robert represented him in his divorce from his second wife. According to Robert, the divorce matter concluded in December 2001, as did their attorney-client relationship. In early 2002, Tauger struck up a close friendship with Robert.

Tauger considered Robert, who was like a son to him, to be "the most honest man [he] ever met." Robert testified that he and Tauger talked to each other several times a day; they spent holidays together and vacationed together. They also helped each other "in a variety of different ways." For example, both Robert and Randi testified that they went furniture shopping with Tauger and purchased household goods for him, including linens "and a variety of other items." Tauger even lived with respondents for a time, after his girlfriend threw him out of their home. There was no attorney-client relationship between respondents and Tauger, during the time that they provided him with this help.

Tauger became a client again in 2004. According to the documents, Tauger purchased a residential property in Boonton on June 29, 2004, leased it to respondents on July 3, 2004, and deeded it to himself and Randi on August 4, 2004.

Robert testified about the circumstances leading to Tauger's purchase of the Boonton property. He stated that he and Randi and their children had lived in Kinnelon, but that, in 2004, the presence of mold forced the family to leave the home and provide their mortgage company with a deed in lieu of

foreclosure because it had become unsellable. At the time, Tauger and respondents enjoyed a close personal relationship.

After Tauger became aware of the situation with the mold and respondents' loss of the property, he purchased the Boonton property for them. In exchange, they were to pay the mortgage, taxes, and other expenses, such as utilities. Tauger testified that he bought the house for respondents because he liked Robert "that much." He explained: "I trusted them with everything, and he needed the house, and I bought it for him."

Tauger told Bolling that he had purchased the Boonton property at respondents' request. Tauger testified that Robert did not tell him to seek independent counsel. Respondents' recollection was different. They told Bolling that they believed they had told Tauger to seek the advice of independent counsel, before entering into the "arrangements" with them, but Tauger had declined.

According to the HUD-1, Tauger purchased the $1.5 million Boonton property on June 29, 2004. Tauger identified the HUD-1, but denied the authenticity of what purported to be his signature on page two. When asked how he could have purchased the property without signing the HUD-1, Tauger replied:

"Because I trusted them, that's it, I trusted them with everything and anything."

The OAE and Randi stipulated that she had represented Tauger in the purchase of the Boonton property and served as the settlement agent. There was no "formal agreement" between Randi and Tauger regarding the closing. Randi testified that she did not charge Tauger a fee for the purchase of the Boonton property or enter into a retainer agreement with him, because she "didn't consider him a 'client.'" Rather, she considered the matter a "familial transaction," with her "merely facilitating the closing on the property."

Tauger obtained a mortgage without Randi's involvement. He vaguely remembered that the monthly payment was $9000.

Robert testified that the agreement with Tauger about the payment of the mortgage, taxes, and "[c]arrying costs" was not reduced to writing. According to Robert, when he asked Tauger if he wanted "any type of written terms," Tauger laughed at him. "Mr. Tauger never wanted to have any paperwork," Robert explained. Robert did not know whether he had advised Tauger that it was in his best interest to put their agreement into writing.

2. The Lease for the Boonton Property

At the ethics hearing, Tauger identified the July 3, 2004 lease between him and respondents. It required respondents to pay a monthly rent of $6000 directly to the first and second mortgage holders. The lease term was described as follows:

> Term. There is no expiration to the term of this lease. The Landlord is providing the Tenant, Randi K. Franco, with a Deed dated August 4, 2004, which transfers all ownership interest in the property known as 6 Bayer Lane, Boonton Township, New Jersey 07005 to the Tenant and the Landlord as of that date. Said Deed has complete priority to the Lease and is the controlling document in this matter. The Deed and the within Lease evidences [sic] the Landlord's intent to transfer all interest he possesses at this date and forever after in the subject matter real property to the Tenant.
>
> [Lease between Robert A. Franco and Randi K. Franco and Norman Tauger, dated July 3, 2004.]

Tauger denied that he had prepared the lease, notwithstanding the presence of his name and purported signature underneath the words "prepared by" on the first page. He admitted to having signed the second page of the lease, as landlord, but he did not remember the circumstances surrounding the execution of the document, except to say that he "absolutely" did not read it. According to Tauger: "I signed it, I know I signed it, it's my handwriting, but I know I didn't

read it, because I never read anything they give me, I just sign it, I did it because I trusted them."

Randi, too, denied having prepared the lease. With respect to Tauger's signature on the document, indicating that he had prepared it, she stated: "If he signed that he did that would mean that he did it. I did not do it."

Robert claimed that, at the time the lease was executed, he had no intention that it would have the force and effect of a traditional lease. According to both respondents, the purpose of the lease was not to establish a tenancy but, rather, to prove that respondents' children resided in the Boonton school district. According to Robert, "we decided upon drawing up a lease just so that we would have [sic] document to use if it was required." He claimed that he had "[a]bsolutely" explained his intention to Tauger, prior to its execution.

According to respondents, other than the lease, no writing set forth respondents' obligations to pay the mortgage. Robert asserted that Tauger did not request a writing, because he "never wanted to have any paperwork;" Tauger did not make it a practice to reduce their financial transactions to writing.

Randi testified that she and Tauger set up a joint checking account, but that all money in it belonged to respondents. The

purpose of the account was to permit Randi to make payments for items related to the property that were in Tauger's name, such as utilities.

3. The Deed to the Boonton Property

Tauger testified that, on August 4, 2004, he signed a deed, prepared by Randi, which transferred the Boonton property from Tauger, individually, to Tauger and Randi, as joint tenants with right of survivorship. As with the lease, Tauger did not recall the circumstances surrounding the execution of the deed. He said it was given to him and he signed it. When asked why he trusted respondents, Tauger stated: "Bob knows I never read anything." When asked why he trusted Robert so much, Tauger replied: "I just loved him, there's no other way to explain it." Tauger viewed Robert as his lawyer.

Robert testified that it was Tauger who had suggested that Randi prepare a deed transferring ownership from Tauger, individually, to Tauger and Randi so that, if Tauger died, the property would not go to his heirs. Randi agreed, but also added that the deed was to protect respondents' "trust in the interest in the house in case something happened to Mr. Tauger."

Randi and Robert testified that the "collateral documents" required to record a deed were never prepared and that the deed

was not recorded. Moreover, according to Robert, the parties "were never concerned that something would happen to Mr. Tauger."

Randi did not know why the deed was never recorded. She denied Robert's claim that it was because doing so may have accelerated Tauger's mortgage. She added, however, that, because the deed was not recorded, "there was no benefit to me." Neither Robert nor Randi could explain why Robert's name was not on the deed.

Tauger, who never expected that respondents would default on the mortgage payments, testified that they paid the mortgage for a period of time, but then stopped. After the mortgage company began to dun Tauger, he confronted respondents. Although Robert assured him that it would be taken care of, eventually the property went into foreclosure.

Robert testified that he and Randi stopped paying the mortgage in August or September 2007. Nevertheless, they continued to live in the residence with their children until July 2010, even though the property was sold at a sheriff's sale in July 2009.

Randi testified that there was not a definitive decision to stop making the payments, but that one of the reasons why they

did was a lack of funds, due to the decline in their business. Both respondents attributed that decline to a blog published by former client Cynthia Jampel, which contained claims against them, causing them "immeasurable harm." According to Randi, over time, it became clear that Tauger was in collusion with Jampel for the purpose of hurting respondents financially, which they succeeded in doing. Robert's testimony was consistent on this point.

Interestingly, it was Jampel who filed the initial grievance against respondents, which, although dismissed, led to the OAE investigation that resulted in the charges of misconduct in the matters now before us. Bolling testified that, in Jampel's grievance, she alleged that respondents had paid their mortgage with trust account funds and that Tauger had provided them with $7000 to replace those funds because, without that money, respondents could not return deposit monies in a real estate transaction that had fallen through. According to Bolling, Jampel had no personal knowledge underlying the allegations in her grievance. Nevertheless, an investigation was undertaken, based on the allegation that trust account funds had been used improperly.

Throughout the ethics hearing, respondents, particularly Robert, spent considerable time attempting to place blame for their unethical conduct on Jampel, who, they claimed, was on a mission to destroy them. Robert testified that, sometime prior to 2006, he had introduced Tauger and Cynthia Jampel and they became friends. Robert detailed his own relationship with Jampel, which had begun when he represented her in a lawsuit brought against her by the developer of a condominium complex where she had purchased a unit. Robert told of Jampel's campaign of revenge against the judge who had handled the matter, as well as against other judges and politicians as to whom she had also developed a vendetta over the years.

Finally, Robert detailed Jampel's mission to discredit him and Randi through various blogs and websites and accusations made to various law enforcement authorities, which began in approximately 2006. Jampel even went so far as to contact DYFS and assert child abuse allegations against Robert and Randi, which, after an interview with respondents, were dismissed.

Robert pointed out a number of other incidents that he claimed were proof of Jampel's ill will toward respondents, her lack of credibility, and her collusive activity with Tauger. In addition, Robert sought to impugn Tauger's credibility by

establishing that he had been convicted of possession of cocaine, for which he was sentenced to three years' probation and was required to pay a $10,000 fine.

As to the merits of the conflict-of-interest charge, Robert testified that Tauger was "considered literally a family member." According to Robert, "this was not a client/attorney relationship, this was a pure friendship," as he had not represented Tauger in any matter, since the conclusion of Tauger's divorce. Robert insisted that he and Randi had treated Tauger fairly during their relationship.

