SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-238
District Docket No. XIV-2008-0493E

IN THE MATTER OF	
JOHN A. KLAMO	
AN ATTORNEY AT LAW	

Decision

Argued: January 17, 2013

Decided: February 5, 2013

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

Respondent appeared, in lieu of his counsel.[1]

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

This matter was before us on a recommendation for a three-month suspension filed by Special Master Philip Stephen Fuoco. The five-count complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.15(a) (failure to safeguard client trust funds), RPC 1.15(b) (failure to promptly deliver

[1] Because counsel was out of state on January 17, 2013, respondent appeared on his own behalf.

trust funds belonging to clients and third parties), RPC 8.1(a) (making material misstatements of fact to ethics authorities), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.4(d) (conduct prejudicial to the administration of justice), and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985).

The Office of Attorney Ethics (OAE) recommends a three-month suspension. For the reasons expressed below, we agree that a three-month suspension is appropriate discipline.

Respondent was admitted to the New Jersey bar in 1982 and the Pennsylvania bar in 1981. He maintains a law office in Cherry Hill, New Jersey.

In 1996, respondent was reprimanded for delegating his recordkeeping responsibilities to an employee whom he never instructed or supervised. As a result, the employee misappropriated client funds. Respondent was also guilty of gross neglect, negligent misappropriation of client trust funds, commingling fee and trust account funds, and recordkeeping violations. In re Klamo, 143 N.J. 386 (1996).

In the current matter, Wanda Riddle, OAE investigator, testified that the OAE began its investigation of respondent's attorney records after a client filed an August 2008 grievance alleging that he had mishandled a personal injury matter. During

the OAE's investigation, respondent's former paralegal informed Riddle that respondent had accumulated money that he withheld from personal injury matters for co-pays and deductibles and had done nothing to insure that the monies were properly disbursed from his trust account.

The OAE initially subpoenaed respondent's financial records from January 2007 through December 2008 and then subpoenaed more documents throughout the investigation. The OAE performed an initial demand audit on December 23, 2008 and had several subsequent interviews of respondent.

According to Riddle, initially respondent was cooperative, provided the requested records, and appeared for the interviews. However, when the OAE requested that he provide specific documents, he did not comply with those requests. Respondent informed Riddle that he employed an accountant and that his wife and sister-in-law helped out with the bookkeeping. He relied on them to perform the reconciliations, but did not follow up with them, and was not sure what his staff was supposed to be doing. The OAE, therefore, provided him with a handbook on recordkeeping.

Respondent's practice includes, among other things, criminal, personal injury, and estate work. According to respondent, his personal injury clients always executed

contingent fee agreements. After their matters were settled, either his paralegal/office manager or a secretary prepared settlement and disbursement documents. Respondent signed all of the disbursement checks. He testified that he always explained to clients what the co-pays and deductibles were in personal injury protection (PIP) cases, which were usually $1,200 and came from the clients' settlement.

Beginning in 1997, respondent began accumulating the $1,200 from personal injury cases and keeping the money in his trust account. His settlement sheets, which were signed by his clients, specified that he would withhold $250 for deductibles and $950 for co-payments. According to Riddle, a decade later the money was still in respondent's trust account, which trust account had accumulated approximately $100,000. Respondent told Riddle that he was trying to disburse the funds, but "was battling with doctors back and forth," trying to determine who got what. Riddle noted, however, that respondent's files did not contain documentation to support his contention that anything had been done, after the cases were settled. In a few instances, respondent filed PIP suits, but the suits were dismissed. Respondent also told Riddle that he intended to file PIP suits

in some other cases, but Riddle believed that the majority of the suits would have been time-barred.[2]

The OAE submitted only a sampling of cases because, Riddle stated, the investigation report would otherwise have been too lengthy. In Riddle's experience, she found that attorneys who retain funds for long periods without disbursing them often take the funds for their own purposes. She, therefore, investigated to determine whether respondent had done the same. In the matters where she found that to be the case, respondent gave her "different stories" about what had happened. He alleged either that the medical provider had given him permission to use the funds, "how he saw fit," to pay for services or to file PIP suits, or that the client had given him permission to use the funds toward additional legal fees in another matter.

Respondent told Riddle that Next Generation Chiropractic, a provider of chiropractic services, had given him permission to use the $1,200. Yet, during a January 16, 2009 OAE interview, told her that Next Generation had not filed a PIP suit and had not told him to file one. They were out of business. "They may

[2] According to Riddle, a PIP lawsuit is filed when an injured person has insurance to cover medical expenses, but the insurer has not paid for the medical expenses.

have filed a PIP suit, I don't know, but I'm just holding $1,200 until they rectify [sic] what they wanted to do."

Respondent stated that, once the audit started, it complicated his handling of cases because the OAE took numerous files and kept them for more than three years. He only received the files back a "couple of months" before the DEC hearing.

COUNT ONE

Count one of the complaint charged that respondent failed to safeguard client trust funds (RPC 1.15(a)).

1) In the Brenda Rodriguez matter, respondent over-disbursed $918.32 to himself. When the disbursement checks were written, the wrong figure ($2,459.16) was taken from the settlement sheet, rather than the amount listed, $1,540.84. It was a clerical error that Riddle claimed would have been caught if respondent had been reconciling his trust account.

2) In the Adalberto Moran matter, there were two settlement checks. Respondent received one $15,075 check, on August 2006, from which he took his $8,098.50 fee, leaving a $6,976.50 balance in the trust account. On August 20, 2006, he disbursed $14,401.50 to Moran, resulting in the negligent misappropriation of other trust funds. Respondent received the second check in October 2006. His records indicated, however,

that both checks had been received in August 2006. According to respondent, his wife had mistakenly disbursed the funds to the client, believing that both settlement checks had been received and deposited.

3) In the Carmen Earland matter, respondent disbursed funds on May 28, 2008. The settlement check was not deposited into his trust account until May 29, 2008. Respondent claimed that his wife forgot to make the deposit. The mistake caused respondent's trust account to be out of trust for one day.

4) As to the Celines Rodriguez matter, on February 26, 2005, respondent's staff deposited a $15,000 settlement check into his trust account. Funds were disbursed on February 26, 2005, including one $5,365.33 check to himself that was posted to his account on February 28, 2005. On March 3, 2005, the bank returned the check because it was not properly endorsed. A new check was issued and deposited into respondent's account, on March 15, 2005, to correct the $5,365.33 shortage.

According to respondent, he has taken steps to insure that he will not make the same mistakes. He claimed that he now makes all of the trust deposits himself, so that he knows when the funds are available. He then waits three to ten days before writing checks against the deposits. He also currently adheres to the guidelines set forth in the OAE handbook that was

provided to him and directed his staff to familiarize themselves with those guidelines.

COUNT TWO

Count two alleged that respondent engaged in gross neglect, failed to promptly disburse client and escrow funds to clients and third parties, and made false statements of material facts to ethics authorities.

1) Riddle testified that, after the Ambrose and Charlotte Rose matters were settled, in January 1997, $2,400 remained in respondent's trust account for thirteen years, until March 2010, when he disbursed the funds at the OAE's direction.

Respondent claimed that there were outstanding medical bills, including one to Dr. Harvey Benn, who had been under investigation. He asserted that he could not disburse the funds to Benn until the investigation was resolved. Once he received the order dismissing the case against Benn, he disbursed the funds to Ambrose and to Charlotte's estate.

