SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-147
District Docket No. XIV-2009-0300E

IN THE MATTER OF

MATTHEW JOHN CAVALIERE

AN ATTORNEY AT LAW

Decision

Argued: September 20, 2012

Decided: November 5, 2012

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

Robert E. Ramsey appeared on behalf of respondent.

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

This matter came before us on a recommendation for a reprimand filed by the District V-C Ethics Committee (DEC), based on respondent's violation of RPC 1.15(d) (failure to comply with the recordkeeping rules set forth in R. 1:21-6) and

RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation). Respondent also was charged with having violated RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter) and (b) (failure to cooperate with disciplinary authorities) and RPC 8.4(d) (conduct prejudicial to the administration of justice). For the reasons set forth below, we determine to impose a censure on respondent.

Respondent was admitted to the New Jersey bar in 1982. He has no disciplinary history. At the relevant times, he maintained an office for the practice of law in Wayne, under the name Cavaliere & Cavaliere, P.A.

This disciplinary matter arises out of two random audits and a demand audit by the Office of Attorney Ethics (OAE), which uncovered respondent's law firm's lack of professional liability insurance; his failure to obtain it, despite the OAE's direction that he do so; his alleged misrepresentation to the OAE that he had obtained a policy, which had "just expired;" and his use of his trust account to manage an incarcerated client's financial affairs.

As to the last violation, the OAE charged that respondent had failed to abide by the direction to remove the client's

funds from the trust account and to put them in a separate, dedicated account. Moreover, respondent misrepresented to the OAE that he held no other account for the client when, in fact, he handled a money market account for one of the client's business entities. Finally, the OAE claimed that respondent assisted the client in fraudulently concealing his assets from the United States Bankruptcy Court and the Lawyers' Fund for Client Protection of the State of New York.

Before the three-day disciplinary hearing in this matter, the parties stipulated to a limited number of facts, as follows.

On July 1, 2003, respondent was the subject of a random audit, carried out by OAE Senior Random Compliance Officer Mimi Lakind. Lakind identified two recordkeeping deficiencies, that is, inactive trust ledger balances that remained in the trust account for an extended period of time and respondent's professional corporation's failure to maintain professional

liability insurance.[1] With respect to one of respondent's clients, Michael Erdheim, the client ledger reflected a $1,714.10 balance, at the time of the July 2003 audit.

On June 15, 2009, Lakind conducted another random audit. Between the 2003 and 2009 random audits, respondent did not obtain and maintain in good standing a professional liability insurance policy. However, on July 1, 2009, he obtained a one-year $1 million policy.

On November 12, 2009, the OAE conducted a demand audit, at which time respondent was questioned about the Erdheim client ledger card.

I. THE JULY 2003 RANDOM AUDIT

At the disciplinary hearing, Lakind testified that, during the July 1, 2003 random audit, she had uncovered five recordkeeping deficiencies. She also had identified two additional problems on the "comments" section of the Random

[1] R. 1:21-1A(a)(3) requires a professional corporation that engages in the practice of law to "obtain and maintain in good standing one or more policies of lawyers' professional liability insurance . . . ."

Audit Program Recordkeeping Deficiencies Checklist. She had reviewed these items with respondent.

At the hearing, Lakind focused on the inactive balances left in the trust account (specifically, funds belonging to Erdheim) and the firm's failure to maintain malpractice insurance. With respect to the Erdheim funds, Lakind knew that Erdheim was a lawyer who had been disbarred in 1993, had spent time in prison, and was, at the time of the audit, in bankruptcy. Respondent maintained a ledger card for Erdheim, which contained a number of transactions that Lakind did not understand, as she "didn't do bankruptcy."

Because respondent had not given Lakind a "valid reason" for holding Erdheim's monies in the trust account, at the July 2003 audit, she instructed him to put them in a separate account, under Erdheim's social security number. According to Lakind, respondent stated, "Not a problem."

With respect to the insurance issue, Lakind testified that respondent told her that he "would either get the insurance or he would dissolve the P.A., because he really couldn't practice without it."

On July 7, 2003, the OAE sent a deficiency letter to respondent. According to Lakind, the letter did not identify

the need for a separate account for the Erdheim funds because that was not a separate deficiency. She explained:

> [W]hen I asked him to move the money out, . . . rather than argue with him over the appropriateness of those transactions going through the trust account, I said, Look, I don't understand what this is about, take it out of your trust account, put it in a separate account under . . . Mr. Erdheim's name and social security number, and then, if you want to run those transactions, since he's a bankrupt . . ., at least the money, if it's proper, will be, in my eyes, under scrutiny, and I don't really have to concern myself with it; and when he didn't lodge an argument with me, and just said, Okay, there was no reason for me to doubt an attorney, when I come out for a random audit, and I ask him to do something, if he doesn't give me an argument about it or he doesn't feel that I'm making a mistake, and in which case, I would have taken it to my office, I have no reason to make a big issue out of it, I didn't, there wasn't a whole lot of money in that. I said simply, Get it out.
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> [1T29-5 to 25.][2]

Respondent was given forty-five days to correct the recordkeeping deficiencies. By October 8, 2003, he had not advised the OAE that the deficiencies had been corrected. When

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[2] "1T" refers to the January 14, 2011 transcript of the ethics hearing.

Lakind called him, he told her that he would do so "next week." He did not, however.

On January 20, 2004, Lakind called respondent again. She left a message for him stating that, if he did not reply to the deficiency letter within the next few days, his case would become a disciplinary matter. Two days later, respondent wrote to the OAE and represented that the law firm had "spoken to several professional liability carriers requesting quotes" and that the firm expected to have insurance in place within sixty days. If that did not happen, respondent added, he would discontinue operation of the firm as a professional association and become a sole practitioner.

Based on respondent's representations, the 2003 random audit was concluded. Lakind explained that, "unless there's something to notify me differently, his signature on that line is good enough."