With regard to Tauger's understanding of the terms of these arrangements with respondents, Robert testified that Tauger, a sophisticated businessman, whose nephew, Mark Miller, was an attorney practicing law in Manhattan,

> had the ability to know what he was entering into at the particular time and by virtue of his request to prepare the document, he certainly was knowledgeable enough to know that if in the event of his early demise, that [sic] the issue of the real estate would become of paramount importance especially to his friends, myself and my wife. So as far as him not having knowledge

> of what he was doing, emphatically I can say that's not true whatsoever.
>
> [6T103-7 to 17.][4]

As to Robert's failure to advise Tauger to seek independent counsel, Robert attempted to deflect responsibility to Randi, who handled the real estate transactions. He continued to argue that Tauger "had every opportunity to speak to an attorney" and that Robert was "certainly not the only attorney in the lawyer's diary so he had a myriad of people he could have turned to." Moreover, Robert was aware that Tauger had discussed the purchase with other individuals, though he did not identify any of them as lawyers.

B. Loans from Tauger to Respondents

Respondents also were charged with having violated RPC 1.8(a) as the result of multiple loans that they had received from Tauger. Tauger testified that he loaned monies to respondents "all the time" and "[c]onstantly," between 2003 and 2008. Randi agreed with that testimony.

---

[4] "6T" refers to the transcript of the October 4, 2010 hearing before the special master.

As of the date of his testimony, Tauger estimated that respondents owed him $160,000. Robert estimated that they had repaid Tauger more than $170,000. Randi stated that she did not know how much money she and Robert had borrowed from Tauger, but she was sure that they had repaid all monies due to him.

According to Tauger and both respondents, the terms of Tauger's loans to respondents were never memorialized. Randi explained that this was so because Tauger "was a surrogate father to us and he was helping us as a family member just like my father has loaning [sic] us money in the past, and that has not been reduced to writing." Tauger did not recall whether respondents had ever told him to get the advice of independent counsel, before the loan transactions with them.

There was considerable testimony below regarding the nature of the loans, payments, and balances. However, these facts are not relevant to the issue of whether respondents had complied with the RPCs involving conflicts of interest. Therefore, we choose not to burden this decision with the details of each transaction, with the exception of one: In early 2006, Tauger loaned respondents money in the form of two $7000 checks, which were deposited into their trust account, one of which bounced. This loan will be discussed in more detail below.

At the ethics hearing, Tauger never answered the question of whether he had ever considered talking to another attorney about the loans he was making to various people. He could not remember Robert's advice to seek independent counsel. Tauger denied ever having asked Miller, his nephew and a New York attorney, to contact Robert about the loans that Tauger had made to Robert and Randi because he "trusted" Robert.

RECORDKEEPING VIOLATIONS (DRB 12-053; District Docket No. XIV-2007-0135E)

Respondents were charged with the following recordkeeping violations, which were described as willful, in the complaints:

a. Legal fees are commingled in the trust account with client funds and not promptly removed to the business account when earned. [R. 1:21-6(a)(2); RPC 1.15(a)];

b. Funds are electronically transferred from the trust account to the business account without written authorization to the bank to do so. [R. 1:21-6(c)(1)(A)];

c. Funds are withdrawn from the trust account by use of a prohibited ATM card. [R.1:21-6(c)(2)];

d. Attorney personal obligations are paid directly from legal fees retained in the trust account rather than deposit of those fees to and payment of the obligations from the business account. [R.1:21-6(a)(2)]; and

e. Attorney personal funds are commingled in the trust account. [RPC 1:15(a)].

Respondents also were charged with the following acts of negligent misappropriation of client funds:

a. depositing legal fees in the Diesso, Vernon, Krieger, Kelly and Mowatt matters and withdrawing those fees prior to the deposited fees having been posted to the trust account by the bank;

b. depositing client funds in the Tauger, Kavinski, St. Val and Valadares matters and disbursing those funds prior to the deposited funds having been posted to the trust account by the bank and the client funds having been returned for insufficient funds;

c. disbursing funds on behalf of clients in the Good heart, Cohen, Tauger, Ali and Power Venture matters in excess of the funds held in the trust account for those clients; and

d. disbursing funds on their own behalf in excess of personal funds or legal fees held in the trust account for themselves.

This is not the first time that respondents' recordkeeping practices have been under OAE scrutiny. In November 2005, an OAE random audit of respondents' trust and business account records uncovered a number of deficiencies, which were memorialized in a December 19, 2005 letter to Franco and Franco from Robert J. Prihoda, formerly of the Random Audit Compliance Program. Those recordkeeping improprieties were not the same deficiencies charged in this disciplinary matter.

On January 9, 2006, Randi wrote to the OAE and stated that she had corrected all the deficiencies. Robert testified that, at some point after the 2005 random audit, Randi told him that she had addressed the issues raised by the review. He was satisfied that she had corrected the deficiencies and that the trust account funds were safe.

During the 2005 random audit, OAE auditor Joseph Strieffler generated a reconciliation of respondents' trust account as of October 31, 2005. At that time, the trust account balance was $76,936.82, with outstanding checks in the amount of $839. There were no outstanding credits.

As a result of Jampel's grievance, claiming that respondents had used trust account funds to pay their mortgage, Bolling undertook a demand audit in the spring of 2008. As part of this audit, Bolling revisited Strieffler's October 31, 2005 trust account reconciliation. She discovered that Randi had provided him with inaccurate records, during the 2005 random audit, namely, trust funds attributable to many more client matters than had been disclosed in 2005. The account balance remained the same. Bolling testified that the information that Randi had provided to the OAE, in 2005, was "inconsistent" with the information that the OAE had gathered in 2008. Bolling

would not go so far as to say that Randi had made any misrepresentation to the OAE, however.

Randi denied the allegation that she had been "placed on a heightened awareness of [her] recordkeeping responsibilities," as a result of the 2005 random audit. She claimed that (1) the issues raised in the present ethics matter are different from the issues that were raised during the 2005 audit and (2) she is "always on an awareness of [her] recordkeeping responsibilities."

Bolling testified that legal fees and personal funds were commingled in respondents' trust account and that personal obligations were paid directly from fees retained in the trust account. The following are a few examples from her testimony. On April 28, 2006, the following entry appeared on the Jeffrey Groth client ledger card, next to a $482.25 disbursement: "Part of legal fee used to pay Volvo Car." On that same date, the ledger card reflected the following two entries: "Part of legal fee used to pay Countrywide." The first payment was for $7,600.60 and the second was for $9.00, representing a "pay by phone fee."

Bolling referred to a ledger sheet that she had prepared for all trust account disbursements that were given to

respondents, either as fees or for the payment of personal obligations. For example, on May 2, 2006, respondents funneled money given to them by third parties through the trust account, in order to make a car payment.

With respect to the two $7000 personal checks that Tauger had written to the trust account, Randi explained to Bolling that the monies were intended for the Boonton mortgage. Bolling testified that, when she asked respondents why the two $7000 checks went through their trust account, Randi stated that she believed that was appropriate because the Tauger closing had gone through the trust account and the mortgage payment was an extension of that transaction. In hindsight, however, Randi acknowledged that the money "probably shouldn't have gone through the trust account."

Randi admitted that she had paid personal obligations directly from the trust account, but, she claimed that the funds were always legal fees. She took issue with the balance figure in the OAE's reconciliation, claiming that, according to the bank statements, "at no time whatsoever [was] there a negative balance."

Bolling testified that respondents electronically transferred funds from the trust account to the business

account, without written authorization to the bank to do so. For example, on April 12, 13, 14, 20, and 28, 2006, a total of six electronic transfers were made. Randi denied that the on-line transfer of funds from the trust account to the business account was an ethics violation. She argued that the applicable rule, R. 1:21-6(c)(1)(A), applies to wire transfers, not electronic transfers within the same bank for the same account holders.

Randi admitted that she sometimes withdrew funds from the trust account using an ATM card. However, she claimed that she was unaware of the rule prohibiting such transactions and that what she had removed from the account "were very small amounts of money, maybe 3 to 500 dollars tops." She claimed that the monies were always fees, never client funds.

Bolling testified that, during the 2008 audit, she learned that respondents had routinely deposited fees into the trust account and then transferred them into the business account almost immediately. Randi told Bolling that she believed that this procedure was required by the Court Rules. Randi also stated that she did not maintain client ledgers for matters where respondents were holding only fees, because she was able to keep track of the monies in her head.

Bolling testified that respondents negligently misappropriated client funds, when they transferred fees from the trust account to the business account before the bank had posted clients' fee checks to the trust account. Bolling referred to the following client matters:

- Diesso: $1350 fee transferred from trust account to the business account on February 6, 2006; fee posted to the trust account on February 7, 2006.

- Franco: $500 transferred from trust account to the business account on February 8, 2007; fee posted to the trust account on February 12, 2007.

- Krieger: $750 transferred to the business account on August 30, 2007; fee posted to the trust account on August 31, 2007.

- Kelly: $1000 transferred to the business account on August 8 and August 9, 2007; $1500 transferred to the business account on August 14, 2007; $3500 fee posted to the trust account on August 14, 2007.