2) As to the Sylvia Saunders matter, respondent filed a complaint in 1997 and, on April 21, 1997, a stipulation of dismissal. Summary judgment was granted in favor of the insurer on December 21, 2001. At the OAE's direction, on December 26, 2009, respondent disbursed $1,200 to Westfield Chiropractic. He

had been holding the money in his trust account for twelve or thirteen years. Nothing in respondent's file justified holding the funds for that length of time.

Here, too, respondent claimed that another provider, Dr. Mariani of Westville Chiropractic, had been under investigation. Because the insurance company denied Mariani's payments, respondent had to "hold out any co-pays and deductibles until [Mariani] resolved his matters."

Respondent filed a PIP suit on Saunders' behalf. Once [Mariani] settled his "action with the [insurance] company . . . [respondent] issued to Westville Chiro his co-pay and deductible," $1,200.

3) On May 3, 1999, respondent received a $7,500 settlement in the Sonia Rodriguez matter. On May 11, 1999, he forwarded a letter to Allstate Insurance Company, requesting a copy of the entire PIP ledger. On June 12, 2002, he asked Allstate to make payments on all outstanding bills or he would file a PIP lawsuit on his client's behalf. Respondent's file lacked any documentation to demonstrate that he had taken any further action. He continued to hold $1,200 until the OAE directed him to disburse it. On December 26, 2009, after approximately ten years, he disbursed the funds to Dr. Zweibaum.

Respondent claimed that Rodriguez had many outstanding medical bills that totaled more than $10,000. One bill, for Dr. Zweibaum, was $8,000. After the OAE began its investigation, respondent contacted Zweibaum and learned that he had retained another attorney to pursue PIP payments. Respondent, therefore, sent him the entire $1,200.

4) Tabitha Robinson's matter was settled for $7,500, on March 23, 1999. Respondent made disbursements to himself and to his client in 1999, but withheld $1,200. Those funds remained in his trust account for ten years. On December 26, 2009, at the OAE's direction, he disbursed $571.85 to Dr. Leonard Vernon and $628.15 to Able Imaging.

5) Doris Willingham's case was settled in 2002. Respondent withheld $1,200 until December 2009, when, at the OAE's direction, he disbursed the funds to Dr. Gary Goldstein. Respondent's file showed that he had filed a PIP lawsuit in June 2003, but that the case had been dismissed for lack of prosecution. He did nothing further in the matter until he disbursed the funds, in 2009.

6) The Magdalena Pacheco case was settled in 2003. On March 11, 2008, after the OAE started its investigation, respondent contacted the client so that he could disburse the balance of funds to her.

7) The Rosemarie Hunt case was settled in 2004. Respondent did not disburse the $1,200 from his trust account until April 8, 2010.

8) The Elba Morales matter was settled in November 2003. In November 2004, respondent disbursed $35.55 to an orthodontist and $20 to a pharmacy. He did nothing further in the matter until March 11, 2008, when he wrote to the PIP carrier, asking for an explanation of benefits. At the OAE's direction, he disbursed the balance held in his trust account, $1,144.45, to Able Imaging. According to respondent, the bill had been sent to collection.

9) The Wanda Zayas matter was settled for $17,000 in January 2006. Respondent held $1,200 in his trust account until December 26, 2009, when, at the OAE's direction, he disbursed $180 to Pennsauken Spine and Rehabilitation and $1,020 to Zayas.

10) The Gladys Rodriguez matter was settled in November 2003. The client ledger card showed that deposits of $1,500 and $6,600 were made on November 19 and February 22, 2003.[3] Respondent did nothing further in the matter until April 2009, when, at the OAE's direction, he wrote to the client asking her to contact him. At the ethics hearing, Riddle stated that

[3] The settlement may have occurred in November 2002, rather than 2003.

respondent was still waiting for Rodriguez to contact him, so he could disburse the $1,200 to her.

Respondent claimed that Rodriguez had dealt with Brotherhood Injury. However, that business was under investigation and has since closed, based on various criminal charges against it. Respondent, therefore, sent the money to Rodriguez.

According to Riddle, she questioned respondent extensively about why he had held the $1,200 in those matters. He gave her different excuses. He explained to Riddle that he planned to file PIP suits in some instances, but Riddle opined that he would have been time-barred. In other instances, he claimed that he was waiting for information, either from the insurance company or doctors' offices. The files contained nothing to support these contentions, however. As noted above, the amount that respondent withheld for co-pays and deductibles totaled more than $100,000.

Respondent ultimately paid some of the moneys to either the client or to the medical providers. He acknowledged that the moneys should have been disbursed sooner. To correct his practice, he currently has his staff obtain PIP ledgers, which can take more than six months. He tries to monitor the cases six

months after a case is finished to see if the medical bills have been paid.[4]

COUNT THREE

Count three charged that respondent improperly charged personal injury clients for certain expenses, in violation of R. 1:21-7(d).

Riddle explained, and respondent admitted, that he improperly charged for overhead expenses in personal injury matters, contrary to R. 1:21-7(d).[5] Respondent's retainer agreements indicated that he would charge his clients for those expenses. He asserted that he was unaware that, in the late 1980s, the rule had been changed to prohibit those charges and, therefore, he never amended his contingent fee agreement to reflect the change. He no longer charges for those expenses.

Typically, respondent would write all actual costs in a case on the outside of the file jacket, for example, doctors'

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[4] At oral argument, respondent informed us that between $10,000 and $20,000 still remains undisbursed. As seen below, respondent should be directed to deposit those funds with the Superior Court Trust Fund, pursuant to R. 1:21-6(j).

[5] The comment to this rule states specifically that the "cost of xeroxing, telephone calls and attorney transportation expenses" constitutes attorney overhead that is non-deductible from the net recovery, when calculating a contingent fee.

reports. The overhead expenses were not similarly listed. Respondent claimed that the amounts were derived by office personnel, who tracked the expenses in their computers. Despite Riddle's several requests for production of print-outs reflecting those expenses, respondent never provided them. While at respondent's office, Riddle asked him to show her where the costs were tracked. Respondent then admitted that the costs for postage, telefax, telephone calls, and copy fees were "pretty much guesstimates that his staff would tack on to the cases."

The OAE presented the following matters, where respondent improperly charged his clients for investigation, postage, telefax, telephone calls, and copying fees:

(1) Frank Kuni, $525.22; (2) Brian Mahaffey, $1,439.75; (3) Sergio Mercado, $470.07; (4) Thomas Patterson, $578.30; and (5) Claudi Perez, $342.25.

According to Riddle, these examples were only a sampling of the cases for which respondent charged overhead expenses.

COUNT FOUR

Count four of the complaint alleged that respondent misappropriated client trust and escrow funds, made false statements of material fact to ethics authorities, engaged in conduct involving dishonesty, fraud, deceit or

misrepresentation, and engaged in conduct prejudicial to the administration of justice. In three of the four matters, the charges stemmed from respondent's alleged use of the PIP deductibles and co-pays that he routinely withheld, $1,200.

Siblings Herbert and LaToya (also spelled LayToya in the record) Hawkins retained respondent, in June 2000, after sustaining injuries in an April 10, 2000 automobile accident. In February 2003, Herbert's case was settled for $7,700; LaToya's case was settled for $9,300. The settlement statement and disbursement forms that they signed listed overhead charges and $1,200 for co-pays and deductibles.

On March 28, 2003, Herbert and LaToya received their portions of the settlement, $3,606.24 and $5,404.31, respectively. Respondent retained $1,200 from each settlement. The Hawkinses had no further contact with respondent.