II. THE JUNE 15, 2009 RANDOM AUDIT

On June 15, 2009, respondent's firm was the subject of another random audit. Lakind testified that of the many deficiencies uncovered by this second audit two had been identified during the audit in 2003, that is, the firm's lack of

professional liability insurance and an inactive balance for Erdheim in the trust account.

Lakind testified that, when she asked respondent to produce the certificate of insurance from the liability carrier, he replied that the policy had "just expired." When she asked him to produce the expired policy, respondent said that he did not have it on the premises and that he would have to "get it."

Lakind then called the Office of the Clerk of the Supreme Court and learned that no certificate of insurance was on file and that "none was ever submitted."[3] On June 20, 2009, she wrote to respondent, giving him five days to provide her with a copy of the insurance policy that he claimed had expired. The purpose of the letter was to provide respondent with the opportunity to establish that the Supreme Court's records were inaccurate and that, therefore, he had not lied to Lakind.

On June 25, 2009, respondent wrote to Lakind, informing her that he had now obtained professional liability insurance

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[3] R. 1:21-1A(b) requires a professional corporation that practices law to file a certificate of insurance with the Clerk of the Supreme Court.

through the Hartford and that the effective date would be July 1, 2009. The letter also stated that the insurance company would send a copy of the certificate of insurance directly to the OAE. The letter did not address Lakind's request for a copy of the policy that had purportedly expired.

On July 2, 2009, respondent sent to Lakind a copy of a letter from a Hartford agent, confirming that coverage was in effect as of July 1, 2009. According to Lakind, the certificate of liability insurance for this policy was not filed with the Court, as required, until more than a year later, on October 25, 2010, after she had instructed the insurance agency to do so.

With respect to the Erdheim funds, respondent "didn't give [Lakind] a satisfactory answer as to why he didn't" remove those monies from the trust account. Thus, she reiterated to him the instructions following the first random audit, that is, to remove the funds from the trust account.

Respondent acknowledged that, as part of the 2003 audit, Lakind had instructed him to open a separate trust account for Erdheim's benefit. He stated that he had not followed that instruction because Erdheim had told him that he was scheduled for release from prison "at any time." Thus, respondent did not see the "wisdom" in setting up a separate account, if he was no

longer going to be "doing stuff" for Erdheim. Indeed, according to respondent, Erdheim was out of jail by September 2003, whereupon "he took over his own stuff."

Lakind testified that not only were the Erdheim funds not removed from the trust account, in July 2003, but "money began to come in and go out again on Erdheim, like [she] had not told him to take the money out." Specifically, between July 1 and September 30, 2003, two deposits totaling $16,000 were made. Juxtaposed against these two deposits were twelve disbursements. By September 30, 2003, the trust account balance was $14.10, where it remained until June 8, 2009, when a trust account check issued to respondent's law firm zeroed out the account.[4] This took place one week before the second random audit.

Respondent denied that, after September 30, 2003, he had taken in any monies belonging to Erdheim and held them as escrow agent or trustee, or in some other fiduciary capacity. Lakind agreed that there had been no activity in respondent's trust account preceding the second audit.

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[4] As for the $14.10 balance in the trust account, respondent testified that he applied it to $70 in unbilled disbursements and wrote off the difference.

Respondent testified that all disbursements on Erdheim's behalf had been made pursuant to Erdheim's instruction. He claimed that he had asked his secretary to zero out the $14.10 balance in 2003, but, he believed, she "sort of left it there," as a reminder for respondent to consider issuing a bill to Erdheim.

III. THE NOVEMBER 12, 2009 DEMAND AUDIT

At the November 12, 2009 demand audit, respondent produced the Erdheim file. It contained evidence of a number of transactions that formed the basis of some of the ethics charges against him. Examples of the transactions are detailed below.

Lakind and respondent testified about respondent's firm's history of professional liability insurance and the trust account transactions that he carried out on behalf of Erdheim.

A. The Professional Liability Insurance Issue

At the hearing, respondent admitted that he did not have professional liability insurance at the time of either random audit and during the period in between. He denied that the lack of insurance was the result of a desire to save money. He testified that, prior to 2000, the firm, which was comprised of

him, his brother, and their father, did maintain liability insurance. He became a sole practitioner after his father stopped practicing, in the early 1990s, and his brother died, in June 1996, although the firm continued to operate as Cavaliere & Cavaliere, P.A. He stated that the failure to maintain malpractice insurance "was just one of those things that – fell away."

Respondent claimed that, after the 2003 audit, respondent claimed, he contacted several carriers, who sent "huge questionnaires." He "just plain never followed up on it, it just got put aside, and one thing led to another, the years rolled by, and [he] received the letter from Attorney Ethics for the second random audit."

Respondent denied that he had told Lakind, at the June 2009 audit, that the policy had "just expired." He maintained that he had admitted to her that he did not have insurance, that he "hadn't had a policy in effect since the last time she was there," that he did have "several quotes out," and that the insurance would probably be in place within thirty days or so.

Contrary to his earlier representation to Lakind, respondent did not dissolve the professional association because, after consulting with an accountant, "it really didn't

make sense." As of January 17, 2012, the date of respondent's testimony, the firm was covered by liability insurance.

In a June 20, 2009 post-audit letter to respondent, Lakind referred to respondent's statement, at the random audit earlier that month, that "the professional liability policy that had expired" was a policy that had been in effect about three-to-four years ago, rather than a policy that had been "recently obtained." Lakind requested a copy of the "last policy you maintained, which had expired previously." Despite respondent's claim, at the hearing, that he had never told Lakind that the policy had recently expired, he did not correct Lakind's misunderstanding, expressed in her letter, that the policy had expired. He did not do so because he "figured all [he] would do there is start up a fight." He explained: "My impression of Miss Lakind was that she was a person who didn't like to be questioned or challenged and I just didn't see anything good happening for me if I started doing that." Although respondent believed that Lakind had started off with a cordial attitude, when it came to the insurance issue, "her demeanor indicated that she was irritated and angry."