- Mowatt: $1300 transferred to the business account on February 6, 2006; fee deposited into the trust account on February 7, 2006

Bolling testified that respondents sometimes deposited fees into the trust account and disbursed funds prior to the clearing of checks. Some checks bounced, causing other client funds to be misappropriated. Bolling cited the following examples:

- Tauger: Two $7000 checks were deposited into the trust account on February 24, 2006; on that same date, $1000 was transferred from the trust account to the business account; on March 2, 2006, one of the $7000

Tauger checks was returned for insufficient funds, leaving a negative balance in the trust account as to the funds being held on Tauger's behalf.

- Kavinski: $3500 was deposited into the trust account on January 10, 2006; on January 11, 2006, $2000 was disbursed to Randi by check no. 2101 and $1500 was transferred to the business account on that same day; on January 17, 2006, the $3500 check bounced, leaving a negative balance in the Kavinski account.

- St. Val: $5000 was deposited into the trust account on January 13, 2006; $1000 was transferred to the business account on January 17 and on January 18, 2006; the $5000 check bounced on January 19, 2006, which, in turn, caused a deficit in the amount of money being held in trust for St. Val.

- Valadares: $1500 was deposited into the trust account on May 17, 2007; the next day, the check was returned, and a $5 "charge-back fee" was deducted from the account; on June 8, 2007, there were two transfers to the business account, one for $995 and the other for $500, which caused a deficit in the Valadares matter.

Bolling also offered examples of Randi's disbursement of funds on behalf of the following clients, which were in excess of what was held on their behalf: Goodheart, Cohen, Tauger, Alli, and Power Venture. All ledgers for these clients had negative balances. Bolling's determinations were based on information that respondents provided to the OAE.

Bolling testified that respondents also negligently misappropriated client funds, when they disbursed trust account funds on their own behalf in excess of personal funds or legal fees held in the trust account for themselves. Specifically,

several disbursements from the trust account were not attributable to a particular client but, rather, were labeled "Franco." Bolling read the following excerpt from her investigative report:

> Bolling prepared a ledger card indicating funds deposited to the Francos' trust account on their behalf only, and those funds disbursed from their trust account attributable only to the Francos, and were funds the Francos could not identify as belonging to a particular client. The ledger also credits the Francos with funds labeled as "unidentified and miscellaneous shortage." At the start of the audit period, beginning in August 2005, this account had a negative balance, reaching a low of negative $300,382 given that the Francos did not identify the disbursements labeled as "Franco fees earned" in any client matter, and that the Francos did not have enough personal funds in their attorney trust account to cover these personal disbursements. The negative balances on the Francos' ledger card indicates that the Francos utilized client funds held in trust for their own purpose.
>
> [3T99-11 to 3T100-3.][5]

Randi testified that her practice was mostly limited to real estate transactions. Since the downturn in the real estate

---

[5] "3T" refers to the transcript of the September 23, 2010 hearing before the special master.

market, she had turned to bankruptcy work. She did not consider herself a full-time attorney, as she also was "mostly raising [her] two sons," then 13 and 14 years old.

She also testified that the firm did not employ an accountant, bookkeeper, or support staff. Beyond handling bankruptcy matters, her "basic job" was to "manage the records for bookkeeping for our office meaning the business account and the trust account." She also was the firm's data entry person. It was Robert who met with clients and appeared in court.

As for the recordkeeping violations in this matter, Robert was quick to point the finger at Randi. He explained that his role in the partnership was to go to court, prepare pleadings, and to perform the traditional role of an attorney in a law firm. According to Robert, Randi "had the exclusive control over both supervisory and transactional control of the partnership trust and business accounts." For example, if he met with a client, who handed him a check or some other form of payment, Randi was responsible for "doing whatever was appropriate with the check." Thus, as to whether he may have had "a heightened awareness" of the accounting issues, he argued that "there was never a time for [him] to believe that there

should have been any type of a correction to the trust account," because Randi had given him no reason to believe so.

Nevertheless, Robert admitted that, in his various answers to the ethics complaints, he stated that he had sometimes engaged in recordkeeping activity, such as issuing and signing approximately ten trust account checks, and that he had maintained control of the business and trust accounts. He also acknowledged that, in his answer to the third amended verified complaint, he denied supervisory and transactional control over the accounts. He claimed, however, that both statements are correct. He explained that, after the OAE asked for a clarification of the statements made in the answer to one of the complaints, he concluded that, although he had issued trust account checks, he did not maintain any control over the accounts. Nevertheless, he conceded that, as a partner, he had equal responsibility over the attorney business and trust accounts. Moreover, he acknowledged that he and Randi had a fiduciary responsibility to properly maintain of the firm's business and trust accounts, to safeguard client funds, and to ensure the safety of fiduciary funds.

KNOWING MISAPPROPRIATION OF ESCROW FUNDS (DRB 12-053; XIV-2007-0135E)

Randi was charged with the knowing misappropriation of a real estate deposit held in escrow in respondents' attorney trust account. The complaint charged her with violations of RPC 1.15(a), RPC 8.4(c), and the principles set forth in In re Hollendonner, 102 N.J. 21 (1985). The OAE was alerted to this possibility by Jampel, whose grievance alleged that respondents had paid their mortgage with escrow funds held for a real estate transaction. At first, respondents stated that Jampel's allegation was a fabrication and that the monies had always remained intact in the trust account. The OAE investigation revealed otherwise.

Bolling testified that, on an unidentified date in October 2005, Larry Goldspiel and Josefa Alba entered into an agreement of sale with Anthony Ambrosio and David Ehrlich. Under the terms of the agreement, Goldspiel and Alba were to sell their home in Glendale, New York, to Ambrosio and Ehrlich for

$700,000.[6] Randi represented the sellers. Marjorie Centrone represented the buyers.

Bolling testified about the Glendale transaction and the misappropriation of the deposit monies. Jampel's grievance alleged that respondents had paid the mortgage on the Boonton property with trust account funds and that, as a consequence, respondents had to borrow money from Tauger in order to return the buyers' deposit in a real estate transaction. When Bolling reviewed respondents' records, she determined that the transaction to which Jampel had referred was the Glendale transaction.

In the Glendale transaction, the agreement of sale required the buyers to issue a $70,000 check to the escrowee, to be held in escrow until closing or termination of the contract. The $70,000 was deposited into the trust account of the sellers' attorney, Randi. The buyers never gave Randi permission to use

---

[6] Due to the different last names of all the parties, we refer to the transaction as the "Glendale transaction."

these escrowed funds for any purpose, other than that stated in the agreement of sale.[7]

On October 11, 2005, the buyers' $70,000 check, payable to Franco & Franco, was deposited into their trust account, bringing its balance to $78,503.94. Bolling testified that, ultimately, the deal fell through. On March 30, 2006, Robert wrote to Centrone (counsel for the buyers) and informed her that both parties to the contract had rescinded it. The letter requested that she submit a writing formally releasing the parties from the contract and asking for the return of the deposit monies.

On April 4, 2006, Centrone wrote to Robert, confirmed that the contract had been rescinded, and requested the return of the $70,000 deposit. The next day, Robert sent to Centrone a $70,000 trust account check payable to Anthony Ambrosio, representing the return of the deposit. The check was cashed on April 13, 2006.

---

[7] We note that, because this was a deposit in a real estate transaction, to be held in escrow, Randi would have required the permission of both the sellers and the buyers to use these funds. In re Hollendonner, 102 N.J. 21, 28 (1985).

The $70,000 deposit did not remain intact in respondents' trust account between the date of its deposit, October 11, 2005, and the date of its return to the buyers, April 13, 2006. On February 5, 2006, the trust account balance was $70,834. The next day, February 6, 2006, respondents transferred $2690 in legal fees from the attorney trust account to the attorney business account. These fees were related to the Diesso, Mowatt, and Mish client matters. This transfer reduced the trust account balance to $68,144. The clients' fee checks for $2650 ($1350 from Diesso and $1300 from Mowatt, both dated February 6, 2006), plus a $40 check (Mish, dated February 2, 2006), were posted to respondents' trust account on February 7, 2006, the day after the electronic transfer of $2690 to the business account, at which point the Glendale deposit was replenished and the trust account balance was back to $70,834. At the disciplinary hearing, Randi agreed that these transactions had occurred.

On February 23, 2006, the trust account balance was $70,304. On that date, $500 also was transferred from the trust account to the business account. On February 24, $1500 was transferred from the trust account to the business account.

Respondents also deposited $14,200 into the trust account on that date. Of the $14,200 deposited, $14,000 represented the two $7000 Tauger checks and $200 was identified as a filing fee in the Kaminski matter. As of February 24, 2006, the trust account bank statement reflected an $83,004 balance.

Also on February 24, 2006, Randi issued a $13,000 trust account check to Countrywide (Tauger's mortgagee for the Boonton property) against the $14,000 Tauger checks, which had been deposited on that same day.

On February 27, 2006, $300 was transferred from the trust account to the business account and a $200 trust account check was paid.