The statement of settlement that each of the Hawkinses signed specified that the amount of the medicals listed was not final. It further contained a paragraph that stated, in relevant part:

> I understand that these are the outstanding medical bills known to [respondent] at the time of the signing of this document. I (we) agree to be responsible for any other medical bills or liens incurred as a result of an accident which occurred on April 10, 2000 other than those mentioned specifically above. If any other medical bills or liens

> should arise, I (we) shall be solely responsible for them and agree to hold [respondent] harmless and indemnify them from responsibility from any of these liens.
>
> [Ex.100,Ex.4; Ex.101,Ex.4.]

After the settlement, on July 26, 2005, September 14, 2005, and November 20, 2007, respondent wrote letters to Herbert and LaToya, asking them to contact him about their outstanding medical bills. The letters were sent to an address where neither one of them had lived, since 2004. As a result, they did not receive the letters or contact respondent about their outstanding medical bills.

On December 27, 2007, respondent issued a trust account check to himself for $1,200, with the notation "Latoya Hawkins." On February 5, 2008, he sent letters to Herbert and LaToya, requesting that they contact him promptly about unpaid medical bills. The letters were sent to the same address. The Hawkinses did not receive or reply to these letters as well. Respondent's files contained no returned mail.

On July 24, 2008, respondent issued a check to himself for $1,158.80, with the notation "Herbert Hawkins." The OAE viewed these disbursements as knowing misappropriation. According to Riddle, when she first questioned respondent about LaToya's matter, he informed her that LaToya had given him permission to take the funds to file a PIP suit.

Herbert and LaToya provided the OAE with affidavits, which, at the ethics hearing, they adopted as their testimony. According to Herbert's affidavit, he understood that the $1,200 that respondent had deducted from his settlement proceeds would be used to pay his deductible and co-payment expenses. Herbert's affidavit stated further that he had not given respondent permission to make a $1,158.80 disbursement to himself from the $1,200.

Herbert testified that he did not really understand the papers that he had signed after the settlement; he just wanted to get his "money and go." He trusted respondent because he was a lawyer. Herbert admitted that he could read "somewhat" and had trouble reading the medical bills paragraph on the settlement statement.[6] Herbert did not understand that he would have to pay medical bills out of his own pocket. He expected respondent to pay them from his settlement. He had also signed an assignment of payments to Next Generation. He recalled that he had received treatment there, but did not remember any explanation about the assignment.

LaToya testified that respondent had gone over the expenses with her, that she understood that they would be paid from her

[6] Later, Herbert stated that he could not read. LaToya testified that he has a learning disability.

settlement, and that respondent would use the $1,200 to pay her deductible and co-payment expenses. She did not give him permission to disburse the $1,200 to himself.

LaToya claimed that she did not understand the papers that she signed to receive her settlement, but admitted that she did not ask respondent any questions about them; she was only interested in receiving her settlement. She conceded that, at the time that she signed the papers, she knew that there were unpaid medical bills for which she would be held responsible.

LaToya, too, signed an assignment to Next Generation and understood that, by doing so, Next Generation could receive money directly from the insurance company. She also executed an assignment to Able Imaging, relating to another accident that she had had, in which respondent had also represented her.

Respondent told Riddle that, in Herbert's matter, the $1,200 belonged to medical provider Next Generation Chiropractic and that he had received authorization from Curtis Bracey, one of its owners, to use the $1,200, presumably as his fee, to file a PIP lawsuit.

Respondent's file contained a copy of an April 3, 2008 letter addressed to Bracey, at Next Generation Chiropractic, P.O. Box 2440, Lawnside, New Jersey, 08045, stating that, pursuant to their telephone conversation that day, respondent

would be filing a PIP lawsuit on behalf of Herbert.[7] Riddle could find no evidence, in respondent's files, of written authorization from Bracey for the use of the $1,200. As noted above, on July 24, 2008, respondent issued $1,158.80 to himself from his trust account, with Herbert's name listed in the memo portion of the check. He had already issued a $41.20 trust account check to Dr. Ronald Brody, on May 11, 2005.

Riddle testified that respondent had filed PIP suits on behalf of LaToya and Herbert, on December 22, 2008, after the suits were already "probably time barred" and after the OAE had first contacted respondent about the grievance.[8] We note that the OAE's demand audit occurred on December 23, 2008.

By separate letters to LaToya and Herbert, dated January 16, 2009 and sent to the old address, respondent informed them that he had filed PIP lawsuits on their behalf. By letter dated January 30, 2009, respondent sent the summons and complaint to the Burlington County Sheriff's office for filing. Riddle found nothing in respondent's file showing that the complaints had been served.

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[7] This letter pre-dated the grievance filed against respondent and docketed on August 28, 2008.

[8] The cases were dismissed for lack of prosecution, on July 10, 2009.

Riddle's investigation revealed that Next Generation was no longer in operation, at the time of respondent's April 2008 letter to it, and that the letter to Bracey was addressed to an incorrect post office address. Riddle concluded that, after Next Generation ceased operating, it was impermissible for respondent to use Herbert's funds to pursue a PIP suit; he could only use the funds with Herbert's permission.

At the ethics hearing, Riddle acknowledged that respondent could have used the $1,200 to pay Next Generation for services it rendered, but stated that it had not been the case here:

> Eight years after the fact when [respondent's] going to be time barred from filing a PIP suit and the fact that it was quite clear that there were letters in the file that were either bogus or had not been sent to the clients, this is not as easy as [respondent's counsel is] trying to make it seem.
>
> [1T179-11 to 16.][9]

Riddle stated that the PIP suits were a sham, based on the fact that Next Generation was out of business; that respondent's letters to Next Generation were sent to a non-existent or incorrect address; that the statute of limitations expired on the suits; and that, every time she inquired about who was

[9] T refers to the transcript of the DEC hearing of November 28, 2011.

entitled to the $1,200, respondent provided a different response: "When it suited him to be the medical provider, it was the medical provider. When it suited him to be the clients, it was the clients."

According to Riddle, respondent also misappropriated funds from the Tianta Williams-Matthews (Williams) matter. Williams retained respondent, on June 29, 2000, following a May 29, 2000 car accident. Her case was settled for $15,000, in January 2004. Her last communication with respondent was in 2004. Respondent forwarded the settlement to her on February 4, 2004 ($8,260.64). Williams understood that the $1,200 that respondent had deducted from her settlement would be used for co-pays and deductibles. She did not give him permission to use the funds for any other purposes.

Williams had obtained treatment for her accident from Next Generation, Delaware Valley Physical Therapy, West Jersey Hospital, and Gary Goldstein, M.D., for a total of $3,694.06. She recalled executing an assignment to Next Generation and understood that it gave Next Generation the right to collect money from her insurance company.

According to respondent, the $1,200 deducted from Williams' settlement belonged to Next Generation; Bracey had authorized him to use that money, presumably as his fee, to file a lawsuit,

which he did. He explained that the case was dismissed, however, because it belonged in arbitration.

The statement of settlement and disbursement that Williams signed showed respondent's standard deduction ($1,200) for co-pays and deductibles. More than four and one-half years after the settlement, on October 24, 2008, respondent paid himself $1,200 from his trust account, referencing Tianta Williams in the memo section of the check. He deposited the funds into his business account. According to Riddle, respondent was not entitled to those funds.