Yet, Lakind's testimony on the issue of respondent's statement to her that the policy had "just expired" was somewhat

inconsistent. On the one hand, she testified that respondent had told her that the policy had "just lapsed," but that, later during the audit, he had told her that he believed that the policy had lapsed "a few years ago." On the other hand, Lakind's notes from the 2009 random audit stated that respondent had claimed only that the policy had "lapsed," not that it had "just expired." She admitted that "just expired" were her words. Nevertheless, she expressed her belief that the context of the conversation suggested quite strongly that this is what respondent wanted her to believe. She explained:

> If it didn't lapse, he would have said to me, you know, Mrs. Lakind, I haven't had a policy in years, I don't have anything. He wanted me to believe that he [sic] just lapsed, and he was getting quotes, and it would all be straightened out very quickly, that was the impression. You're asking me what I thought. That's what I thought, that's why I asked him to get me a copy of the expired policy.
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> [1T123-16 to 23.]

B. Michael Erdheim

Respondent testified that he met Erdheim in "1992ish," through a client named Roger Maggio, whom respondent had represented in some real estate matters. According to respondent, when Maggio needed a divorce lawyer, he hired

Erdheim, whom Maggio had met years before, through a business partner. Because Erdheim, a wealthy New York lawyer, was not licensed to practice law in New Jersey, respondent agreed to sponsor his admission pro hac vice, so that he could represent Maggio. In the beginning of the divorce proceeding, respondent and Erdheim spent a fair amount of time together, attending court appearances. They became friendly.

Lakind testified that, in July 1993, Erdheim was disbarred by the State of New York for the knowing misappropriation of client funds. In 1994, he was convicted on four counts of larceny and sent to jail. He also declared bankruptcy in 1994.

Erdheim was released from prison in late August or early September 2003. By April 2010, The Lawyers' Fund for Client Protection of the State of New York (the New York Fund) had paid $993,099 in claims to Erdheim's former clients.

Respondent testified that, early in his representation of Erdheim — the late 90s, when Erdheim was in prison — he had sent a letter to Erdheim "sort of outlining what I would do." Erdheim had asked him to "essentially represent him on cases that involved collection of money, so that he at least had a place to deposit it, and someone to, you know, do the banking." Erdheim told respondent that, although he could "go

to court," he could not make phone calls, maintain a check book, or "do any banking" from prison. Respondent agreed to carry out these transactions on his behalf.

Respondent received payment for these services on "a couple of occasions," although he did not bill Erdheim for them. According to Lakind, respondent's records contained no copy of a retainer agreement between him and Erdheim or any of Erdheim's corporate entities.

As part of the representation, Erdheim would tell respondent about a case that he had settled, or was in the process of settling, and request that respondent permit the funds to be directed to him. When respondent received the monies, he deposited them into his trust account and "sort of awaited further instructions from Erdheim as to what to do with it." Respondent emphasized that, for any transaction to take place within any account, Erdheim's written authorization was required.

Lakind stated that there was no issue of stealing or improper diversion of Erdheim's funds in this case. She agreed that respondent simply carried out Erdheim's instructions.

Respondent claimed that Erdheim "never really gave [him] the details" underlying his criminal conviction that he "never

really asked." Nevertheless, he understood, at the time, that it arose out of business matters, rather than client matters. Respondent's knowledge of Erdheim's theft of client monies did not come until well after he had ended his professional relationship with Erdheim, in 2003.

With respect to respondent's knowledge of Erdheim's situation at the time they entered into their financial relationship, respondent testified that Erdheim told him that he was suspended from practice by the State of New York and that he had been arrested.

Respondent knew of the New York ethics proceeding against Erdheim "early on," because he had disbursed some of Erdheim's funds from his trust account to Erdheim's attorney in that matter. Respondent also was aware that two attorneys were representing Erdheim, one in the criminal action and another in the ethics proceeding. Respondent did not think that he had asked Erdheim about the ethics proceeding, musing that "the guy was convicted of [sic] crime, so there's gonna' be an Ethics action."

Respondent did not know about the New York Fund's activity with respect to Erdheim until after the disciplinary charges were brought against respondent in this matter, although, in

around 2007, Maggio mentioned to respondent that Erdheim had been accused of taking client monies. Erdheim had never brought that up with respondent. As shown below, it appears that respondent did not learn that Erdheim had stolen from his clients until sometime between 2007 and 2009.

When asked why he did not think it was important to find out more information about Erdheim's theft of what turned out to be nearly a million dollars from his clients, respondent replied:

> Well, certainly it disturbed me, you know. I would have preferred to have known that way back when. I didn't. I was a little disappointed in it, but as you point out, you know, it's not like I was involved in his criminal matter early on. It's not like I voir dired him on it. I didn't really know all the facts and circumstances. I knew what Maggio had told me. I didn't know how accurate that was and I didn't see the point or the purpose or the wisdom to voir dire Erdheim in 2008 or 2009, wherever

> it was that I had the conversation with Maggio. I just didn't see the point of it.
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> [3T36-8 to 20.][5]

Respondent testified that he believed that going to the New York Fund and asking whether it had paid out monies on Erdheim's behalf would have been a violation of his duty to Erdheim. He did not see the point of raising it with Erdheim because, "by that time, 2008, 2009"," he did not have a lot of contact with him. He seemed to think that Erdheim was disbarred because of the criminal conduct that resulted in imprisonment. He asked the presenter, at the hearing: "Are you saying that the reason for his disbarment was because of client funds?"

Respondent explained that, when Erdheim was in jail, respondent did not believe that he was obligated to determine whether the money received into his trust account should go to some other entity. As Erdheim's lawyer, he did not believe that he was obligated to "search out the world to find out whether or not he owes money to anybody, and contact them and tell them." Moreover, he neither believed nor suspected that Erdheim had

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[5] "3T" refers to the September 28, 2012 hearing transcript.

done anything wrong, during the time that respondent had represented him. To the contrary, respondent believed that Erdheim was doing everything right. As an example, respondent mentioned a payment to the IRS that he had made on Erdheim's behalf.