On February 28, 2006, the bank paid the $13,000 Countrywide check. In addition, a $26 trust account check in the Drumm matter, issued to "Clerk," was cashed that day and two $2000 transfers in two client matters (Villareal and Ismail) were made from the trust account to the business account. The $4000 represented legal fees owed to respondents.[8] The above

---

[8] As seen below, however, there was no $2000 held in the trust account for the Villareal matter. The $2000 Villareal fee check was not deposited into respondents' trust account until

(footnote cont'd on next page)

transactions caused the trust account balance to be reduced to $65,478.[9]

As it turned out, one of the $7000 checks issued by Tauger bounced. Tauger testified that, on February 24, 2006, he issued two personal checks to respondents' trust account, each in the amount of $7000. Tauger understood that Robert required the funds to "make [his] escrow account good."[10] According to Tauger, one of their clients, Gary Goldspiel, "wanted his money back." (This is the Glendale transaction.) Tauger claimed that Robert had instructed him to write both checks, but to let one bounce. When Tauger asked Robert why, he replied: "Just make one good, and one not good." Because Tauger did not have enough money in his checking account to cover both checks, one of the

---

(footnote cont'd)

later, March 6, 2006. More than $2000 was on account in the Ismail matter.

[9] The funds that would have backed up the $13,000 check were the two $7000 Tauger checks. However, at the time the bank honored the $13,000 check, the Tauger checks had not yet cleared.

[10] Tauger also told Bolling that he had given respondents the two $7000 checks so that they could try to replenish the Glendale funds.

checks wound up bouncing anyway, just as Robert had requested. Therefore, respondents' trust account had $7000 less than the balance had reflected on the day of the deposit.

During the demand audit on March 26, 2008, respondents claimed that the $70,000 had always remained intact in the trust account. According to Bolling, Randi claimed that the trust account balance had dipped below $70,000 only because one of Tauger's $7000 checks had bounced. Bolling testified, however, that the $7000 check did not bounce until March 2, 2006, a number of days after the trust account balance had already fallen below $70,000, on February 28, 2006, which happened when the $13,000 Countrywide check and the $26 "clerk" check were cashed, thereby reducing the balance to $69,478. This occurred because respondents did not wait for Tauger's two $7000 checks to clear, before issuing the $13,000 check to Countrywide on February 24, 2006, the same date that the Tauger checks were deposited into their trust account. The $13,000 check did not bounce only because the Glendale funds were in the trust account at that time.

Bolling testified about her findings with respect to the Villareal and Ismail transactions. With regard to Villareal, Bolling pointed out that the firm's ledger card showed no funds

being held on behalf of the client as of February 28, 2006. Moreover, during the 2005 random audit, respondents did not identify Villareal as a client for whom they were holding funds. Indeed, the only activity on the handwritten Villareal ledger card is a $2000 deposit into the trust account, on March 4, 2006, and an undated $2000 transfer to the business account. According to the trust account bank statement, however, the funds were not deposited in the trust account until March 6, 2006, one week after Randi had transferred the $2000 to their business account.

Moreover, although the Ismail ledger card showed a $2,282.14 balance as of September 15, 2005, Bolling testified that the 2005 random audit had not uncovered any funds being held on Ismail's behalf as of October 31, 2005. As with Villareal, respondents had not identified Ismail as a client on whose behalf they were holding funds. Also, the Ismail ledger card showed no activity between September 15 and October 31, 2005. No deposit was recorded between October 31, 2005 and February 28, 2006. Although the ledger produced during the demand audit showed that respondents were holding $2,282.14 on behalf of Ismail as of February 28, 2006, when the $2000 was transferred to the business account, Randi did not say to the

OAE that the $2000 belonged to them, as opposed to belonging to Ismail.

Bolling testified that, in addition to the Countrywide check, other trust account disbursements invaded the Glendale funds. On March 1, 2006, the trust account balance was $65,448. On March 2, 2006, one of the $7000 Tauger checks was returned for insufficient funds and a $5 chargeback fee was taken from the trust account. A $28 check in the Teoresu matter also was posted on that date. Thus, as of March 2, 2006, the trust account balance was down to $58,415.

On March 3, 2006, the balance decreased to $57,665 – its lowest balance – after the bank cashed a $750 check issued to Evan Siegel, on behalf of Tauger, for the appraisal of the Boonton property. The trust account did not hold at least a $70,000 balance again until three-and-a-half weeks later.

During that three-and-a-half week period, other transactions were taking place within the trust account, including the posting of the March 6, 2006 $2000 deposit in the Villareal matter. By March 20, 2006, the balance was $58,574.

Finally, on March 28, 2006, the trust account balance exceeded $70,000, when a $20,000 retainer fee in the Groth matter was deposited, increasing the balance to $78,574.

Bolling completed her testimony about the transactions by reading the following from her investigative report:

> Therefore, aside from Tauger's bounced check in the amount of $7,000 that was not replaced, there are three transfers to the Francos' attorney business account totaling $1,300 that cannot be attributed to any client's funds or fees owed and a $2,000 transfer to the Francos [sic] business account that they attribute to client Villareal when no monies were on deposit for Villareal on that date. All of these transactions contributed to the invasion of [Glendale] funds.
>
> [4T152-12 to 22.][11]

With respect to the $7000 Tauger check that was returned for insufficient funds on March 2, 2006, Bolling could not identify the exact date when Randi became aware that it had bounced, but she did recall that Randi had informed her that she reviewed the account balances daily. According to Bolling, Randi told her that she was aware that Tauger's check had bounced, but she relied on him as a friend to issue a replacement check so that the Glendale funds could be replenished. In the meantime, however, she took no steps to

---

[11] "4T" refers to the transcript of the September 27, 2010 hearing before the special master.

replenish the funds with her own money or by taking a loan. Moreover, during the three-week period between the return of the Tauger check (March 2, 2006) and the deposit of the Groth retainer (March 28, 2006), respondents had disbursed more than $7000 in attorneys' fees from their trust account to their business account, rather than keeping those monies in the trust account to attempt to remedy the deficiency in the Glendale funds.

On March 30, 2006, two days after the trust account balance had returned to more than $70,000, Robert asked Centrone to formally request the return of the deposit monies in the Glendale matter. Prior to this date, there were insufficient funds to cover the return of the $70,000 deposit.

Randi claimed that her statement to Bolling, in 2008, that she checked the accounts on line on a daily basis, did not mean that it was her habit at the time of the demand audit, in 2006. She continued: "And quite frankly I don't believe that was my habit in 2006."

Bolling shot down Randi's attempt to establish that she did not know the specific time period when Randi was reviewing the account balances daily. Bolling was adamant that Randi was doing so, during the period between the October 2005 deposit of

the $70,000 check and March 28, 2006, when the funds were finally replenished. Specifically, Bolling had questioned Randi about the times she transferred fees to the business account before the checks had cleared, which, in essence, invaded other trust account funds. In response, Randi stated that she checked the accounts online "everyday" and that it was "hard to tell when [sic] check clears," and that "sometimes it looks like it has." This also was Randi's response to Bolling's suggestion that she check online to determine the status of outstanding checks. Thus, Bolling believed that Randi's answer about checking online daily applied to the time period encompassed by the 2008 demand audit.

As Randi tried to explain how the Glendale deposit funds were not invaded, she stated: "However, upon review of the [Glendale] chart, the invasion of the [Glendale] chart, it's actually a period of about three weeks in which the account fell below where it should have been." She also stated that up to one week could pass, before she learned that a check had bounced. Therefore, she argued, the OAE had not proven, by clear and convincing evidence, that she knew that Tauger's check had bounced on March 2, 2006.

Respondents, mostly Robert, offered a substantial amount of testimony on issues other than the merits of the charges brought against them. They sought to invalidate the disciplinary actions brought against them, on the ground that the investigation was prompted by Jampel's grievance, which, they claimed, was filed for the sole purpose of harassing them and not based on her personal knowledge. On this point, they detailed what they claimed to be Jampel's all-out assault on their character and reputation through various means, such as an internet website and a blog.

Randi described Robert's diagnosis with thyroid cancer, in the spring of 2006, and the subsequent surgery and radiation treatment, in June and July of that year. Randi stated that, during the one-week period when Robert was isolated for the radiation treatment, Goldspiel and Tauger harassed them with multiple telephone calls per day, claiming that Jampel was going to the Somerset County Prosecutor's Office, presumably to file charges against respondents. Randi viewed this as evidence of the conspiracy against respondents. Jampel even went so far as to record conversations between respondents and Tauger, according to Randi.

Respondents also sought to impugn Tauger's credibility, on the ground that he had been convicted of possession of a controlled dangerous substance. Moreover, they offered the testimony of a client, Jeffrey Groth, to establish that Tauger and Jampel were troublemakers, who had tried to alienate Groth from his own sister. Groth had his own credibility problems, however, as he had been imprisoned, in 2006, for conspiracy to possess and distribute a controlled dangerous substance, a fact that he tried to avoid disclosing at the ethics hearing.

THE SPECIAL MASTER'S FINDINGS

With respect to the Byron matrimonial matter, the special master found that Robert had charged a minimum, non-refundable fee, a violation of R. 5:3-5(b). In support of this determination, the special master relied on the plain language of the retainer agreement, which expressly stated that Byron would pay a minimum of $2500 "for legal services regardless of the amount of time actually spent on this case."

In addition, the special master found that, by Robert's own admission, he had violated R. 1:21-6(a)(2) and, therefore, RPC 1.15 (presumably (a) and (d)) by permitting Byron's retainer check to be deposited into his personal checking account, rather

than the business account, and that, as a result, he failed to safeguard the client's funds.

The special master also found that Robert had violated R. 5:3-5(a), when he commenced work on Byron's matter in the absence of a fully-executed retainer agreement, as well as R. 5:3-5(a)(5), by tendering a retainer agreement to Byron that did not state when bills would be rendered and by failing to render bills to Byron, in accordance with the timetable established by the rule.