By letter to Curtis Bracey, Next Generation, dated December 1, 2008, respondent told Bracey that he would be filing a PIP suit on Williams behalf for payment of "your outstanding medical bills." The letter added that Bracey had "agreed to waive Ms. Williams' copayment and deductible due to you once this matter has been settled."

In December 2008, respondent filed a PIP suit and an underinsured motorist (UIM) suit on Williams' behalf. By letter dated December 28, 2008, addressed to Williams, respondent told her that he had filed a UIM and PIP suit on her behalf. Riddle noted that respondent had already taken the $1,200, but had not mentioned that in his letter. By letter to the Burlington County Sheriff, dated January 7, 2009, respondent purportedly enclosed

a check and a summons and complaint to be served on Allstate Insurance Company. Riddle's review of the automated case management system revealed that the suits had been filed on December 19, 2008 and dismissed on July 10, 2009 for, Riddle presumed, lack of prosecution. She opined that, because the accident had occurred in 2000 and had been settled in 2005, the PIP and UIM suits were time-barred.

As in the prior matter, Riddle testified that respondent had sent the letter to Next Generation to a non-existent post office box. Riddle saw a pattern emerging. She, therefore, contacted the Burlington County sheriff's department and was informed that that office had no record of receiving either complaint.

Respondent asserted that, after the OAE had taken his files, he could not pursue the matters. He added that he did not attempt to obtain a copy of the file from his adversary because of his "general embarrassment" over being investigated by the OAE.

At the ethics hearing, Bracey testified on respondent's behalf. Bracey had met respondent prior to 1998. They maintained a professional, as well as a social relationship. Their social relationship preceded their professional relationship.

Bracey explained that he and his partner had owned Next Generation, but they were not chiropractors. They hired licensed doctors to provide chiropractic services. A change in the law prohibited them, as non-licensed individuals, from owning such a practice. Next Generation was, therefore, only in operation from 1998 until approximately 2003.

The Next Generation doctors treated, among others, car accident victims, who signed assignment of benefit forms. After Next Generation closed, it maintained an office, where it conducted its billing for services it had rendered and sought to collect moneys owed to it. Bracey testified that, even though the offices were no longer open, he continued communicating with respondent to try to collect monies still due to the company. Any pending lawsuits on the company's behalf would continue.

Bracey recalled that Herbert Hawkins was a patient of Next Generation and that Next Generation had a claim against him. Bracey stated that there was a "substantial amount of money that was due" and that he had asked respondent to help collect it. Next Generation had several patients who were respondent's clients. Bracey authorized respondent to use the money that respondent was holding to file PIP suits in the Herbert and LaToya Hawkins matters, as well as in the Tianta Williams

matter. Respondent confirmed that he had such an arrangement with Bracey.

According to respondent, the co-pays and deductibles belonged to Bracey. Respondent never used the funds to pursue the litigation, presumably as fees, without Bracey's authorization. The cases were administratively dismissed either for lack of prosecution or because one of the cases belonged in arbitration. LaToya's case had been reinstated pursuant to respondent's motion, filed on December 11, 2009.

According to Bracey, respondent had kept him informed about the status of the lawsuits. Bracey claimed that there were more than 300 cases where patients owed money to Next Generation. When the facility closed in 2003, it was owed approximately $900,000. Bracey stated that respondent was holding money for him, but he did not know how much. Bracey trusted respondent and had not asked him for it. Bracey admitted that he owed state and federal government taxes, but no more than a couple of thousand dollars.

The final case in which the OAE alleged that respondent knowingly misappropriated funds involved fatalities as a result of a car accident.

Marilu Martinez, Leslie Guiza, and Jorge Bautista were all passengers in a car involved in an August 25, 2003 accident.

Respondent filed a lawsuit for all of them. Abel Martinez-Leon (Martinez) was listed as the administrator of the estate of Marilu and Jorge; Gerardo Gonzalez was listed as the guardian for Leslie. The resulting settlements totaled $150,000. Martinez, Marilu's uncle, was appointed executor of her estate.

On October 1, 2003, Martinez retained respondent to represent the estate of Marilu Martinez in a wrongful death action and an uninsured motorist claim. At the ethics hearing, Martinez explained that, after the deaths, he was approached by one of respondent's Spanish-speaking employees, who told him that respondent could "do something about it."[10]

Respondent settled the uninsured motorist claim on behalf of Marilu for $100,000. On March 13, 2004, Martinez signed a settlement and disbursement statement that indicated that respondent would hold $6,000 in trust for future estimated expert fees for a wrongful death action. The statement listed no known outstanding medicals and total medicals of "$0.00."

In August 2005, respondent filed the wrongful death action, which listed Martinez as the administrator of Marilu's and Jorge Bautista's estates, both minors and both deceased, and Gerardo Gonzalez as the guardian for Leslie Guiza, a minor, as

[10] The complaint did not charge respondent with the improper use of "runners".

plaintiffs, against, among others, Gerardo Gonzalez as the administrator of the estate of Maria Amador, deceased.[11] The wrongful death action settled for $50,000, in November 2007 "($40,000 for the companion case involving Leslie Guiza, $5,000 for the companion case involving Jorge Bautista and $5,000 for the Marilu Martinez matter)." The statement of settlement and disbursement for the Marilu settlement listed a deductible of $250 and a co-pay of $950, for a total of $1,200. The settlement portion to the client was $1,949.64.

Under cover letter dated June 18, 2007, respondent paid expert Dennis Andrews a $1,500 retainer. Although respondent's letter noted that time was of the essence, because a preliminary report was needed by June 19, 2007, the expert's services were no longer needed after the case was settled, in November 2007.

On July 21, 2008, respondent disbursed $58,536.13 to Martinez, in accordance with the statement of settlement and disbursement. On that same date, respondent disbursed to himself the balance of the funds retained for expert fees ($4,500), which he claimed was a fee to administer the estates. The trust

[11] Respondent was not charged with a conflict of interest, even though it appears that Gonzalez was listed as both plaintiff and defendant, and that respondent represented multiple plaintiffs whose interests may have been adverse.

account check listed the name Marilu Martinez in the memo portion.

Respondent's file contained no evidence that Martinez had authorized him to use that money. Riddle met with respondent, on January 16, 2009, at which time he informed her that he had an hourly fee arrangement with Martinez ($350 an hour) and a bill to support his additional $4,500 fee, which he could probably send to Riddle. Riddle found no evidence that respondent had earned a $4,500 fee to administer the estate, that is, no computerized bills, no notations, no final bill, and no receipts.

After the meeting with Riddle, respondent met with Martinez on January 17, 2009 and presented him with a document, which he had Martinez sign. The document stated, in relevant part:

> I, Able [sic] Martinez, am the administrator of the Estate of Marilou [sic] Martinez, Jorge Batista and Leslie Guiza. I have prepared this letter with the help of [respondent]. . . .
>
> [Respondent] and his staff always explain to me all financial aspects of the monies disbursed and the billing service for the administrator of the three above estates.
>
> He had explained that there would be a separate fee for administrator of the estate and the money will come from the estates. He did explain to me fully on January 17, 2009

> that $4,500 was from the estate of past and future legal fees for administrator work.
>
> [Respondent] has appeared with me at the surrogate's office in Cumberland County, at the bank and at numerous office visits over 6 years to work on these administration matters.
>
> [Ex.104.]

On January 23, 2009, Martinez told Riddle that he did not understand that document, but signed it anyway because respondent was his attorney and asked him to sign it. He did not know that respondent had taken the $4,500 formerly earmarked for expert's fees. According to Riddle, Martinez was "very, very confused at that point."