Lakind testified that she had no personal knowledge, in 2003, that respondent knew that the New York Fund had paid out nearly $1 million in claims against Erdheim. After the June 2009 random audit, she decided to contact the New York Fund's Executive Director, Timothy O'Sullivan, because she was not satisfied with respondent's explanation as to why he had never moved Erdheim's funds out of the trust account. She wrote to Sullivan on December 23, 2009, requesting a list of all awards that the New York Fund had paid on claims filed by Erdheim's clients. She also asked him whether the New York Fund's right to seek reimbursement from Erdheim would survive "a declaration of bankruptcy."

On April 7, 2010, Sullivan wrote to Lakind, informing her that, as of that date, the New York Fund's trustees had approved twenty awards, totaling $993,099, to Erdheim's former clients. No additional claims were pending at that time. The New York Fund was pursuing Erdheim for restitution and, to date, it had

recouped $32,351.02. Sullivan explained that Erdheim's debt to the New York Fund, arising out of the payment of these claims, "would not necessarily be discharged in bankruptcy."

When asked to identify the evidence that demonstrated respondent's knowledge of the claims paid by the Fund, Lakind testified that, because the New York Fund paid nearly $1 million in claims, between 1993 and 2000, and because respondent knew that Erdheim had been disbarred, "he knew about the fund." Yet, she testified that she did not "learn" that respondent had been given notice of the Fund's payouts and that she did not "learn" whether the documents were sent to respondent.

Lakind was asked whether respondent knew that Erdheim had been disbarred for knowing misappropriation of client funds. She answered: "No doubt in my mind." When asked for the basis for her conclusion, Lakind testified:

> First of all, I base it on the fact that [Erdheim is] friendly with him, he's so friendly with him that he entrusts him to take care of this money when he hasn't got anybody else in the world. If you read his letters to respondent, he signs them with love, just the way you would do personal letters. I don't know if men say that, but that's what his letters said. These are very personal letters, so [respondent] personally knew him, he knew when — he knew what he went to jail for, and he certainly knew that he was disbarred for knowing

> misappropriation of funds, which in New York is a little more difficult than in New Jersey.
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> [1T147-23 to 1T148-9.]

In addition to his ethics problems, Erdheim also was in bankruptcy. He told respondent about the bankruptcy, the "feuds" he was having with the trustee, and the trustee's applications to abandon various assets, including accounts receivable. Erdheim told respondent that he had more than $1 million in accounts receivable "and all sorts of other things."

C. The Erdheim Trust Account Transactions

Lakind testified that the Erdheim ledger for respondent's trust account was opened on May 1, 1996, when respondent deposited a New York law firm's check, payable to Erdheim, in the amount of $40,340.14, representing "a participation fee" in a matter captioned Bockler v. LeFrak. Lakind had no opinion on whether respondent should have paid these monies over to the New York Fund. Her only concern was that the funds should have been placed in a separate account, not the trust account.

Twelve days later, on May 13, 1996, $500 was paid out of respondent's trust account to Erdheim's daughter, Yael. His son, Marc, received $10,000 on August 16, 1997. Several

payments were made to respondent's children, between 1996 and 2003. Respondent testified that these payments were made at Erdheim's direction.

On September 12, 1996, $232.91 was paid to CT Corporation on behalf of "M. Enterprises, Ltd.," which was the company through which much of Erdheim's money was conveyed in and out of the trust account. Lakind testified that M. Enterprises was set up in 1994, "right after [Erdheim] declared himself bankrupt." According to the company's 1998 application for reinstatement of its corporate charter, signed by respondent under a power of attorney, Erdheim was the president. Respondent had denied to Lakind that he held a power of attorney. The application was accompanied by a $270 trust account check, dated September 16, 1998, representing the reinstatement fee. This made the company "viable again."

On May 18, 2001, pursuant to Erdheim's instructions, respondent opened a $90,000 brokerage account in the name of M. Enterprises, Ltd. Erdheim suggested that this initial deposit be described as either a capital contribution or a loan. Lakind testified that, although M. Enterprises had a money market account at the time of the 2003 random audit, respondent told her that there was no such account.

Respondent also failed to tell Lakind about another account belonging to M. Enterprises, with the Greater Community Bank in Totowa, which existed at the time of the July 2003 random audit.

Respondent explained that he never told Lakind about these accounts because they were not trust accounts. They were Erdheim's accounts. Respondent understood that Lakind wanted to know about trust accounts.

As an example of respondent's handling of a matter, on behalf of Erdheim, with monies held in the trust account, Lakind testified about the Dolores Columbo account receivable, which was at issue in the bankruptcy proceeding. Apparently, Columbo owed $20,000 to Erdheim. She offered to settle the debt for $6000. Erdheim, through respondent, offered the bankruptcy trustee $6750, in exchange for his abandonment of that claim against Columbo.[6] The $6750 tendered to the trustee, on behalf of Erdheim, was in the form of a check drawn against respondent's trust account. Columbo, however, paid the $20,000

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[6] If the trustee abandoned a claim, respondent would be able to collect on the debt.

to the trustee. The $6750 was returned to respondent's trust account.

Furthermore, according to Lakind, respondent conspired with Erdheim to defraud the bankruptcy court by channeling transactions through his trust account "that didn't belong there." For example, Lakind testified at length about a loan that was made through the trust account to Rochelle Singer.

On September 16, 1996, two trust account checks, one for $4750 and the other for $18,469, were issued to Singer, with "M. Enterprises" noted on each of them. These payments were described in the client ledger as "part of mortgage loan." According to Lakind, these checks, plus checks issued to the Garetano Agency ($591), CHM Abstract ($80), Gibraltar Title Agency ($350), and to respondent as an attorney fee ($760), totaled $25,000.