The special master found no clear and convincing evidence establishing that Robert had failed to provide Byron with the Statement of Client Rights and Responsibilities, as required by R. 5:3-5(a), for two reasons. First, Robert testified that it was his custom and practice to provide the statement to the client, together with the retainer agreement. Second, Byron did not testify. Thus, there was no testimony that would have supported the finding that, in this case, Robert did not follow his usual custom and practice, when he sent the retainer agreement to Byron.

Finally, the special master found that Robert did not charge an unreasonable fee (RPC 1.5 (presumably (a)) because, despite the absence of a signed retainer agreement, he "had a

good faith belief that he was entitled to keep the entire retainer given the value of services rendered" to Byron.

As to the Glendale real estate transaction, the special master found that Randi knowingly misappropriated escrow funds, when she transferred portions of the deposit monies into the firm's business account, for her personal use, to cover expenses in other matters and as payment of fees in other matters. First, the special master noted, after the $70,000 Glendale deposit was deposited into respondents' trust account on October 11, 2005, it remained intact until February 28, 2006. Second, he pointed out that, between February 24 and 28, 2006, the trust account balance should have exceeded $84,000, a sum that represented the $70,000 deposit and Tauger's two $7000 checks. This was not the case, however.

The special master found that, between February 24 and 27, 2006, the trust account balance fell below $84,000 as a result of respondents transfer of funds from the trust account to the business account and their use of those monies to make disbursements in other matters. Moreover, between February 28 and March 28, 2006, respondents' trust account balance should have been at least $71,000, consisting of the $70,000 Glendale deposit and the $1000 difference between the two $7000 checks

from Tauger and the $13,000 mortgage payment on the Boonton property.

The special master rejected Randi's claim that the $7000 Tauger check that bounced had thrown the account out of trust. He reasoned that, if that were the case, the balance in the trust account would have been $63,000 but, instead, it was less than that amount.

The special master noted the following facts, in support of his conclusion that Randi knowingly misappropriated escrow funds, specifically, portions of the $70,000 Glendale deposit: (1) Randi was responsible for maintaining the firm's books and records; (2) her practice was to review the trust account on a regular basis; (3) she knew that, as escrow agent, she was to hold the $70,000 Glendale deposit intact until the April 13, 2006 refund check was issued to the buyers; (4) she conceded that she had not done so and the parties to the transaction had not authorized her to use the funds; (5) her practice was to deposit legal fees into the firm's trust account and then transfer them to the business account; (6) when she learned that one of Tauger's $7000 checks bounced, she knew that the trust account was out-of-trust; yet, she did nothing to replenish the funds, while waiting for Tauger to replace the bad check; and

(7) despite her knowledge that the trust account was out of trust, she disbursed trust account funds for personal use and purposes unrelated to the Glendale transaction.

With respect to the Luning-to-Ligieri loan, the special master found that Robert did represent Ligieri in the eviction matter, based on (1) the contents of her March 6, 2007 letter to the court, referring to Robert as her attorney and describing his efforts in seeking a postponement of the proceeding and (2) the reference to the extra $1000 paid by Ligieri as a "legal fee" in the firm's books, as well as the same reference to that same amount, when the funds were transferred from the trust account to the business account. Thus, the special master concluded that Robert had violated RPC 1.7(a), when he arranged for the loan from one client (Luning) to another client (Ligieri), without first seeking their "informed consent, confirmed in writing, after full disclosure and consultation."

With respect to the alleged Tauger conflicts, the special master exonerated Robert because there was no evidence that, after the divorce matter had concluded in December 2001, Robert ever represented Tauger again. According to the special master, because RPC 1.8 presumes an attorney-client relationship, Robert could not have violated that rule.

The special master did conclude that Randi violated RPC 1.8(a), when she (1) received loans from Tauger at the same time that she represented him in the purchase of the Boonton property, (2) entered into a lease agreement with him for the Boonton property, and (3) prepared the deed transferring ownership of the Boonton property from Tauger, individually, to Tauger and her, jointly. According to the special master, the rule required Randi to advise Tauger of the desirability of seeking separate counsel and to obtain his informed consent, neither of which she did.

The special master held Robert and Randi responsible for the recordkeeping violations with which they were charged. According to the special master, Randi was "clearly unqualified to serve as a law firm bookkeeper" and, therefore, her conduct was negligent, not willful. She admittedly committed the following violations: (1) made electronic transfers from the trust account to the business account without giving the bank written authorization to do so, R. 1:21-6(c)(1)(A); (2) withdrew funds from the trust account, with an ATM card, R. 1:21-6(c)(2); (3) paid personal obligations from legal fees retained in the trust account, rather than to first transfer the funds to the business account and then pay the obligations from that account,

R. 1:21-6(a)(2); (4) borrowed $14,000 from Tauger, deposited the funds into the trust account, and paid the Countrywide mortgage, a personal obligation, directly from the trust account, RPC 1.15(a) (commingling); and (5) distributed fees from the trust account before the checks had cleared, resulting in the trust account's being "out of trust" and, thus, the negligent misappropriation of client funds.

As for Robert, the special master noted that, although he did not control the books, as a partner in the firm he held an equal fiduciary responsibility to properly maintain the accounts, to safeguard client funds, and "to ensure the safety and integrity of funds held in the firm's trust account." Quoting from In re Shamy, 59 N.J. 321 (1971), the special master ruled that Robert's "passive negligence was a contributing cause of the firm's failure to maintain proper records." Moreover, Robert was aware of Randi's bookkeeping challenges since 2005, when the OAE first cited the firm for its recordkeeping deficiencies.

For Randi's knowing misappropriation of the Glendale deposit monies, the special master recommended her disbarment. In addition, he recommended the imposition of two three-month suspensions for her conflicts of interest with Tauger and her

failure to safeguard trust funds, resulting in the negligent misappropriation of client funds. Finally, the special master recommended that Randi be replaced as the firm's bookkeeper.

For Robert's misconduct in the Byron matrimonial matter, the special master recommended an admonition. He also recommended separate reprimands for the conflict of interest in the Luning-to-Ligieri loan transaction and for his passive negligence regarding the recordkeeping violations and Randi's negligent misappropriation of client funds.

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

THE BYRON MATRIMONIAL MATTER

The complaint did not charge Robert with having violated a specific sub-section of RPC 1.15. The special master also failed to identify any subsections of RPC 1.15. However, it is clear that he found that respondent had violated both RPC 1.15(a) (failure to safeguard trust funds) and RPC 1.15(d) (recordkeeping violations). We find that the special master was correct as to RPC 1.15(d), but not as to RPC 1.15(a).

RPC 1.15(a) requires an attorney to hold "property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." In New Jersey, a general retainer may be deposited into the lawyer's business account, unless the client requires that it be separately maintained, in which case the retainer must be deposited into the trust account. In re Stern, 92 N.J. 611, 619 (1983). Here, there is no evidence that Byron's retainer fee should have been deposited into the trust account. Therefore, Robert did not violate RPC 1.15(a) by not placing it in trust.

Robert's impropriety consisted of depositing the retainer in his personal checking account, rather than his business account, as required by R. 1:21-6(a)(2), and as found by the special master. In not doing so, Robert violated RPC 1.15(d). It matters not that the check was mistakenly deposited into his personal checking account by his mother. The check was a retainer. It was Robert's obligation to ensure that it was deposited into the proper law firm account. Indeed, he so admitted at the ethics hearing.

On the other hand, we agree with the special master that there was no clear and convincing evidence that Robert had

failed to provide Byron with the Statement of Client Rights and Responsibilities in Civil Family Actions, as required by R. 5:3-5(a). Robert testified that his routine practice is to provide the statement to his clients in the retainer packet and that, therefore, the statement would have been included with the packet that was given to Byron. No testimony or other evidence was presented to dispute his claim. Besides, not every violation of the Court Rules is a violation of an RPC.

The special master found that the record lacked clear and convincing evidence that Robert violated RPC 1.5(a) by charging Byron an unreasonable fee for the work that he performed on her matter. RPC 1.5(a) requires a lawyer's fee to be reasonable. The rule also lists a number of factors to be considered, in making the determination of whether a fee is reasonable, including, but not limited to, "the time and labor required" and "the fee customarily charged in the locality for similar services." RPC 1.5(a)(1)-(8).

In this case, Robert, an experienced matrimonial lawyer, spent just over seven hours preparing a notice of motion and supporting certification in a post-judgment matrimonial matter at an hourly rate of $350. See, e.g., In re Gourvitz, 200 N.J. 261 (2009) (finding that the absence of any evidence with

respect to whether the attorney's $350 consultation fee was or was not unreasonable precluded a determination that it was unreasonable under RPC 1.5(a)). No evidence was offered about the fee customarily charged for this type of service; no evidence was offered regarding the time and labor required for such a task. Thus, the special master was justified in concluding that the hourly fee, in and of itself, was not unreasonable.

Notwithstanding the special master's determination that the fee itself was reasonable, as a matter of law, a retainer agreement in a matrimonial matter that requires the client to pay a non-refundable fee is a violation of RPC 1.5(a). In re Gourvitz, supra, 200 N.J. 261 (citing Fischer v. Fischer, 375 N.J. Super. 278, 288 (App. Div. 2005), where the Appellate Division observed that a non-refundable retainer fee provision in a matrimonial hourly fee agreement is both a violation of R. 5:3-5(b) "and unethical"). The plain language of the retainer agreement stated: "You agree to pay a minimum of $2,500.00 for legal services regardless of the amount of time actually spent on this case." Thus, if Robert had made a single telephone call to his adversary and it resulted in the complete resolution of the issues, under the terms of the agreement, Byron would not

have been entitled to a refund of the unearned portion of the retainer that she had paid to Robert. That is not allowed by the rules. Thus, we find that Robert violated R. 1.5(a) by charging Byron a non-refundable retainer fee.

In addition to the RPC violations discussed above, Robert violated several other provisions of the court rule governing attorney fees and retainer agreements in civil family actions. He violated R. 5:3-5(a), which requires "every agreement for legal services to be rendered in a civil family action [to] be in writing signed by the attorney and the client, and an executed copy of the agreement [to] be delivered to the client." Although Robert provided Byron with a retainer agreement, she never signed it.

Moreover, the agreement that he provided to Byron failed to comply with other provisions of R. 5:3-5(a). For instance, it did not state when bills would be rendered to Byron. Finally, Robert did not bill Byron within the timeframe prescribed by that same provision of the rule.

The question, however, is whether these violations of the Court Rule are also violations of the RPCs. In Gourvitz, we stated that, unlike Court Rules that impose page limit rules and filing and service deadlines, which are meant to assist the

courts and the parties in the management of litigation, Court Rules that are designed to protect clients, such as R. 5:3-5(b), "are a different matter." With respect to a non-refundable retainer fee, we noted in Gourvitz that "the net effect" of such a provision is "to punish the client for terminating the representation or to force the client to remain in the attorney-client relationship even if the client is unhappy with the lawyer's services," which is per se unreasonable. In the Matter of Elliot Gourvitz, DRB 08-326 (May 12, 2009) (slip op. at 31).

Here, there can be no doubt that the requirements of a written fee agreement in a matrimonial matter and regular billings to the client are meant to protect the client. However, there is no RPC that captures the failure to abide by these requirements and renders them unethical.

To conclude, in the Byron matrimonial matter, Robert violated RPC 1.5(d), based on the non-refundable fee that his matrimonial client was required to pay under the terms of the retainer agreement, and RPC 1.15(d), based on the deposit of the retainer into Robert's personal bank account. Although Robert violated other provisions of R. 5:3-5 that were designed to protect his client, there is no corresponding RPC that encompasses those violations and renders them unethical.

THE LUNING-TO-LIGIERI LOAN

The special master determined that Robert represented Ligieri in the eviction matter and, therefore, violated RPC 1.7(a), when he arranged for his client Luning to lend money to his client Ligieri, without taking the steps required by the rule, that is, obtaining informed consent from both clients confirmed in writing, after full disclosure and consultation. RPC 1.7(b)(1). As the special master noted, notwithstanding Ligieri's vigorous denials that she was represented by Robert in the eviction matter, she wrote a letter to the court, at the height of the dispute, and claimed that Robert not only represented her but that he had spoken to the landlord about an adjournment of the matter. The special master also based his determination on the May 1 and 2, 2007 entries in the firm's books, referring to the $1000 as a legal fee in the Ligieri matter.

We struggled with the issue of whether there was clear and convincing evidence that Robert had represented Ligieri in the eviction proceeding. Indeed, three of our members found that respondent did not represent Ligieri. The majority recognized that Ligieri adamantly insisted at the hearing that, despite the contents of her letter, Robert had not represented her. The

fact that Ligieri wrote a letter identifying him as her lawyer does not make true what is false. It is also possible Robert called Ligieri's landlord to seek an adjournment, not as Ligieri's lawyer but, rather, as a lawyer who was doing a favor for Ligieri's fiancé, whose parents Robert had represented previously.

The special master, however, found that the proofs clearly and convincingly demonstrated that Robert was Ligieri's lawyer in the eviction proceedings. The special master relied on Ligieri's letter to the court and on the characterization of a $1000 legal fee on the firm's books. The special master, in essence, discredited Ligieri's testimony to the contrary. We defer to the special master's ruling in this regard. As the Court has observed, a court will defer to a tribunal's findings with respect to those intangible aspects of the case not transmitted by the written record, such as witness credibility. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). Here, the special master presided over the case, observed the witnesses, and heard them testify. Accordingly, he had "a better perspective" than do we" in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988). Thus, five of our members chose to defer to the special master's determination in this

regard and to find that Robert violated RPC 1.7(a) by representing Ligieri in the eviction matter and then Ligieri and Luning in the loan transaction.[12]

The special master did not address the OAE's claim that Robert also had violated RPC 1.8(a) (prohibited business transaction with a client) by accepting from Luning the $1000 fee from Ligieri, as reimbursement for some expenses that he had incurred on Luning's behalf. Perhaps this omission was the result of the special master's determination that the fee was a legal fee paid by Ligieri for the representation in the eviction proceeding. Regardless, there is no clear and convincing evidence to support this charge.

RPC 1.8(a) prohibits a lawyer from entering into a business transaction with a client absent a number of precautions, such as advising the client in writing of the desirability of seeking, and giving the client a reasonable opportunity to seek, the advice of independent legal counsel. Here, while the evidence supports the conclusion that, after Robert received Luning's $1000 fee from Ligieri, Luning decided to give it to

[12] We note that the loan was unsecured, thereby exposing his client, Luning, to the loss of $4100.

him, in reimbursement for the paint and cell phone, etc. that he had purchased for her previously, there is no evidence that, prior to Robert's purchase of the paint and cell phone, he and Luning had agreed that, after she had received the $1000 fee from Ligieri, she would use it to reimburse him for those purchases. Thus, there is no evidence of any business transaction at all between Robert and Luning. Therefore, there was no violation of RPC 1.8(a).

THE TAUGER CONFLICTS

The special master correctly determined that Randi had engaged in impermissible business transactions with Tauger by (1) receiving loans from him while he was her client and (2) by entering into a landlord-tenant relationship with him while he was her client, both in the absence of the precautions required by RPC 1.8(a). However, he erred in finding that Robert did not violate this rule because Tauger was not his client at the time.

The special master's determination that Robert did not violate RPC 1.8(a) was based on the absence of an active attorney-client relationship at the time that the transactions took place. Although, there was no formal attorney-client

relationship at that time, under the circumstances, Robert's conduct was still governed by the rule.

The evidence clearly established that, even though Robert's representation of Tauger ended in December 2001, their relationship grew familial; Tauger clearly placed his trust in both respondents, but particularly in Robert. Tauger testified that he considered Robert his lawyer, beyond the conclusion of the representation in the divorce matter. He trusted Robert.

The conflict-of-interest rules may apply even in the absence of a formal attorney-client relationship. See, e.g., In re Turco, 196 N.J. 154 (2008) (attorney found to have engaged in a conflict of interest when he, a close, long-time friend of an elderly widow, advised the widow to invest in a company; the attorney was not acting in the context of an attorney-client relationship at the time); In re Gold, 149 N.J. 23 (1997) (in the absence of a formal attorney-client relationship, the conflict of interest rules applied when it was reasonable for the putative clients "to assume that [the attorney] was representing their interests;" the wife of the putative clients was the attorney's secretary); and In re Chester, 127 N.J. 319 (1992) (secretary, though not strictly a client, had reason to rely on her attorney-employer in representing her interests in a

loan that, upon the attorney's solicitation, she agreed to make to one of his clients). Here, given the close relationship between Tauger and Robert, we find Robert guilty of unethical conduct in his dealings with Tauger.

We first address the loans from Tauger to respondents. We will not address the alleged loans from respondents to Tauger, because they were not the subject of any charges in the ethics complaints.

Respondents clearly violated RPC 1.8(a). The loans received from Tauger were business transactions. The special master found that Randi never advised Tauger to seek the advice of independent counsel. The same can be said for Robert, who suggested in his testimony that Tauger was free to seek counsel from Miller, his nephew and a Manhattan attorney.

In terms of the Boonton property closing, the lease, and the deed, although they were independent transactions, in reality, they were one ball of wax. The bottom line is that respondents needed a place to live; Tauger agreed to buy a house for them; in exchange, they agreed to pay the mortgage, taxes, and "carrying costs;" and, in the end, after Tauger had given Randi a fifty percent interest in the property, respondents stopped making the mortgage payments. Thus, although Randi's

representation of Tauger in his purchase of the Boonton property was not, in and of itself, a conflict, the other transactions did violate RPC 1.8(a).

As with the loans, the fact that it was Randi who prepared the documents does not exonerate Robert from responsibility. His testimony clearly indicated that he was directly and intimately involved in the arrangement. He freely admitted that the lease was not for Tauger's protection, as landlord but, rather, for respondents' own interest, that is, proof that their children resided in the Kinnelon school district. Robert's willingness to ascribe blame to his wife, by claiming that she was solely responsible for these transactions (as well as for the firm's financial matters), reflects a troubling disloyalty to her and an equally troubling refusal to take any responsibility for his own actions.

In short, the agreement between respondents and Tauger, permitting them to live in his home, in exchange for the payment of the mortgage, etc., was clearly a business transaction. Respondents did not advise Tauger, in writing, of the desirability of seeking the advice of independent legal counsel of his choice concerning the transaction, thereby depriving him

of the opportunity to do so, as is required by RPC 1.8(a)(2). Thus, they violated that rule.

RECORDKEEPING VIOLATIONS AND NEGLIGENT MISAPPROPRIATION

The special master was correct in holding Robert equally responsible with Randi for the recordkeeping violations and negligent misappropriation of client funds, even though Randi was the firm's bookkeeper. In re Shamy, 59 N.J. 321 (1971). In Shamy, attorneys George J. Shamy and Jack Pincus formed a partnership. Id. at 322. They soon had a disagreement over the competence of the firm's bookkeeper, at which point Shamy "took exclusive charge of the firm's books and records." Id. at 323.

Shamy, it turned out, was a heavy gambler who funded his gambling with monies diverted from the firm's trust account. Id. at 322. He was charged with knowing misappropriation of client funds and illegal gambling. Id. at 322-23. Shamy and Pincus were charged with the following recordkeeping violations: the indiscriminate practice of shifting funds from one account to the other, the failure to maintain a general ledger book, and the failure to make timely entries into the firm's books. Id. at 323.

Pincus, who had "complete confidence in Shamy's integrity," argued that he could not be found guilty of the recordkeeping violations because Shamy had assumed responsibility for maintaining "suitable records" and that he (Pincus) had been unaware of any recordkeeping deficiencies until the disciplinary proceeding was instituted against them. Ibid. Pincus's defense was rejected on the ground that his "passive negligence was a contributing cause for the firm's failure to maintain proper records." Id. at 324. He received a reprimand. Id. at 326.

In this case, Robert was content to let Randi be the bookkeeper. Like Pincus in the Shamy case, we reject Robert's attempt to deflect responsibility and place blame on Randi.

Randi admitted to most of the recordkeeping violations, specifically, electronic transfers from the trust account to the business account without written authorization, R. 1:21-6(c)(1)(A); ATM withdrawals from the trust account, R. 1:21-6(c)(2); the payment of personal obligations with legal fees retained in the trust account, rather than from the business account, after transfer from the trust account, R. 1:21-6(a)(2); commingling the $14,000 personal loan from Tauger by depositing it into the trust account and then paying a personal obligation with those funds directly from the trust account, RPC 1.15(a);

and negligently misappropriating client funds by transferring fees from the trust account to the business account before the client checks were posted. The special master did not, however, address all of the negligent misappropriation charges brought against respondent.

In addition to transferring fees from the trust account to the business account before the client checks were posted, the clear and convincing evidence established that Randy had negligently misappropriated client funds when she: (1) deposited fees into the trust account, disbursed funds against the deposit prior to the checks having cleared and, when some of the checks bounced, other client funds were invaded; (2) disbursed funds from the trust account on behalf of clients in excess of what was held on their behalf; and (3) disbursed trust account funds on respondents' behalf in excess of personal funds or legal fees held in the account for themselves.

KNOWING MISAPPRORIATION OF ESCROW FUNDS

We find clear and convincing evidence that Randi knowingly misappropriated a portion of the $70,000 Glendale deposit. In this regard, there are a number of invasions at issue, but not

all of them were proven to be knowing by clear and convincing evidence.

The first invasion took place on February 6, 2006, when Randi electronically transferred $2690 from the trust account to the business account. This reduced the trust account balance to $68,144. The corresponding fee checks were not deposited into the trust account until the following day. Thus, at the time that Randi electronically transferred the $2690 to the business account, she absolutely knew that those funds were not in the trust account, because she had not even made the deposit. Her conduct was a knowing misappropriation of Glendale escrow funds. In re Hollendonner, 102 N.J. 21, 26-27 (1985).

The second invasion took place on February 28, 2006, when Randi electronically transferred $2000 from the trust account to the business account, which purportedly represented the payment of a legal fee in the Villareal matter.[13] There are two problems with this transaction. At the time, the trust account held no

[13] With respect to the $2000 transferred in the Ismail matter, the firm's records showed a $2,282.14 balance on the Ismail client ledger, as of February 28, 2006. The evidence did not establish whether these funds actually belonged to respondents or to Ismail. Thus, we cannot determine whether the transfer was a misappropriation of client funds.

funds on behalf of Villareal. Thus, as with the $2690 electronic transfer on February 6, 2006, Randi took the legal fee from the trust account with the knowledge that the funds were not there because she had not yet deposited the fees into the trust account. Indeed, the $2000 in fees was not deposited to the trust account until nearly a week later, on March 6, 2006. Thus, Randi knowingly invaded Glendale funds, when she electronically transferred $2000 in the Villareal matter six days before the client's $2000 was deposited into the trust account.

These two invasions are to be distinguished from what occurred on February 24, 2006, when Randi issued the $13,000 trust account check to Countrywide against Tauger's two $7000 checks, which were deposited on the same day. The $13,000 check to Countrywide was issued against uncollected funds. Nevertheless, the two bank transactions – the $14,000 deposit and the $13,000 disbursement – took place on the same day. Although Randi had to wait for the $14,000 to clear before issuing the $13,000 to Countrywide, we find that her conduct amounted to issuing a check against uncollected funds, rather than knowing misappropriation. Her conduct was undoubtedly reckless, for she exposed client funds to risk, but not quite

tantamount to knowing misappropriation. Perhaps she expected that the $13,000 check would not be negotiated before the $14,000 in checks had cleared the trust account.

We now return to the first and second invasions that occurred when Randi electronically transferred legal fees from the trust account before the checks were even deposited. That cannot be removed from the realm of knowing misappropriation on the theory that her actions were analogous to those of attorneys who make disbursements against uncollected funds. In those cases, the attorneys had actually deposited the underlying checks or, at least, believed they had deposited them.

Consider, for example, In re Gertner, 205 N.J. 468 (2011). There, Gertner and his business partner, who had acquired properties through sheriff sales, each brought certified checks from their respective banks for the deposits. At some unspecified point, Gertner learned that the sheriff accepted trust account checks. He and his partner then began using Gertner's trust account for convenience, to avoid using certified bank checks. Whenever they successfully bid on a property, Gertner wrote a trust account check to the sheriff and, immediately thereafter, deposited personal funds into the trust account to cover the check.

On four occasions, Gertner issued checks from his trust account that cleared the account one day before the corresponding funds had been deposited. As a result, client trust funds were invaded on four occasions.

Gertner's explanation was that his receptionist was responsible for depositing his firm's checks. He discovered, however, that she was not making daily deposits, as he had believed, and that she had not done so on the four instances when the checks to the sheriff had cleared ahead of the deposits. Gertner accepted responsibility for the employee's inaction. He received a reprimand.

Randi's actions are not comparable to Gertner's. Although Gertner did not make the deposits into his trust account until after he had disbursed funds against them, he tendered actual checks to the sheriff. He did not make instant transfers as did Randi. Thus, there likely would have been time for the deposits to clear before the trust account checks were cashed. Besides, he believed that his secretary had made the deposits on the same day.

Similarly, in In re Broder, 184 N.J. 294 (2005), the attorney received a reprimand for disbursing against uncollected funds in a real estate transaction. There, Broder accepted a

$137,000 check from his client's company's business account at a closing. He did not independently verify that the company's account maintained the funds, prior to making disbursements. The check bounced.

Broder admitted that he knew, at the closing, that he should have waited for the funds to clear and be credited to his trust account and that, by disbursing funds without verifying that the check had been drawn on sufficient funds, he had violated RPC 1.15(a) (other client's funds were negligently invaded).

Again, Randi's actions are not comparable to Broder's. The client funds had not been deposited, when she made the fee transfers to the business account. Moreover, by making electronic transfers, Randi could not avail herself of the "float" that might have saved her, if she had written checks instead.

One other issue in this case is Randi's failure to replenish the $7000, when she learned that one of Tauger's checks had bounced. Although the record does not reveal the precise dates, according to Bolling, Randi informed her that she checked the firm's account balances on-line on a daily basis. Based on this statement, it is safe to assume that Randi learned

of the bounced check at some point between March 2, 2006, when the check was returned, and March 28, 2006, when the trust account balance finally exceeded $70,000, after the $20,000 Groth retainer was deposited. Further, it is clear from the record that, when Randi did learn that the check had bounced, she made no attempt to make restitution, electing instead to wait for Tauger to replace the funds.

That being said, Randi's failure to replenish the account despite her awareness of the shortage cannot be considered knowing misappropriation. In In re Colby, 172 N.J. 37 (2002), the client, PCC, issued a check, in October 1997, in partial satisfaction of a monetary settlement of an action in which PCC was the defendant. Colby deposited this check in his trust account, on October 8, 1997, and waited seven days to mail his trust account check to the plaintiff's attorney. PCC's check was returned for insufficient funds. Unfortunately, rather than call Colby to alert him to the dishonored check, the bank mailed a notice to Colby, which was not received until October 27, 1997, almost three weeks after Colby's deposit of the check.

Colby took reasonable steps to rectify the problem. He directed his secretary to contact the plaintiff's attorney, who reported that he had already issued a check to his client.

Colby also directed his secretary to contact the client's principal, Peter Granovetter, who continually promised to send another payment. Colby's secretary testified that, in addition to making several telephone calls to Granovetter, she had sent him a letter asking that he correct the situation.

Colby, too, had several conversations with Granovetter, who repeatedly assured him that he would resend the $3,500. According to Colby, he had no reason to doubt his client's word.