On that same day, January 23, 2009, Martinez also signed an affidavit prepared by the OAE, stating that respondent had disbursed the $4,500 balance of the expert's escrow to himself, without Martinez' knowledge or consent.

At the ethics hearing, Martinez testified through an interpreter. He adopted the OAE affidavit as his testimony.

According to Martinez, on an unspecified date, but after he had spoken to Riddle, respondent had asked him to come to his office to review some documents. Respondent told him that he had to sign a paper stating that respondent's work was fine. Martinez signed it to make respondent feel "more secure."

Martinez testified that respondent never gave him a bill for the additional services or showed him a record of the time spent on the matter. He admitted, however, that, in May 2004, he knew that $6,000 was going to be held as an expert's fee. He also recalled that respondent's office always informed him when they were using "money for something." He did not specifically recall being told that the $4,500 would be used for services rendered apart from the personal injury matter. He added that, although respondent's office would explain about the expenses, he did not understand the "technicality of it all." He also conceded that respondent's office informed him about certain expenses, that he did not ask what the expenses were, and that he consented to respondent's taking money for the expenses and for fees.

According to Martinez, respondent's office did not help him with everything; he dealt with a portion of it on his own and received assistance from "people" at the Bridgeton Courthouse. He admitted, however, that respondent was involved in the "friendly" hearing, that he went to respondent's office to prepare for it,[12] and that respondent accompanied him to the bank

[12] A friendly hearing typically occurs when a minor receives funds from an accident and a judge orders that the funds be held

(Footnote cont'd on next page)

to open a bank account for the Marilu Martinez estate. He met with respondent on the estate matter on more than one occasion and needed assistance obtaining custody of two nieces and in administering two estates. Either respondent or someone from his office had helped him in that regard. Martinez conceded that someone from respondent's office had accompanied him to the surrogate's office once or twice and that respondent had appeared in court for him, in Marilu's estate matter, once or twice. Martinez did not recall receiving a bill or an accounting for legal services and did not have a written agreement with respect to those charges. He believed, however, that respondent's secretary had explained what the charges would be, "at the beginning."

As to the disbursements made from the settlements, Martinez testified that, even though he signed the statement of disbursements, he did not know what the expenses should be and did not ask respondent any questions about the propriety of the expenses and costs. He did not understand the difference between legal fees and expenses. They meant the same thing to him. He claimed that, when he signed the document, in January 2009,

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(Footnote cont'd)

by the Surrogate, who is charged with the responsibility of protecting the minor's assets.

respondent "stressed the amount of the $4,500" and its purpose. He became suspicious "of why [respondent] was stressing about that money and the expenses, and if everything was okay." He, nevertheless, agreed to sign the paper because "[respondent] insisted -- he insisted that his services had been good." However, he claimed that, when respondent asked him if he would use him in the future, Martinez told him, "I do not run into the same stunt twice" or "I do not stumble against the same stone twice."

For his part, respondent testified that he had been retained by both Martinez and Gerardo Gonzalez, Leslie Guiza's uncle. Fiduciaries had to be appointed for the decedents, their estates, and the surviving children. Respondent explained to Martinez and Gonzalez that the court would have to appoint them to obtain custody of the surviving children. Respondent assigned that task of the appointments to his associates.

Either respondent or his staff accompanied Martinez to court two or three times on the custody issue, as well as to the surrogate's office. At one point, an interpreter was required, which increased the amount of time spent, because everything had to be repeated through the interpreter.

Respondent did not have Martinez sign separate fee agreements for the additional representation, because he

believed that the Court Rules did not require it. During the OAE's January 16, 2009 interview, respondent claimed that he had a fee agreement for the work that he did to administer the estate, and that his original file contained proof that he had earned the $4,500. He later admitted that there was nothing in the file to support the additional fee or that his file contained Martinez' authorization to take the $4,500. At the OAE's subsequent April 27, 2009 interview, respondent acknowledged that he may have "misspoke[n]," when he informed the OAE that he had a fee agreement and bills for the additional work.

At the ethics hearing, respondent argued that the $4,500 amount that he charged Martinez to administer the estate was a flat rate for five years' worth of representation. He interpreted the Court Rule to mean that an attorney who regularly represents a client need not give the client a fee agreement. He rationalized that he regularly represented Martinez for the next five or six years. He also noted that his contingent fee agreement provided that, in the event that the client required representation in "municipal court, county, traffic court or administrative hearing . . . the attorney shall be compensated for his services on a time basis at the rate of $150.00 per hour, with a minimum fee of $750.00 per court

appearance" and that his services relating to the administration of the estate was the "county court" referred to in his contingent fee agreement. He stated that he did not keep time records: "I don't like to give the clients time records. I'm not a time records lawyer."

When asked how he had come up with the $4,500 amount, respondent replied that it had been based on all of the work that he had provided in the estate matters. It had taken him five years to have the matter proceed through the surrogates' office. He would ordinarily charge $15,000 to $20,000 for a probate matter.

According to respondent, he spent a great deal of time dealing with the administration of the estates, for example: conducting research, dealing with custody and guardian issues for the young children whose mother had died and whose father resided in Mexico, having Martinez appointed as the administrator of Marilu's estate, having funeral expenses paid, having Marilu's death certificate corrected and obtaining birth certificates, making determinations about the nationalities of the parties, attending and preparing for the friendly hearing, and performing other ministerial tasks. Despite Martinez' claims to the contrary, respondent asserted that his office did most, if not all, of the work in connection with the administration of

the estates. The matter was complicated by the fact that family members were in Mexico and renunciations had to be obtained from them.

According to respondent, he informed Martinez and Gonzalez that he wanted to be paid for his additional services and expenses from the remainder of the funds that had been escrowed for the expert ($4,500) and explained that, if he submitted a bill for all of his services in connection with the estates, it would probably be a very large bill. Respondent contended that Martinez and Gonzalez had consented to his keeping the $4,500 for his services. He claimed that he received Martinez' authorization to take the money on July 19, 2008, but did not document it. Two days later, on July 21, 2008, respondent wrote the check to himself and a check to Martinez for $58,536.13, as the executor of Marilu's estate. Respondent testified that he was one hundred percent certain that he had Martinez' authorization to use the $4,500 for his services.

Respondent presented an expert witness on personal injury law, David Paul Daniels, an attorney who was admitted to the New Jersey bar in 1979. His primary areas of practice are personal injury and bankruptcy. He has handled thousands of personal injury cases and has tried approximately 100 of them.

According to Daniels, under a typical insurance policy, there is a $250 deductible for which the client is responsible; thereafter, the carrier pays eighty percent of the next $14,000. There is also a twenty percent co-pay, making the client responsible for a maximum of $1,200. It is the attorney's function to explain the co-pay and deductible to the client.

Daniels explained that he first attempts settlement. If no settlement is achieved, the attorney has two years to file a lawsuit. If the third party has no insurance, the attorney files for arbitration against the client's own policy.

Daniels further stated that, if a case is settled, the carrier and the carrier's clients are released of further liability. A check is made out to the attorney and the client. A distribution sheet is prepared. The first disbursement from the settlement, which is held in the attorney's trust account, is for out-of-pocket expenses: investigators' fees, police reports, medical reports, and the like. The attorney's one-third fee is deducted from the net amount. The remainder is earmarked for the client, less the co-pay and deductible ($1,200), the amount the insurance company did not pay the providers.