Lakind testified that respondent's file contained notes that shed some light on the loan to Singer. A handwritten note, dated August 7, 1996, stated, "Mike suggest MJC 'as agent for undisclosed principal' or M Enterprises can be lender." Another note on the same page stated:

> - MIKE ERDHEIM — is lending $25,000 to Rochelle Singer (she does not know the lender is Mike) & he does not want her to

> know – mort & prom note for 1 year at 11% but Matt to take 750 to 1000 for fee (whatever he feels is appropriate) she will call – mortgage to be on 123 Suffolk Ave., Staten Is – needs money to pay off sheriff foreclosing on Pa prop.

[1T59-1T60;Ex.16.]

A "telephone & event log" entry from respondent's Erdheim file, dated August 7, 1996, also contained notes regarding the Singer loan. An entry on August 8, 1996, written by respondent's secretary, stated that Erdheim's "name is not to be mentioned in this transaction says she is a 'creditor' of Mike!"

Respondent testified that Singer was Erdheim's friend, who had a vacation home in Pennsylvania. Apparently, she had fallen behind on her mortgage payments. Erdheim wanted to lend her money so that she would not lose the home. However, Erdheim did not want Singer to know that he was the lender, because he did not want to risk injuring their friendship. Nevertheless, according to respondent, Erdheim negotiated the amount of the loan, its terms, the interest rate, and "all of the details" and told Singer that respondent would probably represent the lender.

Singer contacted respondent, who told her that he would give her money from his trust account. He drafted all the necessary documents. As to the note in the file that stated

that Erdheim did not want his name mentioned, respondent testified:

> Now, I did know that Ms. Lakind, she was going through the files that she had asked me to turn over to her, and I did, and she noticed that there's a telephone log notation in my secretary's handwriting that says Rochelle Singer called and not to mention Michael's name, because she was a creditor, I did not discuss that with Singer, but I did understand from Erdheim that she was a creditor in the bankruptcy, in my mind, it didn't matter, none of that mattered, he can be a creditor in a bankruptcy and a borrower after the bankruptcy, because there's two different events, a bankruptcy is a snapshot of your finances, as of the date of filing, and everything after that is everything after that. And that was it, the transaction, and then, several months later, she repaid it.
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> [2T47-5 to 20.][7]

Respondent denied that he and Erdheim had conspired to conceal the loan to Singer from the bankruptcy court and the New York Fund. He maintained that Erdheim simply did not want Singer to know that he was the lender. Therefore, the loan was arranged from M. Enterprises.

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[7] "2T" refers to the January 17, 2012 transcript of the ethics hearing.

On cross-examination, respondent testified that he did not know if Erdheim's desire not to injure his friendship with Singer was reflected in any written instructions, correspondence or notes. He could not recall Erdheim stating that he did not want Singer to know the source of the loan because she was an unsatisfied creditor. He denied that was a problem in a "legal sense."

At this point in the ethics hearing, there was some testimony about the mechanics of bankruptcy proceedings. Respondent stated that, although he did not handle bankruptcy matters, he had a "working knowledge" of some basic concepts. Specifically, he understood that a bankruptcy court is only interested in the state of the debtor's "financial world" up to the date that the petition is filed. "What happens after that is separate and distinct," he stated. Thus, according to respondent, one could be a post-filing creditor or a post-filing debtor.

Respondent denied having conspired with Erdheim to defraud the bankruptcy trustee or the New York Fund. With respect to all monies that he received and placed into his trust account, he understood that Erdheim was entitled to those funds and that any underlying claims to the monies had been abandoned by the

bankruptcy court. Because Erdheim was in bankruptcy, he had asked Erdheim to provide him with paperwork to establish his entitlement to the proceeds. According to respondent, Erdheim was "very good" about getting paperwork to him that satisfied him as to Erdheim's entitlement to the monies. Indeed, the trustee in bankruptcy never made a claim to respondent for any of the monies.

Respondent made no inquiry as to whether there had been "any supervening interest in those monies by any entities or person." He did not believe that he had a duty to undertake such an inquiry, unless he had "some reason to believe that it exists or a fraud was being committed," which he did not.

As to the Singer loan, she repaid it on January 27, 1997, with a check for $26,009.56. Respondent deposited the check into his trust account on May 6, 1997. He could not explain the three-month delay, but speculated that he had been awaiting Erdheim's instructions during that time. He deposited the money into the trust account instead of the M. Enterprises money market account, because that is what Erdheim instructed him to do.

Lakind also testified about a number of transactions involving a company called Webmaster – USA, which was owned by

Maggio. Webmaster provided internet services to small companies. Her testimony suggested that these transactions were designed to defraud the bankruptcy court.

On August 3, 1997, Erdheim provided Maggio with a pro forma letter, created by Erdheim for Maggio to send to the trustee in bankruptcy. The pro forma letter contained Maggio's offer to purchase for $10,000 Erdheim's limited partnership interest in Beckley Hotel Associates, which the trustee had declared to have "no market value" and which had been assigned to an individual named Ronald Krakauer. The offer that Maggio was to make was "not subject to the Lien of Mr. Krakauer."

Underneath the pro forma letter, Erdheim wrote the following note to Maggio:

> Roger: I will if you agree have Matt [respondent] arrange for payment to you or see if he will do this for me. The Trustee and Kraukauer are playing games. In the past several years, the partnership interest has paid more than $5,000 in distributions more as each year has gone by.
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> [Ex.25.]

On August 11, 1997, Maggio sent the following fax to respondent:

> Matthew: Mike called me Sunday + need [sic] to have this "letter" sent by me to the party listed. He said 10K is in the escrow account. He wants to buy the limited

> [partnership] unit. Do you want me to send it??
>
> [Ex.26.]

On August 13, 1997, respondent wrote to the trustee and stated that he represented Allied Partners, Ltd., which was interested in buying Erdheim's interest in Beckley Hotel Associates for $10,000, free of the lien held by Krakauer. When Lakind was asked if there was a transaction that correlated with this offer to the trustee, she pointed to an entry in the ledger, dated December 26, 1997, at which time respondent issued a $10,000 trust account check to Webmaster — USA with the notation "investment/one half unit."