By March or April 1998, according to Colby, he had forgotten about the shortage in his trust account. Contributing to his failure to discover the shortage was his computerized accounting system. According to Gluckman, respondent's expert witness, respondent's computer software program could be set either to permit the entry of negative balances and, thus, print negative balances in a report, or to reject any attempt to enter a negative balance and, thus, preclude the appearance of negative balances in a report. Gluckman believed that Colby's software did not permit the entry of a negative posting; therefore, no written report would have been produced to alert Colby to a negative balance.

Moreover, because at that time Colby did not perform the required three-way trust account reconciliation, he was not

reminded of the shortage. Although he compared his bank statements with his records, he did not perform the required reconciliation of trust account ledgers and journals.

Based on this unfortunate set of circumstances, Colby allowed the shortage to remain in his trust account for seventeen months, despite his financial ability to replenish it. On March 23, 1999, he cured the shortage by depositing $3,500 of his own funds into his trust account. Colby received a reprimand.

In In re Prado, 159 N.J. 528 (1999), the attorney maintained trust and personal accounts at the same bank. When he directed the bank to automatically charge loan payments to his personal account, the authorization erroneously listed his attorney trust account number. During a period of five months, the bank deducted a total of $2,079.18 from his trust account. Although the attorney became aware of the trust account shortage and the ensuing invasion of other clients' funds, he did not replace the monies until eighteen months later, after the OAE began an investigation, based on a random audit. The attorney stipulated, and we found, that he negligently misappropriated client funds, in violation of RPC 1.15(a). Prado received a three-month suspension.

Similarly, in In re Moras, 131 N.J. 164 (1993), the attorney accommodated the request of a longtime client and friend to issue a trust account check to her, in exchange for which she tendered him a $15,000 personal check. After the attorney issued the trust account check, he called the client's bank and discovered that there were insufficient funds to cover the check. Although the client assured him that she would immediately deposit sufficient funds, she failed to do so. The attorney declined to stop payment on his trust account check. As a result, other clients' funds were invaded. Despite the client's sporadic payments to the attorney over the next several years, the shortage was not cured until almost four years later, when the attorney deposited his own funds into his trust account. Although the OAE contended that the attorney knowingly misappropriated client funds, the Court disagreed. The attorney received a six-month suspension.

In In re Librizzi, 117 N.J. 481 (1990), after issuing a check from his trust account, the attorney was notified that an $1800 client check that he had deposited into his trust account had been returned. The client's replacement check was also dishonored. Finally, the client's father agreed to pay the attorney in "dribs and drabs." The trust account was short for

more than two years. Because of misdeposits and overpayments in other matters, the attorney was out of trust by $25,000. The Court found that the attorney had negligently, not knowingly, misappropriated funds. He was suspended for six months.

The above cases demonstrate that the failure to promptly replenish funds in an attorney trust account, without more, does not necessarily amount to knowing misappropriation of client funds, despite the invasion of monies belonging to other clients.

In summary, thus, Randi knowingly misappropriated the Glendale funds when she (1) electronically transferred $2690 in legal fees from the trust account to the business account on February 6, 2006, before the underlying checks were deposited, and (2) electronically transferred $2000 in legal fees from the trust account to the business account on February 28, 2006, six days before the underlying checks were deposited.

There remains for determination the appropriate quantum of discipline to be imposed on Robert and Randi for their multitude of ethics infractions. For the reasons set forth below, we determine that Robert should receive a three-month suspension and we recommend that Randi be disbarred.

ROBERT

In the Byron matter, Robert violated RPC 1.5(a) (unreasonable fee), by collecting a retainer that was characterized in the fee agreement as non-refundable, and RPC 1.15(a) (failure to safeguard funds), by depositing the retainer fee into his personal checking account.

Under the circumstances, an admonition is appropriate for Robert's charging an unreasonable fee. In re Gourvitz, supra, 200 N.J. 261 we observed that an admonition would be the appropriate discipline for an attorney who charged a non-refundable fee in two matrimonial matters. The attorney also failed to promptly refund a client's retainer. A reprimand was imposed due to the attorney's ethics history (prior reprimand).

An admonition also is appropriate for Robert's mistaken deposit of Byron's retainer fee into his personal checking account. See, e.g., In the Matter of Pasquale F. Giannetta, DRB 10-138 (July 1, 2010) (attorney mistakenly transferred $5000 from his trust account to his personal account; he also delayed in delivering funds to third parties; and committed recordkeeping violations; mitigating factors included unintentional nature of the mistaken transfer, the lack of

personal gain, and lack of harm to any client). As in Giannetta, the deposit was a mistake.

With respect to the Luning-to-Ligieri loan, Robert engaged in a conflict of interest (RPC 1.7(a)(1)) by representing his client Luning, the creditor, in the loan transaction with his client Ligieri, the debtor, in the absence of full disclosure, consultation, and consent. A reprimand is the starting point, when determining the discipline to be imposed for this type of infraction. See, e.g., In re Turco, supra, 196 N.J. 154 (we noted that the starting point for a conflict of interest is a reprimand; attorney was censured because of the egregious circumstances surrounding the loan, namely, his creditor-client's vulnerability, his awareness of the debtor-client's financial instability, his interest in the debtor-client company, and his failure to protect the creditor-client's investment in any way, which constituted egregious circumstances).

In some situations, suspensions have been imposed on attorneys who receive loans from a client, in violation of RPC 1.7(a), and who also facilitate loans between clients. See, e.g., In re Hilberth, 149 N.J. 87 (1997) (three-month suspension imposed on attorney who borrowed $20,000 from a client, which he

paid five years after the last payment was due; attorney also arranged for the client to loan other clients money, which resulted in a $170,000 loss to the creditor-client) and In re Shelly, 140 N.J. 50 (1995) (six-month suspension imposed on attorney who, in nine years of informality in his financial dealings with his client, borrowed $40,000 from her without documentation and without advising her to obtain independent counsel prior to entering into the loan; the attorney did not repay the loan; the attorney also committed recordkeeping violations).

Here, Robert facilitated the Luning-to-Ligieri loan and received multiple loans from Tauger, over the years, all without the disclosures required by RPC 1.7(a) and RPC 1.8(a). Although the record establishes that Luning did not suffer financial harm as the result of the loan to Ligieri, it is not clear whether Tauger was ever repaid for all the loans that he had made to respondents. Moreover, we note, in aggravation, the usurious nature of the $1000 "fee" charged to Ligieri in connection with the loan from Luning.

However, there is also another conflict of interest to consider in assessing discipline, that is, the lease agreement between Tauger, as landlord, and respondents, as tenants. This

arrangement also was in the nature of a loan. Tauger purchased the $1.5 million Boonton property for respondents to live in. In exchange, they were to make the mortgage payments. Ultimately, they stopped making the payments and the bank foreclosed on the property, which was sold at a sheriff's sale and which must have resulted in a substantial loss to Tauger.

Finally, a reprimand is typically imposed for negligent misappropriation of client funds, even when accompanied by other, non-serious infractions, such as recordkeeping deficiencies, commingling, and failure to promptly deliver funds to clients. See, e.g., In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 occurred in attorney trust account, as the result of a bank charge for trust account replacement checks; the attorney was also guilty of recordkeeping irregularities); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney overdisbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies, but the attorney was not disciplined for those irregularities; that aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Conner, 193 N.J. 25 (2007) (in two matters, the attorney

inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of clients' funds; the attorney also failed to promptly disburse funds to which both clients were entitled); and In re Regojo, 185 N.J. 395 (2005) (attorney negligently misappropriated $13,000 in client funds as a result of his failure to properly reconcile his trust account records; the attorney also committed several recordkeeping improprieties, commingled personal and trust funds in his trust account, and failed to timely disburse funds to clients or third parties; the attorney had two prior reprimands, one of which stemmed from negligent misappropriation and recordkeeping deficiencies; mitigating factors considered).

We find that, as to Robert, a three-month suspension is sufficient for his totality of his ethics infractions. In addition, one troubling aspect of this matter requires closer examination. Tauger claimed that Robert told him to make one of the $7000 checks "bad." If this is true, Robert would have known that the $13,000 Countrywide check would bounce and that, as a result, trust account funds would be invaded. We suggest that the OAE consider undertaking an investigation into this

issue to determine whether Robert committed an ethics infraction.

Members Baugh, Clark, and Zmirich voted to impose a censure on Robert. In those members' view, the record lacked clear and convincing evidence that Robert had represented Ligieri in the landlord-tenant action. Consequently, they found no conflict of interest in the loan transaction between Luning and Ligieri.

Judge Gallipoli recused himself.

RANDI

For the knowing misappropriation of the Glendale deposit, we recommend Randi's disbarment. In re Hollendonner, 102 N.J. 21, 26-27 (1985). In view of this recommendation, we need not consider the issue of the appropriate sanction for Randi's additional violations.

Member Gallipoli recused himself.

We further determine to require respondents to reimburse the Disciplinary Oversight Committee for administrative costs

and actual expenses incurred in the prosecution of these matters, 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 Randi Kern Franco
Docket No. DRB 12-053

Argued: June 21, 2012

Decided: August 7, 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
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matters of Robert Franco
Docket Nos. DRB 12-054, 12-055, and 12-056

Argued: June 21, 2012

Decided: August 7, 2012

Disposition: Three-month suspension

Members	Disbar	Three-month Suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh			X			
Clark			X			
Doremus		X				
Gallipoli					X	
Wissinger		X				
Yamner		X				
Zmirich			X			
Total:		5	3		1	

Julianne K. DeCore
Chief Counsel