According to Daniels, the $1,200 amount is for the benefit of the providers. Additional bills that come to light, after the settlement is disbursed, are the client's responsibility, a fact

made known on the settlement distribution sheet. Providers require their patients to sign assignment of benefits forms. The providers' rights under the assignment take precedent over the injured party's rights.

If a provider does not get paid by PIP for all services rendered, a suit can be filed against the insurer or arbitration can be pursued. The suit can be filed under the name of the provider or the injured party. If there is more than one provider, it is typically filed under the name of the injured party. The medical provider is subrogated to the rights of the insured and controls the litigation as the subrogee.

The provider can authorize the attorney to use the $1,200 to pursue the suit, because it is the provider's money. Alternatively, the provider could take the $1,200 and write a check to the attorney for the services. If the provider's suit is successful, the $1,200 is credited back to the provider against their bill. If there is any money left over from the $1,200, it belongs to the client.

According to Daniels, there are several statutes of limitation that apply to PIP suits, from the day of the accident and from the last payment made by the provider. An exception applies if the carrier knows or should have known that the injured person needs treatment "after the two-year statute" or

if they require treatment in the two years after the last payment. Daniels added that the statute of limitations is an affirmative defense that must be raised by the defendant.

Respondent agreed that the statute of limitations is raised as an affirmative defense. He added that there is no "bright-line statute of limitations in PIP actions," because of various exceptions. Many times PIP suits are filed two or three years after the actual incident. He testified that he filed suits many times after the statute of limitations had expired and that the insurers never raised it as a defense. Respondent stated that a suit may be filed six years after payment of the last bill for treatment, because it is a contractual matter. He, therefore, had a good faith belief that there was no bar to his filing the suits, when he did so. His filing of the suits was never a charade to cover up his alleged misappropriation of funds. He reiterated that Bracey's authorization to use the money was legitimate. Finally, he explained that PIP suits were not a high priority in his office, because his office also deals with criminal matters.

COUNT FIVE

Count five charged respondent with recordkeeping deficiencies.

Riddle testified that, when she performed the demand audit, respondent told her that he was not conducting monthly or, sometimes, even quarterly trust account reconciliations; that he did not maintain trust receipts or disbursements journals; that he did not monitor or reconcile his trust account in any fashion; and that he did not note client identifiers on deposit slips so they could easily be linked in the client audit trail. He was aware, however, that the money was accumulating in his account. Respondent's lack of recordkeeping led to the negligent misappropriation of client trust funds (count one).

Riddle further testified that respondent was operating as a corporation, but did not maintain malpractice insurance. Moreover, he was not aware that he was required to have it.

Respondent's counsel admitted that respondent was negligent with his bookkeeping practices and took money for expenses, when he should not have done so.

Respondent provided six character witnesses, four of whom he knew socially: Harold Greenlee, Gary Wasoner, John Park, and Craig Farr. Another character witness, Willie Daniels, was a deacon who had known respondent for approximately twenty-seven years. The deacon's wife, June Daniels, also testified on respondent's behalf. They all attested to respondent's honesty, truthfulness, and good reputation.

The special master noted that respondent admitted the substantive ethics violations in counts one, two, three, and five and found that respondent violated the ethics rules, as alleged in those counts. According to the special master, only count four, charging knowing misappropriation of client trust and escrow funds, was contested.

As to count four, the special master found that the Hawkinses and Williams matters were similar and that Bracey, whose testimony was credible, was the "most important" witness for that count. The special master characterized Bracey's testimony as "firm and unequivocal: Next Generation was entitled to the deductibles at issue in each instance." It had assignments from the clients and provided treatment for injuries sustained. Bracey authorized respondent to use the monies at issue for costs and attorneys' fees to file suits or arbitrations to seek additional monies due to Next Generation from the insurance carriers.

Relying on Daniels' expert testimony and Cronin v. McKim-Gray, 353 N.J.Super 127 (App. Div. 2002), Berkowitz v. Haigood, 256 N.J. Super 342 (Law Div. 1992), and In re Diorio, 201 N.J. 121 (2010), the special master concluded that Bracey "had the right to do as he wished with those monies" and permitted

respondent to utilize the funds for costs and fees to pursue additional litigation.

As to the Marilu Martinez matter, the special matter noted that the case spanned a six-year period, from 2003 through 2009. Respondent represented a number of clients involved in a car accident that resulted in three fatalities and left children orphaned. The various parts of the litigation resulted in settlements totaling $150,000. During the course of the representation, permission was sought from persons residing in Mexico to settle the litigation and for the guardianship of minors.

The special master found that Martinez had provided "essentially" conflicting affidavits on his knowledge and consent to respondent taking the $4,500 of the $6,000 that had been escrowed for experts' fees. The special master was unable to find that the proofs clearly and convincingly established that respondent deliberately, intentionally, or knowingly availed himself of the $4,500, without Martinez's knowledge and consent.

The special master also found that, on at least two occasions, respondent was not truthful in his statements to ethics authorities. During a January 16, 2009 interview, respondent told the investigator that he had a fee agreement

with Martinez setting forth a $350 per hour fee and he repeatedly asserted that he kept track and itemized the overhead he billed his personal injury clients (which was unauthorized). Later, however, he admitted that they were mere estimates.

In all, the special master found that respondent admitted failing to safeguard client funds, failing to promptly deliver funds to clients and third parties, improperly charging personal injury clients for overhead costs, engaging in various recordkeeping improprieties, and making false statements during the course of the investigation.

The special master was unaware of respondent's prior discipline. He recommended a three-month suspension. He also recommended that, on reinstatement, respondent submit to the OAE, for a two-year period, quarterly reconciliations of his trust account, certified by an OAE-approved accountant and also practice under the supervision of an OAE-approved proctor for a two-year period.

In respondent's counsel's November 14, 2012 letter-brief to us, he noted, among other things, that respondent admitted that he had no explanation for the delays in disbursing the escrow funds. Counsel further pointed out that respondent admitted improperly charging five clients for expenses. Counsel stressed that he directed respondent to "make every effort to return the

funds to the clients, even though the Statute of Limitations has run."

Counsel asked us to dismiss the charge that respondent failed to carry malpractice insurance, because that charge was only in the general allegations and was not included in any of the specific counts of the complaint. Moreover, he argued that there was a "paucity of proof" as to this allegation and that now that respondent has been made aware of the requirement he has obtained malpractice insurance.

Counsel urged us to impose a reprimand.

The OAE's November 16, 2012 letter to us stated that the OAE accepted the findings of the special master and agreed that a three-month suspension was appropriate discipline in this matter.

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

Although respondent's practices gave rise to a suspicion of knowing misappropriation (counts two and three), there is no clear and convincing evidence in the record that respondent was guilty of that offense. As to count two, according to the OAE investigator, respondent amassed approximately $100,000 in his

trust account by failing to disburse the deductibles and co-pays, in some instances for as long as thirteen years. Distributions were not made until after the OAE started its investigation and instructed respondent to disburse the funds. The OAE presented only ten matters, involving funds totaling $13,200 of the $100,000. In two of those matters, respondent claimed that he could not disburse the funds until criminal investigations against the providers were concluded. In another matter, he filed a lawsuit early on, but failed to pursue it further and did not disburse the funds until the OAE instructed him to do so. In none of the ten matters did the OAE allege that respondent improperly used the escrowed funds. The funds remained intact in his trust account. He did, however, fail to promptly disburse the funds to clients or third persons, a violation of RPC 1.15(b). Respondent's counsel admitted that respondent had no explanation for failing to promptly disburse the funds.[13]

Count two also charged respondent with having violated RPC 1.1(a). The OAE did not present evidence to support the allegation of gross neglect, which we dismiss.