Respondent agreed that the $10,000 payment to Webmaster, on December 26, 1997, was for the purchase of Erdheim's interest in the Beckley Hotel, which the trustee had determined to have no value. After some discussions between Erdheim and Maggio about whether Maggio had the funds, Erdheim instructed respondent to take $10,000 of his funds to support the offer. Respondent sent the $10,000 to the trustee, on behalf of Maggio's operating company, Allied Partners. The trustee rejected the offer, claiming that someone else owned the interest. When the funds were returned to respondent, they were then used to buy a one-

half unit in WebMaster. A second one-half unit was purchased for $10,000, on January 15, 1998.

Respondent also testified that there was a later investment, in 2001, at $50,000. He explained his role in these Webmaster investments:

> I mean, I don't really understand these things, I handle the transaction, in terms of basically pushing through the paperwork. I didn't make any decisions or recommendations on the wisdom of it, which is not my thing, he did all of that himself, but he, "he" meaning Erdheim, later also bought another block of stock, pursuant to another offering, although that one had a provision that he could – it was a $50,000 investment for a certain amount of stock, the other was bonus stock and with the right to redeem and get back the $50,000. Erdheim elected to redeem, he got the $50,000 back, although it didn't go to me. I'm not sure exactly where it went.
>
> [2T48-22 to 2T49-9.]

On August 24, 1998, respondent issued a $20,000 trust account check to Maggio, which represented a loan from Erdheim to Maggio for a deposit on a co-op. According to Lakind, this loan was perfected via a "security agreement" between Maggio and Erdheim, on February 24, 1999, which covered a $20,000 promissory note, dated August 25, 1998, and the balance of legal fees owed by Maggio to Erdheim in the Maggio v. Maggio matter.

According to someone's handwritten note, the loan to Maggio was made "in exchange for shares." This loan would later become an issue in the New York Fund's attempt to seek restitution from Erdheim.

Lakind testified about a number of additional transactions, over the years, involving Susan Fishkin, Ruth Flynn, Barbara Toback and others. Presumably, these transactions represented additional evidence that respondent and Erdheim were working together to hide the monies from either the bankruptcy court or the New York Fund.

In early 2005, the New York Fund conducted an assets deposition of Erdheim, who failed to disclose the $20,000 loan to Maggio. On May 6, 2005, Erdheim and the New York Fund entered into an agreement regarding Erdheim's outstanding restitution owed to the Fund. Pursuant to the agreement, Erdheim was to pay $150 per month to the Fund, plus fifty percent of all net accounts receivable that he collected.

Apparently, Maggio did not repay the $20,000 loan, as a result of which Erdheim sued him. After the New York Fund learned of the lawsuit, on July 20, 2010, the Attorney General of the State of New York wrote to Erdheim about the $20,000

loan, advising him of the consequences of his wrongdoing in failing to identify it.

On July 21, 2010, seemingly unaware of the Fund's letter to Erdheim the day before, respondent wrote to the New York State Office of the Attorney General, stating that, given Erdheim's limited income, the $150 monthly restitution payment was "in excess of what [he] should be paying." The letter made no mention of Erdheim's connection to Webmaster or M. Enterprises, the money market account that respondent had opened for him, the money that he had given to Erdheim's children, or the loans that he had paid through his trust account.

The DEC determined that respondent had failed to maintain professional liability insurance, which it found to be a violation of RPC 1.15(d). On the other hand, the DEC determined that respondent's decision to retain Erdheim's monies in the trust account, after Lakind had instructed him to move them, was justified because Erdheim was to be released from prison shortly and would take over his own affairs at that time. Therefore, the DEC concluded, respondent did not violate the recordkeeping rules in this regard.

Because "[a]ll of the alleged conduct occurred before a disciplinary proceeding was instituted against respondent," the

DEC concluded that there was no evidence that he had failed to cooperate with disciplinary authorities "in connection . . . with a disciplinary matter," a violation of RPC 8.1(a) and/or (b). It did find, however, that respondent violated RPC 8.4(c), when he told Lakind, at the July 2003 random audit, that he expected to have insurance in place within sixty days.

Finally, the DEC found no violation of RPC 8.4(d) arising out of the transactions in the trust account. The DEC explained:

> 73. The Complaint alleges that "[t]hrough the use of his attorney trust account, respondent conspired by aiding Erdheim in fraudulently concealing financial assets to which third parties, either the bankruptcy court or the NY Lawyers' Fund had an interest. . ." (Complaint, p.8,¶17.) While each of the cited transactions by the OAE did occur and were done at the request and direction of Erdheim, there was no competent evidence – let alone clear and convincing evidence as required – offered to establish that (a) respondent was not acting as counsel for his client, (b) respondent had knowledge that any third party had an actual interest in those assets, (c) the transactions were alone or together unlawful or (d) respondent completed those transactions with the intent of defrauding any creditor or assisting Erdheim in defrauding any creditor.
>
> 74. A review of the RPCs and case law has not led us to any authority, nor did counsel participating in this case so cite, for the

> proposition that an attorney has an affirmative duty to investigate the source of a client's funds and subsequently determine if another person or entity might have a superior claim to those monies.
>
> 75. Indeed, to the extent respondent voluntarily turned over Erdheim's monies in his trust account without Erdheim's consent, respondent might be subject to discipline. See, e.g., In re Wilson, 81 N.J. 451 (1979).
>
> 76. In this case, the clear and convincing evidence does not establish that respondent violated RPC 8.4(d) in the handling of matters for Erdheim.
>
> [HPR¶73-HPR¶76.][8]

According to the DEC, there was no evidence that demonstrated respondent's knowledge of any payments made by or on behalf of the New York Fund. Moreover, although it was clear that, at times, Erdheim wanted to hide his identity with respect to certain transactions, there was no clear and convincing evidence that he intended to defraud any creditor or that respondent had conspired with him to do so.

As indicated previously, the DEC recommended the imposition of a reprimand.

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[8] "HPR" refers to the March 5, 2012 hearing panel report.

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

Respondent violated RPC 1.15(d), which requires all attorneys to comply with the provisions of R. 1:21-6, which, in turn, sets forth the recordkeeping requirements. Specifically, R. 1:21-6(j) prohibits an attorney, after two years, from continuing to maintain in the trust account "trust funds which are either unidentifiable, unclaimed, or which are held for missing owners." Although respondent violated this paragraph of the rule as of the date of the second random audit, in 2009, he was not in violation at the time of the first random audit, in 2003.

At the time of the 2003 random audit, the Erdheim ledger card reflected just about seven months of inactivity, with the last transaction having taken place on December 14, 2002. Moreover, the funds were not unidentifiable, unclaimed, or held for a missing owner. With respect to this allegation, therefore, the charge is dismissed.

The charge may be sustained, however, as to the period between the 2003 and 2009 random audits. There was no activity, between September 30, 2003 and June 8, 2009. Yet, the account

had a $14.10 balance, during that time. Clearly, these funds were either unidentified or unclaimed, during this six-year period, a violation of R. 1:21-6(j) and, thus, RPC 1.15(d).

Another violation of RPC 1.15(d) involves respondent's use of his trust account to maintain Erdheim's personal funds and to conduct banking and other financial transactions on Erdheim's behalf. R. 1:21-6(a)(1) requires an attorney to keep the attorney trust account "separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity." Here, respondent managed Erdheim's financial affairs, receiving and disbursing funds on his behalf. Although respondent testified that he and Erdheim had an attorney-client relationship during the period in which the funds were kept in the trust account, the transactions that respondent carried out were not typical attorney-client transactions. Rather, they were transactions of a quasi-fiduciary nature, undertaken as an act of kindness to Erdheim, whose incarceration limited his ability to manage his finances. These funds did not belong in respondent's trust account. Therefore, we find that respondent violated RPC 1.15(d) by placing the funds in the trust account.

As stated previously, respondent did not comply with Lakind's request, at the 2003 random audit, that he move the Erdheim funds out of the trust account. Instead, for the next three months, there was a flurry of activity with Erdheim's "account." Although respondent claimed that he did not see the "wisdom" of setting up a separate account, because Erdheim was to be released from prison at "any time" in July 2003, that is beside the point. Erdheim's funds did not belong in the trust account; the OAE instructed respondent to move them into a separate account. Respondent did not do so, a continuing and willful violation of R. 1:21-6(a)(1).

Respondent also was charged with having violated RPC 1.15(d), as a result of his failure to maintain professional liability insurance and to comply with the OAE's demand that he obtain the insurance. This obligation, however, is not imposed by R. 1:21-6 but, rather, R. 1:21-1A(3), which governs professional corporations for the practice of law, and requires such corporations to "obtain and maintain in good standing" lawyers' professionally liability insurance. More properly, respondent's failure to maintain the insurance was a violation of RPC 5.5(a)(1), which prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the

legal profession in that jurisdiction.[9] Indeed, in In the Matter of F. Gerald Fitzpatrick, DRB 99-046 (April 21, 1999), we imposed an admonition on an attorney who, for a six-year period, practiced law in a professional corporation named Fitzpatrick & Fitzpatrick, P.A., without the required malpractice insurance. His violation of R. 1:21-1A(3) was deemed a violation of RPC 5.5(a).

Related to respondent's failure to maintain professional liability insurance for Cavaliere & Cavaliere, P.A. is the claim that he lied to Lakind, at the 2009 random audit, when he told her that he had had a policy, but that it had "just expired" and that he was in the process of obtaining quotes for a new policy.

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[9] R. 1:20-4(b) requires a complaint to "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated." In this instance, the complaint did not charge respondent with a violation of RPC 5.5(a)(1). However, a determination that respondent violated RPC 5.5(a)(1) would not violate R. 1:20-4(b) because the allegations of the complaint clearly delineate respondent's engagement in the practice of law in violation of "the regulation of the legal profession" in this state and no other RPC addresses this conduct. The erroneous citation to RPC 1.15(d) in the complaint, is a matter of form, rather than substance, and does not amount to a due process violation.

Respondent was charged with having violated RPC 8.4(c) as a result of this statement. The record, however, lacks clear and convincing evidence that respondent made such a claim.

First and foremost, Lakind's testimony on this issue was inconsistent. She admitted that her notes did not reflect that respondent had stated to her that the policy had "just expired." Moreover, she admitted that, at some point during the 2003 audit, he had told her that the policy had lapsed about "a few years ago." Indeed, the charge that respondent had lied to Lakind about the policy's having "just expired" was based on her interpretation of the context of an exchange between her and respondent, at the 2003 audit, about the lack of insurance. As she stated, if the policy had not just expired, respondent "would have said to [her], you know, Mrs. Lakind, I haven't had a policy in years, I don't have anything."

As further proof, Lakind pointed to respondent's failure to correct what appeared to be her misunderstanding, in her June 2009 letter to him, that he had stated to her that the expired policy had been recently obtained, before telling her that it had been in effect a few years ago. This does not amount to clear and convincing evidence that respondent lied to the OAE about having had malpractice insurance that "just expired,"

which was either a misunderstanding or supposition on Lakind's part. Respondent vehemently denied that he had told or suggested to Lakind that the policy had just expired. Lakind's notes unambiguously state that, at the audit, he had told her that the policy had expired years ago. Respondent testified that he did not correct what appeared to be Lakind's misunderstanding in that June 2009 letter, essentially because he was afraid of her.

The "just expired" claim aside, it is undisputed that respondent did tell Lakind that the policy had either lapsed or expired, if not recently, then certainly within the six-year period between random audits. His claim to Lakind that he had the insurance in effect "a few years ago" is troubling. The lack of insurance was pointed out to him, at the audit in 2003. He did not have it then and he did not obtain insurance thereafter. He knew, in 2009, that he had not obtained insurance after the first random audit, in 2003. Thus, he violated RPC 8.4(c), when he told Lakind that he had had a liability insurance policy in place, but that it had either expired or lapsed.

As for his claim that he was in the process of getting quotes at the time of the June 2009 demand audit, nothing in the record disputes that statement.

With respect to respondent's claim that he would obtain insurance within sixty days or convert the professional corporation to a sole proprietorship, we find no clear and convincing evidence that he had no intention of taking this action, at the time that he made that statement to Lakind. As respondent testified, the task simply got away from him. In the absence of clear and convincing evidence that respondent had no intention of procuring the malpractice insurance, the RPC 8.4(c) charge as to that allegation must fall. See, e.g., In re Uffelman, 200 N.J. 260 (2009) (where we noted that, if an attorney makes a statement believing it to be true at the time that he makes it, the statement is not a misrepresentation; a misrepresentation is always intentional and, therefore, does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances).

Respondent also was charged with having violated RPC 8.4(c), because he told the OAE that he held no other account for Erdheim, at a time when there were a money market account and a regular bank account for M. Enterprises. Respondent

testified that he understood Lakind to be asking him only about trust accounts. There is a lack of clear and convincing evidence to establish this statement as a misrepresentation, rather than a misunderstanding.

Finally, we dismiss the RPC 8.4(c) and RPC 8.4(d) charges, allegedly arising out of respondent's and Erdheim's conspiracy to hide his assets from the United States Bankruptcy Court and the New York Fund. Although some of the transactions certainly created an air of suspicion, the OAE offered no evidence that any of the transactions defrauded the bankruptcy court or the New York Fund.

Lakind admitted that she knew very little about bankruptcy. She had no specific information about Erdheim's proceeding; the trustee did not assist her in any way, in determining whether Erdheim was or was not entitled to take control of or dispose of any of the assets at issue. Respondent, on the other hand, testified that all of the transactions were above board and that he had satisfied himself that Erdheim was entitled to the monies that came in and went out of the trust account. The OAE offered no expert on how assets are determined to be a part of a bankruptcy estate and whether the transactions at issue were a

part of the estate, or even to challenge respondent's assertions in this regard.

Similarly, with respect to the New York Fund, the OAE produced no evidence to support the allegation that any of the transactions were designed to deny the Fund any monies that it was due from Erdheim. The Fund's director told Lakind that Erdheim's debt to the Fund "would not necessarily be discharged in bankruptcy," but she never verified whether this was the case with any of the transactions at issue. Moreover, respondent testified that he was unaware of the New York Fund's involvement until many years after the last transaction through his trust account had taken place. Nothing contradicted his testimony.

The most significant statement on Lakind's part was that she had no personal knowledge that respondent knew that the Fund had paid out nearly $1 million in claims against Erdheim. Instead, she rested her conclusion that he had such knowledge on the fact that, because he knew that Erdheim was disbarred, he had to know that the Fund had claims against Erdheim. She contended that respondent had to know that Erdheim was disbarred for knowing misappropriation, because they were friends and because Erdheim signed letters to respondent with "love." None of these contentions, however, are sufficient to establish

respondent's knowledge of the New York Fund's entitlement to any funds that he collected and disbursed on Erdheim's behalf.

In short, the record lacks clear and convincing evidence that respondent engaged in any transaction on Erdheim's behalf that defrauded the bankruptcy court or the New York Fund. We, therefore, dismiss the RPC 8.4(c) and RPC 8.4(d) charges.

There remains for determination the appropriate quantum of discipline to be imposed on respondent for his recordkeeping violations, his failure to obtain and maintain professional liability insurance, and his misrepresentation to the OAE that he had obtained insurance but that it had expired, violations of RPC 1.15(d), RPC 5.5(a)(1), and RPC 8.4(c).

A misrepresentation in any context typically results in the imposition of at least a reprimand. The Court has consistently imposed reprimands for misrepresentations to clients, disciplinary authorities, and the courts. See, e.g., In re Kantor, 165 N.J. 572 (2000) (attorney misrepresented to a municipal court judge that his vehicle was insured on the date it was involved in an accident when, in fact, the policy had lapsed for nonpayment of premium); In re Powell, 148 N.J. 393 (1997) (attorney misrepresented to a district ethics committee that an appeal had been filed; attorney also exhibited gross

neglect and lack of diligence and failed to communicate with his client); and In re Kasdan, 115 N.J. 472, 488 (1989) (attorney intentionally misrepresented to a client the status of a lawsuit). As indicated previously, an admonition has been imposed on an attorney whose firm was not covered by malpractice insurance for a period of six years. In the Matter of F. Gerald Fitzpatrick, supra, DRB 99-046 (April 21, 1999). An admonition also is the usual form of discipline for recordkeeping violations. See, e.g., In the Matter of Marc D'Arienzo, DRB 00-101 (June 28, 2001) (failure to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards). In this case, however, respondent did not simply use the trust account improperly. Rather, after the OAE had expressly instructed him to move the funds to another account, an instruction to which he ostensibly assented, he made a conscious decision to ignore that direction and to retain the funds in the trust account, in any event.

In both of the above instances, respondent's disregard of the OAE's instructions were continuing and willful violations of the relevant RPCs. For this reason, the otherwise appropriate discipline for such violations – an admonition – is insufficient in this case. All in all, we find that a censure is

appropriate, under the circumstances. Although respondent had a twenty-year unblemished disciplinary history at the time of the first random audit, the fact that these violations continued through to a second random audit, six years later, justifies the imposition of a censure.

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

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Matthew John Cavaliere
Docket No. DRB 12-147

Argued: September 20, 2012

Decided: November 5, 2012

Disposition: Censure

Members	Disbar	Suspension	Censure	Dismiss	Abstained	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
Chief Counsel