[13] The record is silent regarding to whom or to what cases the remainder of the $100,000 accumulation belong.

Count three charged respondent with engaging in a pattern of improperly charging his personal injury clients for photocopying, postage, and telephone calls. Respondent's retainer agreements, in fact, indicated that he would charge for these expenses. His defense was that he was unaware that the Court Rules prohibited such charges. He added that he no longer assesses them. Respondent's conduct in this regard was a violation of RPC 1.5(c) (permitting a contingent fee that is not prohibited by law or the Court Rules) and R. 1:21-7(d). Respondent's counsel asserted that he directed respondent to return the funds to his clients, but did not comment on respondent's success in doing so.

Count three also charged that respondent made false statements to ethics authorities (RPC 8.1(a)). The evidence supports a finding of a violation of this rule. Respondent informed the OAE that he typically wrote all of a case's actual costs on the outside file jacket. However, the expenses for photocopying, postage, and telephone calls were not so listed. He later told the OAE that his office personnel tracked those expenses on their computers. After being pressed by the OAE to produce print-outs to verify those expenses, respondent conceded that the charges were "pretty much guesstimates" that his staff would add on.

Count one and count five go hand-in-hand. Count one charged respondent with having violated RPC 1.15(a) (failure to safeguard funds), while count five charged him with recordkeeping improprieties (RPC 1.15(d) and R. 1:21-6) for failing to maintain receipts and disbursements journals, failing to include client identifiers on deposit slips, and failing to perform reconciliations of his trust account. The evidence supports a finding that respondent was guilty of recordkeeping improprieties and failed to safeguard funds in four matters by either over-disbursing funds or prematurely disbursing funds, thereby causing shortages in his trust account. The OAE investigator stated that, if respondent had been reconciling his trust account, he would have caught some of the clerical errors that led to the shortages in his account.

There remains count four, which involves the most serious charge of knowing misappropriation of client and escrow funds. The evidence, however, does not clearly and convincingly support this charge.

N.J.S.A. 39:6A-4e(2) permits the assignment of PIP benefits to providers of services. The courts, too, have recognized that the proceeds of personal injury actions are assignable to providers of services and that attorneys are duty-bound to honor such assignments, if the assignments are facially valid and the

attorneys have notice of them. Cronin v. McKim-Gray, supra, 353 N.J. Super at 130-131 and Berkowitz v. Haigood, supra, 256 N.J. Super at 346.

In the Herbert and LaToya Hawkins matters, as well as the Williams matter, each client assigned their benefits to Next Generation and each signed a statement of settlement and distribution that referred to outstanding medical bills for which they would be held personally responsible.

After respondent distributed the Hawkinses' settlements, he wrote them several letters, over the course of three years, about their outstanding medical bills. Neither one of them received any of the letters because respondent mailed them to an old address, where neither Hawkins had lived for several years. Although the OAE investigator characterized the letters as a sham, the OAE presented no evidence to dispute their authenticity. It appears, thus, that respondent tried to resolve the Hawkinses' outstanding medical bills over the course of three years.

Nevertheless, respondent maintained that the provider of medical services was entitled to the escrow funds for unpaid medical bills, not Herbert, LaToya, or Williams. He asserted further that the provider's representative, Curtis Bracey, had authorized him to use the escrow funds, presumably as a fee, to

pursue PIP suits. Bracey, too, testified unequivocally that he had given respondent authorization to utilize the escrow funds from each of the three cases.

Bolstering respondent's contention is a copy of an April 3, 2008 letter from respondent to Bracey, confirming their conversation that day to the affect that respondent would file a PIP suit on Herbert's behalf. The letter was dated before the grievance against respondent was docketed in August 2008. That respondent sent the letter to an incorrect address does not establish that this letter, too, was a sham, particularly in light of Bracey's testimony.

Respondent's letter to Bracey in connection with the filing of a PIP suit in the Williams' matter, however, was dated December 1, 2008, after the grievance had been filed. Nevertheless, the escrowed funds were designed to satisfy outstanding medical bills, that were not intended for Williams. In fact, Williams conceded that she understood that to be the case.

In the three cases, respondent required authorization to use the escrow funds from the medical providers to whom they belonged, not from the clients. That Next Generation was no longer in operation did not preclude respondent from pursuing the company's receivables. Moreover, Bracey testified that the

company remained in business solely to collect moneys it was due.

Thus, as to these three matters, there was no clear and convincing evidence that respondent knowingly misappropriated escrow funds.

Similarly, there is no clear and convincing evidence that respondent knowingly misappropriated funds in the Martinez matter. Martinez executed conflicting affidavits and provided conflicting testimony, at the ethics hearing, about whether he had authorized respondent to use the remaining expert's escrow, $4,500, as a fee to administer the estates. Respondent did not waiver in his testimony that he was one hundred percent certain that he had Martinez' authorization to use the remaining escrow for his services. Although respondent had no bills to substantiate his entitlement to the amount, he testified about a laundry list of services that he and his firm had provided in the case and asserted that he would have been entitled to a much larger fee for those services.

Even though some of respondent's actions might be viewed suspiciously (PIP suits filed after the grievance was filed, letters sent to incorrect addresses, conflicting testimony about his fee arrangement with Martinez, testimony of a social acquaintance to support his authorization to use escrow funds,

and character testimony of long-time social acquaintances), the record fails to establish, to a clear and convincing standard, that respondent knowingly misappropriated client trust or escrow funds. We, therefore, dismiss that charge.

The only charges that survive this count are that of RPC 8.1(a) and RPC 8.4(c). Initially, respondent told the OAE investigator that he had an hourly fee agreement with Martinez for $350 an hour. This was not true. In fact, at the ethics hearing, he testified that he believed that the Court Rules did not require a separate fee agreement for the additional representation, because he had regularly represented Martinez for five or six years. Later, however, respondent testified that the $4,500 was a flat fee and also that his contingency fee agreement provided for additional services to be billed at $150 per hour and a minimum $750 fee for court appearances. We find that respondent's conflicting statements in the course of his disciplinary matter constituted a violation of RPC 8.1(a) and RPC 8.4(c).

Respondent is also guilty of failing to maintain malpractice insurance (R. 1:21-7(d)). Although respondent's counsel requested a dismissal of this charge, we find that respondent had sufficient notice of it in the complaint and addressed the allegation in his answer. Moreover, Riddle

testified about his failure to maintain such insurance, testimony which respondent did not dispute at the DEC hearing. In addition, we find counsel's statement that, once respondent became aware of the requirement he obtained the insurance, to be an admission of this violation.

In sum, the record provides clear and convincing evidence only of respondent's violation of RPC 1.5(c), RPC 1.15(a), RPC 1.15(b), RPC 1.15(d), RPC 8.1(a) and RPC 8.4(c). The sole issue left for determination is the proper quantum of discipline.

The following cases are helpful in assessing the appropriate form of discipline for this respondent.

In cases involving attorneys who fail to properly deliver funds to clients or third persons (RPC 1.15(b)), admonitions or reprimands are usually imposed. See, e.g., In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (admonition for attorney who for three years did not remit to the client the balance of settlement funds to which the client was entitled, lacked diligence in the client's representation, failed to cooperate with the investigation of the grievance, and wrote a trust account check to "cash;" significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (admonition for attorney who did not promptly disburse to

a client the balance of a loan that was refinanced; in addition, he did not adequately communicate with the client and did not promptly return the client's file); In the Matter of Douglas F. Ortelere, DRB 03-377 (February 11, 2004) (attorney admonished for failure to promptly deliver balance of settlement proceeds to client after her medical bills were paid); In the Matter of E. Steven Lustig, DRB 02-053 (April 19, 2002) (admonition imposed upon attorney who, for three-and-a-half years, held in his trust account $4800 earmarked for the payment of a client's outstanding hospital bill); and In re Dorian, 176 N.J. 124 (2003) (reprimand imposed upon attorney who failed to use escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities).

A case where an attorney was found guilty of violating RPC 1.5(c) and another minor violation resulted in an admonition. See, e.g., In the Matter of Michael S. Kimm, DRB 09-351 (January 28, 2010) (attorney improperly calculated his fee on the gross recovery rather than the net recovery and improperly advanced funds to his client prior to the conclusion of the client's case; mitigating circumstances considered).

As to negligent misappropriation of client funds and recordkeeping deficiencies, generally reprimands are imposed. See, e.g., In re Deitch, 209 N.J. 423 (2012) (as a result of

attorney's failure to supervise his paralegal-wife and also poor recordkeeping practices, $14,000 in client or third-party funds was invaded; the paralegal-wife stole the funds by negotiating thirty-eight checks made out to herself by either forging the attorney's signature or using a signature stamp; no prior discipline); In re Arrechea, 208 N.J. 430 (2011) (negligent misappropriation of client funds; the attorney also failed to promptly deliver funds that a client was entitled to receive and ran afoul of the recordkeeping rules by writing trust account checks to himself and making cash withdrawals from his trust account, practices prohibited by R. 1:21-6; the discipline was not enhanced in this default matter because of the attorney's unblemished professional record of thirty-six years and his cardiac and serious cognitive problems (mild dementia)); In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Macchiaverna, 203 N.J. 584 (2010) (minor negligent misappropriation of $43.55 occurred in the 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 over-disbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for a conflict of interest); In re Dias, 201 N.J. 2 (2010) (an over-disbursement from the attorney's trust account caused the negligent misappropriation of other clients' funds; the attorney's recordkeeping deficiencies were responsible for the misappropriation; the attorney also failed to promptly comply with the OAE's requests for her attorney records; prior admonition for practicing while ineligible; in mitigation, we considered that the attorney, a single mother working on a per diem basis with little access to funds, was committed to and had

been replenishing the trust account shortfall in installments); In re Seradzky, 200 N.J. 230 (2009) (due to poor recordkeeping practices, attorney negligently misappropriated $50,000 of other clients' funds by twice paying settlement charges in the same real estate matter; prior private reprimand); In re Weinberg, 198 N.J. 380 (2009) (motion for discipline by consent granted; attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account; because he did not regularly reconcile his trust account records, his mistake went undetected until an overdraft occurred; the attorney had no prior final discipline); and In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated $103,750.61 of trust funds as a result of his failure to reconcile his trust account; the attorney was also found guilty of recordkeeping violations).

As to respondent's misrepresentations to ethics authorities, generally, discipline ranging from a reprimand to a term of suspension results, depending on the gravity of the offense, the presence of other unethical conduct, and aggravating or mitigating factors. See, e.g., In re DeSeno, 205 N.J. 91 (2011) (attorney reprimanded for misrepresenting to the district ethics committee the filing date on a complaint on the client's behalf; the attorney also failed to adequately communicate with the

client and failed to cooperate with the investigation of the grievance; prior reprimand); In re Sunberg, 156 N.J. 396 (1998) (reprimand for attorney who created a phony arbitration award to mislead his partner and then lied to the OAE about the arbitration award; mitigating factors included the passage of ten years since the occurrence, the attorney's unblemished disciplinary record, his numerous professional achievements, and his pro bono contributions); In re Homan, 195 N.J. 185 (2008) (censure for attorney who fabricated a promissory note reflecting a loan to him from a client, forged the signature of the client's attorney-in-fact, and gave the note to the OAE during the investigation of a grievance against him; the attorney told the OAE that the note was genuine and that it had been executed contemporaneously with its creation; ultimately, the attorney admitted his impropriety to the OAE; extremely compelling mitigating factors considered, including the attorney's impeccable forty-year professional record, the legitimacy of the loan transaction listed on the note, and the fact that the attorney's fabrication of the note was prompted by his panic at being contacted by the OAE and his embarrassment over his failure to prepare the note contemporaneously with the loan); In re Bar-Nadav, 174 N.J. 537 (2002) (three-month suspension for attorney who submitted two fictitious letters to

the district ethics committee in an attempt to justify his failure to file a divorce complaint on behalf of a client; the attorney also filed a motion on behalf of another client after his representation had ended, and failed to communicate with both clients); and In re Rinaldi, 149 N.J. 22 (1997) (three-month suspension for attorney who did not diligently pursue a matter, made misrepresentations to the client about the status of the matter, and submitted three fictitious letters to the ethics committee in an attempt to show that he had worked on the matter).

The appropriate discipline for failure to maintain liability insurance is an admonition. See, e.g., In the Matter of F. Gerald Fitzpatrick, DRB 99-046 (April 21, 1999) (attorney admonished for failure to maintain professional liability insurance for six years, which was found to be a violation of RPC 5.5(a) (unlawful practice of law)).

Were respondent's transgressions limited to the negligent misappropriation of funds and recordkeeping violations, a reprimand might have been sufficient here. But he also failed to disburse funds to clients or third persons for many years and disbursed them only after being directed to do so by the OAE; improperly charged contingent fee clients for expenses; and failed to maintain malpractice insurance. Respondent claimed

ignorance that the latter two were offenses. However, "[i]gnorance of ethics rules and case law does not diminish responsibility for an ethics violation." See In re Eisenberg, 75 N.J. 454, 456 (1978); In re Goldstein, 116 N.J. 1, 5 (1989).

Moreover, respondent's misconduct is aggravated by several factors, including his ethics history. In 1996, he was found guilty of recordkeeping improprieties, negligent misappropriation of funds, and failure to supervise an employee, which led to the misappropriation of funds by that employee. Here, respondent is once again guilty of recordkeeping improprieties and admittedly abdicated his bookkeeping responsibilities to his wife and sister-in-law. He has failed to learn from prior mistakes and may have used his relatives as a convenient scapegoat for his ethics problems. Respondent submitted no persuasive mitigation. Although he provided character witnesses, the majority of the witnesses were long-time social acquaintances.

Based on the above factors, including respondent's pattern of improper practices -- failure to safeguard funds in four matters; failure to promptly disburse funds to clients or third parties in ten matters; and the improper charge of expenses in five personal injury matters -- we find that a three-month suspension is justified.

We further determine that, upon respondent's reinstatement, he be required, for a two-year period, to practice under the supervision of an OAE-approved proctor and to submit to the OAE, on a quarterly basis, monthly reconciliations of his trust account, prepared by an OAE-approved accountant. Respondent is further required to complete a course in law office management and is to submit to the OAE, prior to his reinstatement, proof of its completion.

Finally, we require respondent to deposit the remaining funds in his trust account with the Superior Court Trust Fund, pursuant to R. 1:21-6(j).

Member Baugh did not participate.

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

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John Klamo
Docket No. DRB 12-238

Argued: January 17, 2013

Decided: February 5, 2013

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:		8				1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel