SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-280
District Docket Nos. XIV-08-282E, XIV-08-283E, XIV-08-016E, and VB-06-038E

IN THE MATTERS OF

MARVIN S. DAVIDSON

AN ATTORNEY AT LAW

Decision

Argued: January 21, 2010

Decided: April 13, 2010

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics (District Docket Nos. XIV-08-283E, XIV-08-282E, and XIV-08-016E).

Nicholas S. Brindisi appeared on behalf of the District VB Ethics Committee (District Docket No. VB-06-038E).

Ronald M. Gutwirth appeared on behalf of respondent.

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

These matters came before us on a recommendation for discipline (two-year suspension) filed by the District VB Ethics Committee (DEC). Three complaints charged respondent with violating RPC 1.1(a) (gross neglect); RPC 1.3 (lack of diligence); RPC 1.4(b) (failure to keep a client reasonably informed about the status of the matter); RPC 1.15(a) (failure

to safeguard client funds); RPC 1.15(b) (failure to promptly notify the client or third person of receipt of funds in which the client or a third person has an interest or failure to promptly deliver to the client or third person funds that the client or third person is entitled to receive); RPC 1.15(c) (failure to keep separate property in which the lawyer and another person claim an interest until there is an accounting and severance of their interests); RPC 4.1(a)(1) (false statement of material fact or law to a third person); RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority); RPC 1.15(d) and R. 1:21-6 (recordkeeping violations); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The case management order, dated December 11, 2008, amended the complaint in District Docket No. XIV-08-283E (the Glaud matter) to include a violation of RPC 1.2 (failure to abide by a client's decisions regarding the scope and objectives of the representation).

We determine that a one-year suspension, with conditions on respondent's practice, is the appropriate discipline in these matters.

Respondent was admitted to the New Jersey bar in 1969. He maintains a law office in Orange, New Jersey.

In 1995, respondent was suspended for three months for improperly witnessing and acknowledging documents, preparing a power of attorney containing false representations, and advancing funds to a client in connection with litigation. In re Davidson, 139 N.J. 232 (1995). In 2005, respondent was reprimanded for recordkeeping violations and negligent misappropriation of more than $28,000 in client funds. In re Davidson, 182 N.J. 587 (2005).

Respondent was temporarily suspended, on May 20, 2009, for failure to satisfy a fee arbitration determination and to pay a sanction to the Disciplinary Oversight Committee. In re Davidson, 199 N.J. 37 (2009). He was reinstated on July 7, 2009. In re Davidson, 199 N.J. 574 (2009).

On April 3, 2008, we considered some of the same charges now before us in a matter under Docket No. DRB 07-340, which proceeded on a certification of default. Those charges related to the Bost to Jenkins matter, the Jenkins to Glaud matter, and recordkeeping violations. We denied respondent's motion to vacate the default and determined to impose a three-month suspension, with various conditions. Respondent filed a petition for review with the Court. The Court granted respondent's petition and remanded the matter to the Office of Attorney Ethic's ("OAE") for further proceedings.

On November 18, 2009, respondent's counsel made a motion to supplement the within record with a certification from Charles Kandel, respondent's part-time bookkeeper. In that certification, Kandel noted that his "objective" was to provide a reconciliation of respondent's past trust account statements. Kandel certified that he was able to account for $43,007.67 of outstanding funds. However, as of August 31, 2008, there was an $11,227.07 balance for which he could not account. Respondent believed that it represented fees and expenses not taken prior to June 1, 2003. At oral argument before us, the OAE noted that respondent had been unable to substantiate his belief. Kandel further certified that respondent had "made erroneous payments to some individuals."

Kandel added that he had opened a new trust account for respondent and conducted a complete reconciliation of the funds deposited and disbursed from that account.

Although we determine to grant respondent's motion, we find that it has little bearing on the outcome of the relevant charges.

The Bost Matter - District Docket No. XIV-08-282E

The complaint in this matter charged respondent, who acted as the buyer's attorney in a real estate transaction, with

violating RPC 1.15(a) and (b) by failing to satisfy two New Jersey Division of Taxation judgments that showed up in the pre-closing title search. Instead, without authorization, respondent disbursed the funds to the buyer of the property.

Some of the facts in this matter were not in dispute and were stipulated by the parties.[1]

In May 2005, respondent represented Austin Jenkins in the purchase of property located in Irvington, New Jersey, from grievants Fred and Sarah Bost.[2] An OAE investigation conducted by disciplinary auditor G. Nicholas Hall revealed that, following the closing, respondent did not satisfy two state tax liens/judgments that had appeared in the pre-closing title search. Line 506 of the "draft" HUD-1 statement for the transaction showed that respondent had escrowed $12,885.53 for the state tax liens and $9,000 for local tax and sewer liens. The Division of Taxation's May 19, 2005 letter indicated, however, that the state tax liens totaled only $5,320.54. The Bosts' attorney, Rosalyn Cary-Charles, faxed a copy of that letter to respondent on that same day. According to Hall, respondent did not pay the judgments until November 1, 2007, two

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[1] The executed stipulation was misplaced before the record came to us. There is only an unsigned version in the record.

[2] Austin passed away in August 2008.

and one-half years after the May 18, 2005 closing (well after Sarah had filed the grievance against respondent, in 2006).

Fred claimed that, on numerous occasions after the closing, he had tried to contact respondent about the satisfaction of the tax judgments and the return of the balance of the escrow, to no avail. Fred's attorney, Carey-Charles was, likewise, unsuccessful in her attempts to contact respondent. Sarah, therefore, filed the grievance against respondent.

On July 23 and October 5, 2005, and February 19 and July 20, 2006, Carey-Charles wrote to respondent and sent him "faxes," requesting a copy of the HUD-1 statement and urging him to satisfy the outstanding judgments. Sarah, too, wrote to respondent, on June 27, 2005, requesting, among other things, that he immediately remit the payment for the taxes, send them a check for the balance of the escrow, and forward them a copy of the closing statement.

By letter dated July 18, 2005, Sarah sent a second request to respondent, adding that any interest accrued on the unpaid taxes should not be borne by the Bosts. Respondent's failure to comply with those requests resulted in penalties and accrued interest on the unpaid taxes. After respondent eventually paid the tax judgments and sewer lien, he owed the Bosts approximately $7,767 from the escrowed funds.

Respondent claimed that he paid the taxes with his own funds. He conceded that he did so only after he realized that he would be personally responsible for the accrued interest and penalties.

Respondent was aware that, following a closing, escrow funds must be disbursed as quickly as possible. He could not recall why in this case he had not immediately paid the taxes. He added, however, that he "was glad [he] didn't because [he had] received a phone call from Mr. Jenkins immediately after the closing," in which Jenkins had informed him that he believed that an oil tank was hidden on the property and that it was leaking into the ground.

Respondent told OAE auditor Hall that, rather than having satisfied the tax liens, he had given the escrow funds to Austin to cover the costs to clean up the oil spill from the underground oil tank. He also told Hall that funds had been escrowed for that purpose. This was false. Funds were escrowed only for the tax liens and sewer charges.

During Hall's interview of Austin and Austin's wife, Tamika, Hall learned that Austin had not discovered the oil tank problem until two months after the closing. Austin informed Hall that he discovered it when he was removing the oil tank to

replace the oil heater with a gas heating system.[3] According to Austin, respondent claimed that he was able to give him money for the clean-up because "some extra money had been collected at the closing," due to an oversight.

Tamika, too, testified that the oil tank problem had not been discovered until after the closing. She stated that, on the day of the closing, during the walk-through, there was no visible problem. According to Tamika, the tank had huge holes in it. Oil had seeped into the ground. Approximately thirty-eight tons of soil had to be removed.

The Jenkinses wanted the Bosts to compensate them for the oil tank remediation and other problems with the property, but they did not intend to be compensated from the escrow funds.

Although the closing took place in May 2005, respondent did not write to Carey-Charles about the oil tank problem until December 28, 2005. His letter indicated that there was "a new problem" concerning the property -- the oil tank had to be removed. According to Hall, from December 28, 2005 to February 15, 2006, respondent wrote five letters to Carey-Charles about

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[3] In a March 31, 2009 letter to the DEC, respondent admitted that he had given "incorrect testimony" about Austin's contacting him immediately after the closing. After hearing Hall's and Tamika's testimony, he conceded that Austin had learned about the leaks only after he had tried to convert his heating system.

the oil spill on the property and his intent to release the escrow monies to help defray the costs of the clean-up. On February 24, 2006, respondent notified Carey-Charles that he had disbursed the escrow funds to Jenkins.

Hall's analysis of respondent's client ledger for the Jenkins/Bost real estate transaction, however, showed that, on August 10, 2005 (three months after the closing), respondent had already disbursed $2,000 to Austin and that, on February 18, 2006 (six months after the closing), he had disbursed an additional $7,132.55. Thus, respondent disbursed funds to Austin four months before he even wrote to Carey-Charles, notifying her of his intent to release the funds. Hall noted that the disbursements to Austin were not authorized by Carey-Charles.

Respondent's testimony was somewhat confusing and, at times, contradictory. He admitted that, in retrospect, he should not have released the funds to Austin, should have paid the taxes right away, and should have either remitted the difference to Austin immediately or litigated the matter on Austin's behalf.

Respondent claimed (and then retracted in his March 31, 2009 letter to the DEC) that Austin was "extremely upset when he left the closing. . . . [H]e called me right from the property (the same day of the closing) and I can't believe that the Bosts

said that, they weren't aware [of the oil tank problem], it had to be hidden or something because he said it was a tremendous job." Respondent characterized Austin as having been "hysterical" right after the closing, but admitted that Austin had not called an environmental agency about the spill clean-up at that time.

Respondent also claimed that he only turned over the money because the "workmen" (doing the remediation on the property) were "yelling" at him and Austin needed the money to pay them. He then issued "a loan" to Austin from the escrow. When asked whether he believed that Austin had a viable damage claim against the Bosts, respondent replied:

> Well, the answer is yes . . . . I frankly didn't believe that the inspectors missed something like an oil tank but [Austin] called me hysterically and he seemed to think that the oil tank was hidden and, you know, then all you can do is there is circumstantial evidence just like here against me. I thought that maybe he's right so I was sorry that I paid what I did pay and I decided to hold the taxes and later I realized that the taxes would only accrue additional interest that's why I paid out of my own funds.
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> [1T81-21 to 1T82-8.][4]

[4] 1T refers to the transcript of the January 27, 2009 DEC hearing.

Although respondent believed that the Bosts had concealed the problem with the oil tank, he did not file suit against them or deposit the escrow funds with the court.

Ultimately, respondent conceded that he did not pay the taxes immediately because he just did not "get to it," even though he had the pay-off statement from the Division of Taxation at the time. He speculated that he was probably "busy with something else."

As to having paid the taxes with his own funds, respondent testified that he felt as though he had been "left holding the bag . . . out $5,000, my life is in jeopardy because [the presenter] thinks I'm terrible but I made a mistake, I shouldn't have given [Austin] any money." As noted earlier, Austin died in August 2008. According to respondent, Tamika has not reimbursed him for the taxes.

Conceding that he should have paid the taxes immediately after the closing, respondent raised the environmental problems on the property as a mitigating circumstance. He added that, if he were faced with the same circumstances today, he would have paid the taxes and given the balance to Austin.

Recordkeeping Violations – RPC 1.15(d) and R. 1:21-6

As to respondent's recordkeeping, Hall testified that, during the audit of respondent's attorney records, he found many

recordkeeping deficiencies for the period from December 1, 2005 to the time of the audit, in August 2006: (1) client ledgers had not been kept; (2) a schedule of clients' ledger accounts was not prepared and reconciled to the bank statement on a monthly basis; (3) a running balance had not been maintained in the trust account checkbook; (4) trust and business receipts books had not been maintained; (5) client ledger cards were found with debit balances; and (6) old outstanding checks had not been resolved. The OAE gave respondent forty-five days to cure the deficiencies, which respondent failed to do.

Three or four years earlier, the OAE had conducted a random audit of respondent's records. On November 7, 2002, the OAE had instructed respondent to correct his recordkeeping deficiencies (nine deficiencies had been cited). Respondent certified to the OAE that he had done so.

According to Hall, however, during his 2006 audit, he found that some of the same recordkeeping deficiencies still had not been remedied. The most significant deficiencies included respondent's failure to conduct a three-way reconciliation and the existence of old outstanding checks with substantial amounts left unresolved. Hall found that respondent was conducting only a two-way reconciliation. Although respondent reconciled the checkbook balance to the bank statement, he stopped doing that

after November 2005. He also failed to "prepare a schedule of client ledger balances to the bank statement balance."

Respondent also had outstanding checks since 1995. Hall explained that, under R. 1:21-6(j), if, after two years, a diligent effort does not uncover to whom outstanding funds belong, an attorney is required to deposit the funds with the court. Respondent claimed that he was unaware of this requirement until he heard Hall's testimony.

By letter to the OAE, dated January 18, 2007, respondent claimed that he had hired a bookkeeper. However, he still did not provide the OAE with a three-way reconciliation of his accounts or any evidence that outstanding checks had been cleared up. He forwarded documentation to the OAE, on January 16, 2009, purportedly created by his new bookkeeper. According to Hall, as of that date, respondent's records were still not in compliance with R. 1:21-6.

Respondent admitted that he had not supervised his initial bookkeeper, Eva Ruch, and believed that "she was doing what was required." He claimed that, although he would review her "reconciliations," he did not realize that the reconciliations did not conform to the requirements of R. 1:21-6. Ruch left his employ in January 2006.

After the OAE filed its complaint, in August 2007, respondent asserted that he hired another bookkeeper, who "got involved in personal matters" and left his employ. Recently, in the fall of 2008, respondent retained an unemployed accountant, Charles Kandel, to take over his bookkeeping responsibilities. Respondent claimed that, as of the date of the DEC hearing, he and Kandel were reviewing every check and every account.

Kandel testified that he began working for respondent on November 5, 2008. At that time, respondent's records were not in compliance with the recordkeeping rules. Respondent had not properly reconciled his records since May 2003. Kandel was retained to reconcile the records for the period from 2006 to 2008. Some bank statements had to be obtained from the bank.

Kandel attempted to reconstruct respondent's ledgers for three years, but had not yet done monthly reconciliations. He needed bank statements from June 2003 through December 2003 to perform the three-way reconciliations. According to Kandel, once all of the necessary records were in his possession, it would take him two to three weeks to complete the reconciliations. He opined that he would be able to account for the $49,000 in unidentified funds in respondent's account. According to Kandel, the bank made two errors, totaling approximately $10,000. He had written to the bank, but had not yet received a reply.

As of the date of his testimony, Kandel had not considered closing respondent's account and opening a new account to protect clients' funds. He conceded, however, that starting anew was a good suggestion by the presenter.

At oral argument before us, the OAE presenter noted that, even though the OAE had received some documentation from respondent as late as the night before, respondent's reconciliation for 2009 was not complete, he had not turned over his bank statements to the OAE, and he had no proof that the funds remaining in his account were fees.

The Glaud Matter – District Docket No. XIV-08-283E

The complaint in this matter alleged that respondent represented Austin Jenkins in the sale of a different property to grievant Cleon Glaud. When Glaud was unable to secure financing, he requested the return of his deposit, but respondent refused to return it. Glaud's attorney then obtained a default judgment in the amount of the deposit.

Rather than satisfy the judgment, respondent notified Glaud's attorney that he had filed a motion to vacate the judgment. That was untrue, however. Respondent was, thus, charged with violating RPC 1.15(b) and (c), RPC 1.2, and RPC 8.4(c).

Specifically, Glaud entered into a contract of sale to purchase Austin's property and gave respondent a $5,000 deposit. By letter dated January 23, 2006, Glaud's attorney, Stacy Santola, notified respondent that, because their clients could not agree on certain issues and because Glaud had not obtained mortgage financing within the timeframe set forth in the original contract, Glaud was declaring the contract null and void. Santola requested that respondent refund the deposit. Respondent did not do so.

Glaud's successor attorney, Mary Ann McField, testified that she attempted to negotiate with respondent for the return of the deposit. When that proved unsuccessful, she informed respondent that she planned to file suit. She instructed respondent not to disburse the deposit to his client, but to keep it in his escrow account until they either settled the matter or the court acted on it.

McField reiterated her position in a letter dated April 11, 2006. The letter added that, if respondent's client wanted to settle the matter, respondent should contact her by April 18, 2006 or she would seek court intervention.

Presumably, respondent did not contact McField. She then filed a lawsuit against Austin on May 4, 2006. She consented to respondent's request for a sixty-day extension to file an

answer. When respondent failed to file an answer within the extended time, McField moved for a default judgment against Austin. On September 21, 2006, a final judgment of default was entered, in the amount of $5,171. By letter dated October 16, 2006, McField forwarded a copy of the judgment to respondent and requested that he forward a check to her in that amount.

Respondent did not release the deposit. Instead, by letter dated October 20, 2006, he informed McField that Austin had sold the property and that he believed that Austin was still entitled to something for his trouble, that he did not wish to hold the money in escrow any longer, and that he would deduct his fee from the deposit. According to respondent, he believed that Glaud's action had interfered with his relationship with Austin.

McField then advised respondent not to deduct his fee because she had already obtained the default judgment and, in addition, her client would not consent to it. Respondent still did not turn over the deposit, prompting McField, on November 7, 2006, to file for a wage execution against Austin. The application was granted. McField served the notice of wage execution directly on Austin to give him an opportunity to contest it.

According to Tamika, after Austin was served with the judgment to have his wages executed, he asked respondent to get

the judgment vacated, which respondent failed to do. Respondent's concern was how Austin would pay his fee. The Jenkinses did not believe that respondent was entitled to a fee because he had neglected the matter and failed to release the escrow when, sometime before March 8, 2007, Austin had instructed him to do so.

On an unspecified date, McField received a copy of a motion filed by respondent, seeking to vacate the judgment and wage execution. On February 19, 2007, McField filed a letter-brief in opposition to respondent's motion. Thereafter, she contacted the court to find out when the matter would be listed for hearing. She learned that the court had never received respondent's motion.

Respondent testified that, when he contacted the court about oral argument on the motion, the court told him that there was no motion in the system and advised him to re-file it, which he failed to do. Respondent claimed that he had sent the motion to the court, but added that the Essex County special civil part "has a way of losing papers."

According to respondent, Austin wanted him to withdraw the motion. By letter dated March 8, 2007 to respondent, with a copy to McField, Austin expressed his belief that Glaud had breached the contract, when he had refused to buy the property.

Nevertheless, Austin requested that respondent stop corresponding with McField because they were "getting nowhere." Austin stated that, once the buyer had sued him for the escrow money, he had asked respondent to release the escrow funds, but that respondent had failed to do so, thereby causing a default judgment and a wage execution to be entered against him. Austin claimed that, when he had asked respondent to release the money to him so that he could pay the judgment directly, respondent had refused to do so. Austin, therefore, concluded that respondent no longer had the money, which he believed constituted a theft.

Austin's letter also threatened that, if respondent did not release the escrow to pay the judgment within three business days, he would pursue criminal charges with the Orange police and would file an ethics grievance against respondent.[5]

Respondent asserted that he had not released the money to Austin because he thought that (1) he "would eventually go back to court with the motion;" (2) it was wrong to release the funds because Glaud had breached the contract; (3) Austin was entitled to part, if not all, of the deposit; and (4) he was entitled to

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[5] At the DEC hearing, respondent's counsel stated that Austin had filed a civil suit against respondent for the $5,000 escrow. Respondent could not recall how the suit had been resolved.

a fee.[6] According to respondent, he thought that he would have been able to come to some agreement with Glaud's attorney over the distribution of the deposit.

Respondent did not provide Austin with a written fee agreement or give him a bill for his services. Austin never objected to paying respondent a fee. Respondent informed Austin that he would deduct his fee from the deposit. He had represented Austin for years and knew that Austin did not want to spend much on legal fees. He did not have any records to document the time he spent on Austin's matter, but felt that $250 represented a nominal fee and that he had done more work than the fee represented (seven to ten hours of work).

At some point, Austin satisfied the judgment with his personal funds. According to respondent, Austin did so against his advice. Respondent claimed that, at that time, Austin was "mad" at him. Eventually, respondent turned over the deposit to Austin, but took a $250 fee from the $5,000 that he eventually disbursed to Austin.

Hall, who also investigated this matter, learned from respondent that he did not want to release the deposit because

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[6] Respondent was not able to say whether Austin had suffered any damages from the cancelled contract with Glaud because, he claimed, he did not know the sale price of the property.

he believed that he would be unable to collect his fee. According to Hall, Glaud had obtained a mortgage commitment at some point, but, for unknown reasons, the commitment had been cancelled later.

Presumably, Hall's investigation revealed that the deposit had remained intact in respondent's trust account, as the complaint does not charge him with failure to keep the deposit inviolate.

The Aquil Matter – District Docket No. VB-08-16E

The complaint in this matter charged respondent with violating RPC 1.15(b) (failure to promptly notify a client or third person upon receiving funds or other property in which a client or third person has an interest); RPC 1.15(c) (failure to keep separate property in which the lawyer and another person claim an interest until there is an accounting or severance of their interests); RPC 1.15(d) (recordkeeping violations); RPC 4.1(a)(1) (knowingly making a false statement of material fact or law to a third person); and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority). These charges relate to respondent's failure to honor a chiropractor's lien, failure to notify the chiropractor of his receipt of the client's settlement funds, misrepresentation to

the chiropractor about his receipt of the funds, and failure to turn over documents requested by the DEC investigator.

Elaine Asya Aquil, a chiropractor, rendered services to respondent's client, Salimah Rasul, for injuries sustained in a December 9, 2002 slip-and-fall accident at a gas station. Although respondent routinely had his clients sign contingency fee agreements, he did not have one in the Rasul file.

Aquil also provided services to Rasul for injuries sustained in a subsequent car accident. Rasul's automobile insurance covered the cost of those services. Because Aquil was not a participating provider with Rasul's health plan, her services for the slip-and-fall were not covered. At Aquil's request, on August 15, 2003, both respondent and Rasul executed a notice of doctor's lien ("letter of protection"), which stated, in relevant part:

> I hereby authorize and direct you, my attorney, to pay directly to said doctor such sums as may be due and owing him [sic] for medical services rendered that are due his [sic] office and to with hold [sic] such sums from any settlement, judgment or verdict as may be necessary to adequately protect said doctor. And I hereby further give a Lien on my case to said doctor against any and all proceeds of my settlement, judgment or verdict which may be paid to you, my attorney, or myself, as the result of the injuries for which I have been treated or injuries in connection therewith.

> I agree never to rescind this document and that a rescission will not be honored by my attorney.
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> [AEx.1)[7]

Aquil understood that the lien would ensure payment of her services out of the proceeds of Rasul's settlement.[8] Her understanding was bolstered by respondent's October 16, 2006 letter, in which he informed her that he did not have a copy of her total bill for services and assured her that he would protect her lien. According to Aquil, however, she had submitted her bill to respondent on more than one occasion, to no avail.

Respondent failed to honor the lien. Once he received Rasul's settlement, sometime in early 2007, he deducted his fee and expenses and disbursed the balance to Rasul, leaving nothing for Aquil's services.

Aquil maintained a log of telephone calls made in connection with each of her patients. From February 26 to June 25, 2007, Aquil's log documented ten telephone calls to respondent, attempting to determine the status of Rasul's

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[7] AEx. refers to the exhibits in the Aquil matter.

[8] Respondent claimed that he was forced to sign the lien because, otherwise, he would not have gotten a report from Aquil. Aquil's report was dated October 24, 2006. He conceded that he had agreed to "protect Aquil's bill," but alleged that, prior to this matter, he had not understood the meaning of the language "protect a bill."

settlement and the payment of her fee. On more than one occasion, respondent misrepresented to Aquil that he had not yet received the settlement funds.

Aquil learned of respondent's misrepresentations when Rasul provided her with a copy of a letter from respondent to Rasul, dated March 5, 2007. That letter set forth the amount of the recovery, the expenses in the case, and respondent's fee and remitted a check to Rasul for $2,500. The letter also stated that respondent had heard from Aquil and had "indicated I did not have the money yet. Please contact me concerning this matter."

Respondent alleged that he had received the settlement funds "in between getting the call from [Aquil] and doing this letter [to Rasul]." He admitted that he never notified Aquil of the receipt of the settlement funds. He conceded that RPC 1.15(b) required him to do so.

In defense of his action, respondent claimed that he did not pay Aquil because he thought that her fee for the report was unreasonable and that the arbitrator had told him that Aquil's report was not very good. He also questioned some of Rasul's visits and believed that some of the charges "seemed a little odd." He added that the case settled for only $4,000 and that Rasul had another case pending from which Aquil's bill could be

paid. He conceded that, if Rasul did not recover funds from her automobile accident case, she would have had to pay Aquil's bill.

Respondent also claimed that he did not pay Aquil for the services she rendered in the slip-and-fall because

> [a]t that time there was very [sic] big ethics investigation about lawyers and chiropractors and getting paid by insurance companies, part of the insurance fraud so to avoid this kind of hearing and to avoid me being charged at all, you just disbursed the money entirely to Salimah Rasul and I believe that I told Dr. Aquil at one time that she would be paid when the other case was settled.
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> [2T211.]

Notwithstanding respondent's claim that Aquil's bill seemed improper, he never attempted to compromise the bill or to discuss her fees or the validity of her charges because, he claimed, that it would have "triggered an ethics investigation."

According to Aquil, her fees were reasonable. They were set by the insurance companies.

Rasul testified that she did not object to paying Aquil from the second case, her car accident settlement. She recalled that her settlement from the slip-and-fall case was probably less than the amount of Aquil's bill for services. She stated that she would not have consented to respondent's giving Aquil the entire settlement because "I've never been involved in a

case where the doctor got more money than I did." When asked in how many accidents she had been involved, Rasul replied, "[J]ust about every year I've had a couple of car accidents, you know. Somebody hit me though, you know."

The ethics complaint alleged, and respondent admitted in his answer that, during the course of the ethics investigation, the presenter had asked him to provide copies of Rasul's retainer agreement, of the signed disbursement sheet required by R. 1:21-7 and R. 1:21-6, and of the file. Respondent did not have a contingency fee retainer agreement and a settlement distribution sheet signed by Rasul. As to the file, respondent stated that he did not provide a copy of it to the investigator because it would require "extensive photocopying, a compromise of privileged information." He notified the presenter that the entire file would be made available to him for inspection.

The Metz Matter – District Docket No. VB-06-38E

The complaint in this matter charged respondent with violating RPC 1.1(a), RPC 1.3, and RPC 1.4(b) for, among other things, filing a complaint but allowing it to be dismissed, failing to have the complaint reinstated, and failing to communicate with the client, after she moved out of state.

According to the formal ethics complaint, in December 2003, Sherrie Metz retained respondent to file a complaint against Hythm Abuali. She was suing her ex-boyfriend for money he owed her. Metz believed that she had paid respondent a retainer, but did not have a writing setting forth the basis or rate of his fee.

Respondent filed the civil complaint on May 21, 2004. On July 6, 2004, the defendant filed an answer. By letter dated October 30, 2004, Metz notified respondent that she was moving out of state and, therefore, wanted to resolve the matter as soon as possible. She emphasized that she did not want to dismiss the case and urged respondent to reschedule the next mediation as soon as possible.

Respondent's November 29, 2004 letter informed Metz that there would be a $3,000 "trial fee." He requested $750 "for additional effort" made on her behalf. Metz did not pay the additional fee.

On November 30, 2004, respondent notified the mediator that "both counsel agree that further mediation would not be productive," that they were attempting to resolve the matter, and that they were also waiting for a trial date.

A court-ordered mediation took place on December 3, 2004. According to Metz, respondent was not only late for the

mediation, but also unprepared, claims that respondent denied. Respondent did not believe that they would succeed at the mediation and accused Metz of making unreasonable demands. Metz claimed that respondent had not brought any documents from her file with him and was unable to answer any questions that were posed. Respondent agreed that he did not bring Metz's file, but maintained that he had extensive notes with him.

The mediation was unsuccessful. After the mediation, Metz prepared draft responses to interrogatories.

Metz informed respondent that she was moving out of state, but did not tell him the destination. She informed him that he should either contact her at her mother's residence or call her mother's telephone number. Metz's letter to the ethics investigator confirmed that she had told respondent that she was leaving the state and that he could filter any correspondence to her through her mother. Respondent had her mother's address and telephone number in the original file in the matter. Respondent admitted sending correspondence to Metz's mother's house, the only address that he had, but did not recall Metz telling him to do so.

Metz spoke to respondent in December 2004, before she moved to Alaska. Her lawsuit was still pending at the time. After she left, respondent did not contact her about the case. She tried

reaching him on numerous occasions and left messages for him to contact her as soon as possible, to no avail.

Respondent claimed that his secretaries had not told him about Metz's calls. He also stated that he "spoke to [Metz] several times" and that he had forwarded six letters to her, but had received no response. One letter, dated July 24, 2006, concerned a March 29, [2005] trial date, which respondent did not attend. The letter, which respondent claimed he had sent to Alaska, stated:

> I'm enclosing various letters [six] that where [sic] sent to you and to the other lawyers.
>
> . . . .
>
> Firstly, all of these letters were sent to other parties, were sent to you as well [sic]. Secondly, I did not hear from you when I received the Trial Date for March 29, 2005.
>
> I could make a Motion to Restore this case but it would seem silly for you to drive or fly from Alaska for this type of case.
>
> [MEx.4.][9]

In 2005 and 2006, Metz was receiving mail at her mother's house, including bills and her regular mail. She did not file a change-of-address card until June 2005, when she finally had a permanent address in Alaska. Until that time, her mother was

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[9] MEx. Refers to the exhibits in the Metz matter.

forwarding her mail to her. She claimed that she received nothing from respondent, including a March 2005 letter.

Respondent testified that he did not know that Metz had moved to Alaska until she called him in 2006. He did not remember calling her after her October 30, 2004 letter to him, informing him that she did not want to dismiss the case and urging him to call her. He stated that, after that letter, he did not hear from Metz and, therefore, believed that she had given up on the case, which made him "happy."

Metz's trial was scheduled five months after her letter. Although respondent admitted, in his reply to grievance, that he had received the notice for the trial date, at the DEC hearing, he testified that he was unaware of a trial date. He added that he thought that he notified Metz about the trial date, but later admitted that, because he did not notify her of it, he could not have expected her to appear. He added that "[one is] supposed to hear from [one's] client throughout the whole litigation."

Respondent never informed the assignment judge or presiding judge that his client was unavailable and never asked for an adjournment or make a motion to have the complaint restored. He assumed that he had received a notice that the case had been dismissed, but thought that Metz had given up on the case. He did not recall when he had received the notice, but noted that

the court usually sends them within a few weeks after the trial date. He later claimed that he received the notice of the dismissal, but that he did not know Metz's whereabouts and that, when he found out that she was in Alaska, he did not have the budget to telephone her there. He did not keep time records and, therefore, could not say how many hours he had worked on Metz's case.

Metz finally heard from respondent on June 21, 2006. At that time, she understood that he was still her attorney and, up until then, believed that her case was still pending. During their telephone conversation, she learned, for the first time, that her case had been dismissed. When she asked respondent why, he replied that he did not know why. He also told her that he was not going to call her in Alaska. Metz asked respondent to forward her case file and to explain why and when her case had been dismissed.

According to Metz, respondent had never informed her that her case had been scheduled for trial or forwarded any correspondence to her mother. Neither she nor her mother had received any calls or letters from him about her case. She never received a copy of the order of dismissal. It was not until she contacted the court that she was informed that her case had been dismissed for failure to appear at trial.

Respondent could not explain why he had failed to appear on the trial date. He theorized that he probably just "blew it." He claimed that, "at one time," he thought that Metz had dropped her case. He further claimed that her settlement demands were unreasonable and that she was "very difficult to handle."

During the course of the representation, Metz returned from Alaska twice. She did not go to respondent's office to find out about the status of her case because, she stated, "I've tried to call him and I couldn't contact him so why would I just show up at his office?" He would not return her calls.

In 2004, Metz had filed an ethics grievance against respondent, while her civil case was still pending. The DEC would not consider it during the pendency of the civil litigation. Metz, nevertheless, wanted respondent to continue with her case because she had already gone through everything with him, wanted him to see it through, and did not want to start over with another attorney.

At the DEC hearing, respondent presented several character witnesses. Russell Sinoway, Cheryll Smalls, and Robin Turner had known respondent for at least twenty-five years. They each thought that respondent was a good attorney, had done a good job on their cases, never neglected their matters, and charged a reasonable fee. Wilbur Ross testified that respondent

represented him for approximately the last four to six years. He concurred with the other character witnesses' opinions and added that respondent is a "very benevolent individual, and a very good person."

Respondent's counsel's brief to us acknowledged that, in the Bost matter, respondent violated RPC 1.15(a) and RPC 1.15(b) for releasing to Austin funds that were escrowed to pay the Bosts' debts. He offered, however, the following mitigating circumstances: (1) the Bosts were responsible for the environmental damage caused by the leaking fuel tank; (2) respondent faced extreme pressure from Austin because Austin was unable to pay the costs for the clean-up; and (3) respondent was contrite about his misconduct.

As to the Glaud matter, counsel argued that respondent did not violate RPC 1.15(a), (b) or (c) by keeping Glaud's $5,000 deposit, because Glaud breached the contract; he obtained a mortgage, but refused to consummate the transaction. Counsel claimed that respondent met his obligations under the rules by keeping the deposit in his trust account. Moreover, counsel reasoned that, if respondent's motion to vacate the default in the matter "had been filed and denied, it would have been reasonable for respondent to keep the [escrow] pending the appeal." Counsel further argued that, because Glaud, not Austin,

filed the grievance against respondent, the DEC did not have jurisdiction to hear the matter.

In the Metz matter, counsel denied that respondent was guilty of a pattern of neglect.[10] He argued that respondent did not willfully abandon Metz's case and that the dismissal of her complaint was caused by respondent's inadvertent failure to notify her of the trial date or to attend the calendar call. As to respondent's failure to communicate with Metz, counsel faulted Metz for not having provided him with her address and telephone number, presumably in Alaska.

Counsel also argued that respondent did not violate the Rules of Professional Conduct in the Aquil matter, when he failed to pay her from the proceeds of Rasul's personal injury action, inasmuch as, counsel claimed, that responded admitted to Aquil that he had released the proceeds to Rasul. Among other things, counsel argued that the "letter of protection" constituted an illegal contract; as such, compliance with its terms would have been against public policy. Counsel cited In re Fontaine, 231 B.R. 1 (Bankr. D.N.J. 1999), where the court held that a physician who seeks to enforce a lien must comply with N.J.S.A. 2A:44-41, which requires the filing of a lien in the

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[10] The complaint did not charge respondent with a pattern of neglect.

county clerk's office within ninety days from the patient's first treatment. The court also held that a "letter of protection" could not excuse compliance with the provisions of that statute.

Counsel concluded that Aquil's lien was illegal and in violation of public policy because she had never filed it with the county clerk within the time required by N.J.S.A. 2A:35-44. Therefore, he argued, her lien constituted an impermissible assignment of the proceeds of a personal injury case prior to judgment. Counsel's position was that, because Aquil's lien was invalid as a matter of law, respondent could not be deemed to have acted unethically.

Counsel also argued that Aquil's lien was impermissible because it exceeded the recovery and that N.J.S.A. 2A:44-38 limits the amount of a physician's lien to twenty-five percent of an accident victim's recovery.

Counsel further argued that Aquil's fees were unreasonable and that, therefore, respondent could not have been expected to pay them.

Counsel denied that respondent had violated RPC 8.1(a) or (b) claiming that he had cooperated fully with ethics authorities.

Counsel concluded that, in view of the mitigating circumstances, the appropriate sanction for the improper distribution of funds to a third party is either a reprimand or an admonition.

As to the bookkeeping violations, counsel pointed to respondent's retention of a qualified accountant, who is performing the required reconciliations of his trust account.

Finally, counsel argued that respondent's overall misconduct deserves a censure because none of it demonstrated "dishonesty, deceit or contempt of law, but lapses in judgment that are honest errors." Counsel asked us to

> (1) acquit respondent of any misconduct in the Glaud grievance and the Aquil grievance; (2) impose the sanction of censure for any misconduct in the Bost and Metz grievance and any other violations which the respondent contests; (3) deny the Office of Attorney Ethics' request for a three month suspension; (4) appoint a proctor for the respondent.
>
> [RB20.][11]

In the Bost matter, the DEC found that respondent's reasons for disbursing the escrow funds were not credible. Conversely, it found Sarah Bost's testimony credible, notwithstanding respondent's attempts to impeach her credibility. Her testimony

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[11] RB refers to respondent's counsel's brief.

was consistent with her husband's testimony and the documentary evidence. In turn, respondent's testimony about when Austin discovered the oil tank problem was inconsistent with Austin's statement to the OAE investigator that the problem was not discovered until months after the closing.

The DEC noted that, regardless of when the contamination had been discovered, no funds had been escrowed to remediate that problem. Therefore, respondent had no basis to retain the escrow proceeds for that purpose. Moreover, respondent's release of funds to Austin occurred before the oil tank problem was discovered. The DEC also noted that respondent conceded that he had violated RPC 1.15(a) and (b) by releasing the funds to Austin.

As to the recordkeeping deficiencies, the DEC found that, as of the date of the filing of the complaint, respondent had not provided the OAE with a current reconciliation of his trust account or proof that he had corrected his recordkeeping deficiencies. The DEC noted that respondent had stipulated violations of RPC 1.15(d) and R. 1:21-6.

In the Glaud matter, the DEC considered respondent's failure to assert a defense in the litigation against Austin. It pointed out that, if respondent had believed that Austin was entitled to the deposit, it was incumbent on him to raise and

litigate that claim. The DEC rejected respondent's argument that he was justified in holding the deposit because Austin could have incurred additional costs to sell the property after the deal with Glaud collapsed. The DEC noted that Austin had suffered no damages because the property sold for more than the contract price with Glaud.

As to respondent's argument that he was entitled to an attorney-retaining lien on the escrow proceeds to protect his fee, the DEC found that respondent did not have a legal basis to assert such a lien. The DEC pointed out that, pursuant to N.J.S.A. 2A:13-5, such a lien arises only in connection with representation in litigation, which did not occur here. Respondent failed to defend Austin in the action started by Glaud and took no steps to perfect his purported lien.

In the Aquil matter, the DEC again found that respondent's testimony lacked credibility, when he claimed that he had offered to "protect" Aquil's bill only because he wanted her report. The DEC noted that the lien document pre-dated the report by two months. In addition, the DEC found inconsistent respondent's testimony about his prior lack of understanding of the meaning of a "letter of protection" and about his ability to use the proceeds from the automobile accident case to guarantee payment of Aquil's bill for the slip-and-fall case.

The DEC found also that respondent's March 5, 2007 letter to Rasul, forwarding her portion of the settlement, was inconsistent with his statements to Aquil, from February 27 through April 27, 2007, that he had not yet received the settlement. The DEC determined that respondent repeatedly avoided talking to Aquil because he had already disbursed the settlement funds to his client.

As to respondent's arguments that the assignment of the settlement to Aquil was illegal under N.J.S.A. 2A:44-41 and void against public policy, the DEC remarked that he had no discussions with Aquil about her bill, after he signed the "letter of protection" and made no attempts to compromise her bill, before he unilaterally disbursed the funds to his client. Instead, he led Aquil to believe that she would be paid for her services.

The DEC determined that, even assuming that Aquil's charges were unreasonable, respondent was not entitled to release the settlement monies and to disregard Aquil's claim to the funds, without some sort of resolution of the competing claims. The only competing claim was respondent's alleged entitlement to a fee. As in the Glaud matter, the DEC found that respondent's alleged right to a fee did not justify his failure to safeguard

the settlement funds until there was a resolution of the competing claims to the funds.

In the Metz matter, too, the DEC found that respondent's testimony lacked credibility, when he maintained that he had sent four letters to her. The DEC noted that Metz was still receiving mail at her last known address.[12]

The DEC found that it was respondent's obligation to contact Metz about the trial date and to notify her that her case had been dismissed; it was not her obligation to contact respondent, during her visits to New Jersey. Moreover, respondent could provide no excuse for not attempting to contact Metz at her last known address. The fact that he accepted only a nominal fee did not excuse his failure to communicate with Metz or to protect her rights.

In all, the DEC found the following violations:

(1) In Bost, respondent violated RPC 1.15(a) and RPC 1.15(b) for having released to his client escrow funds reserved to pay tax liens. In addition, the DEC found that respondent's testimony that, had he the opportunity to redo the transaction,

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[12] The hearing panel report apparently contains a typographical error in the last sentence of page 24: "The grievant's testimony is not credible given that the grievant was still receiving mail at her last known address." The DEC must have meant that respondent's testimony was not credible.

he would pay the liens and release the balance to Austin, instead of the Bosts, demonstrated respondent's failure to appreciate the significance of his wrongdoing and the fact that he was guided by his own personal sense of justice, rather than his obligations under the Rules of Professional Conduct.

(2) Respondent violated RPC 1.15(d) and R. 1:21-6; his recordkeeping deficiencies were the same as those identified in 2002.

(3) In Glaud, respondent violated RPC 1.15(b) by failing to release the deposit, after a default judgment was entered. Additionally, respondent violated RPC 1.2 by failing to abide by Austin's request to release the escrow to satisfy the judgment entered against him.

(4) In the Aquil matter, respondent violated RPC 1.15(b) by failing to notify Aquil when he received the settlement, RPC 1.15(c) by failing to segregate the settlement until he resolved the dispute over Aquil's right to be paid, RPC 4.1, by making misrepresentations to Aquil that he had not received the settlement proceeds, when he had, and RPC 1.15(d) and RPC 8.1(b), by failing to prepare and produce to the investigator the retainer agreement and the disbursement statement.

(5) In the Metz matter, respondent took no action to prevent Metz's case from being dismissed; he failed to request

an adjournment or to appear at the trial call. Thereafter, he took no action to contact Metz, notify her of the status of her case, or have the case reinstated. The DEC did not find gross neglect, but only violations of RPC 1.3 and RPC 1.4(a).

In assessing discipline, the DEC considered respondent's prior three-month suspension, reprimand, and temporary suspension (for failure to satisfy a fee arbitration award) and concluded that respondent continued to violate the same rules. The DEC also considered that respondent would commit some of the same violations, if placed in the same situation. Because of respondent's numerous ethics violations and his inability to comprehend his ethics responsibilities, the DEC recommended a two-year suspension. The DEC based its recommendation, in part, on its belief that respondent would likely engage in future RPC violations, in contravention of the public interest, if lesser discipline were imposed.

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

Respondent's testimony throughout the proceedings demonstrated that he is either oblivious to the Rules of Professional Conduct, or ignores them to suit his own needs, or both. His resort to self-help remedies, rather than the legal

process, clearly and convincingly demonstrates this point. The cases now before us establish that respondent's needs (his fees) were paramount to the interests of his clients or the entitlement of third persons. Moreover, to further his own interests, rather than admit his wrongdoing, respondent provided testimony that strained credulity and twisted the law.

The DEC specifically found, in the Bost, Aquil, and Metz matters, that respondent's testimony lacked credibility. We agree. In the Bost matter, after providing improbable testimony, respondent conceded that he must have been wrong about when Austin discovered the problems with the oil tank. At the DEC hearing, respondent initally vigorously testified that Austin had discovered the problem immediately after the closing and that he had disbursed the funds to Austin for the soil clean-up. Respondent so testified, notwithstanding the testimony of Fred and Sarah Bost, Tamika Jenkins, and G. Nicholas Hall, confirming Austin's statements that the oil tank problems had not been discovered until months after the closing. Documentary evidence from the remediation company supported their testimony.

After the hearing, in a letter to the DEC, respondent conceded that he was mistaken about the date of the discovery. He, therefore, admitted that, by disbursing to his client escrow

funds earmarked for the satisfaction of tax liens, he violated <u>RPC</u> 1.15(a) and (b).

Notwithstanding respondent's ultimate concession that the discovery of the oil problem had occurred several months after the closing, the record is devoid of any explanation for his release of some of the funds to Austin on one occasion (August 10, 2005), prior to that discovery. In light of his revelation that Austin learned of the problems months later, his claims that Austin needed the money for the remediation and/or he was pressured by the remediation company were simply disingenuous.

Unquestionably, respondent breached his obligation to timely satisfy the tax liens after the closing. He paid the judgments two and one-half years after the closing, after the Bosts filed a grievance against him and after he realized that he would be responsible to pay for penalties and accrued interest on the judgments. As of the date of the DEC hearing, respondent was obligated to return the balance of the escrow (more than $7,000) to the Bosts. If Austin had a viable claim against the Bosts for fraudulent concealment of problems with the property, respondent's recourse was to assert that claim through the judicial process, not through self-help measures, that is, keeping the balance of the escrow funds.

Respondent's obvious failure to understand his ethics obligations was underscored by his admission that, if he had to do it over again, he would have satisfied the judgments and turned over the balance of the escrow to Austin, rather than to the Bosts.

As to the charged recordkeeping violations, the OAE's audit revealed numerous accounting improprieties, violations of RPC 1.15(d) and R. 1:21-6. Hall found that many of the bookkeeping deficiencies were the same as those found during the OAE's 2002 audit. Respondent had certified years earlier that the problems had been corrected.[13] We note, based on the OAE's representations at oral argument before us, that respondent's records are still not in full compliance with R. 1:21-6, notwithstanding that respondent has hired an accountant.

In the Glaud matter, after McField demanded the return of Glaud's deposit, respondent never instituted litigation to determine whether Glaud had improperly breached the contract of sale. Instead, respondent failed to comply with McFields' requests for the return of the deposit, claimed that Austin was entitled to "something" for his trouble, and threatened to take

[13] Respondent was not charged with providing the OAE with a false certification. Therefore, we make no findings in this regard.

his fees from the $5,000 deposit, notwithstanding that the $5,000 did not belong to his client, but to Glaud.

Respondent's failure to either release the deposit or assert a claim on Austin's behalf resulted in the entry of a default judgment and a wage execution against Austin. Afterwards, respondent failed to comply with Austin's directive to release the escrow to Glaud. Ultimately, Austin had to use his own funds to satisfy the judgment. Respondent, thus, failed to abide by his client's decision about the scope of the representation, a violation of RPC 1.2(a), and failed to promptly deliver funds that Glaud was entitled to receive, a violation of RPC 1.15(b).[14] The judgment of default mandated the turnover of those funds. Although respondent allegedly filed a motion to vacate the default, the court had no record of it and respondent did not re-file it, as he alleged the court directed him to do.

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[14] Respondent's argument that the DEC lacked jurisdiction to consider this matter because Glaud, not Jenkins, filed the grievance against him lacks merit. Any individual may file a grievance against an attorney. A district ethics committee secretary shall have the authority to investigate any information received by inquiry, grievance or from other sources alleging unethical conduct by an attorney (R. 1:20-3(e)(1)). The Director of the Office of Attorney Ethics shall have the discretion and the authority to investigate any information coming to the Director's attention, whether by grievance or otherwise, which, in the Director's judgment, may be grounds for discipline (R. 1:20-2(b)(2)).

We do not find, however, that respondent violated RPC 1.15(c), as charged in the complaint. That rule requires that funds in which the lawyer and another person claim an interest be kept separate by the lawyer until the resolution of the dispute. Although respondent asserted a claim to $250 out of the $5,000 and, ultimately, removed his $250 fee, he did so when the funds no longer belonged to Glaud. Glaud had already received his $5,000 from Austin when respondent took his fee. By that time, the monies that respondent was holding as "the deposit" belonged to Austin, not to Glaud. Respondent, thus, paid himself a fee out of his client's funds. In the absence of a charge that respondent did so without Austin's consent, we cannot find a violation of RPC 1.15(c).[15]

Likewise, there is no clear and convincing evidence to support the charged violation of RPC 8.4(c) in the Glaud matter. Respondent was charged with having misrepresented that he had filed a motion to vacate the default. Respondent alleged that the court had lost his papers and had told him to re-file the motion, which he failed to do. Because there was no evidence

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[15] Although Hall testified that Austin had told him, during the investigation, that respondent was not entitled to a fee, the complaint did not allege that respondent withdrew his fee without Austin's permission or over his objection.

presented to refute respondent's assertion, we dismiss that charged violation.

In the Aquil matter, respondent failed to honor a "letter of protection" that he signed and a subsequent letter stating unequivocally that he would pay Aquil's bill out of the settlement funds. Yet, he took his fee and disbursed the balance of the settlement to Rasul, all the while misrepresenting to Aquil that he had not yet received Rasul's settlement. In addition, he attempted to draw Rasul into his web of deception when, after telling Aquil that he had not received the settlement, he sent Rasul her portion of the settlement and told her that "I indicated [to Aquil] I did not have the money yet. Please contact me concerning this matter." In this context, respondent violated RPC 4.1(a).

Respondent also violated RPC 1.15(b), in that he failed to promptly notify Aquil that he had received the settlement and failed to either pay or to attempt to negotiate a reduction of her bill.

At the DEC hearing, respondent questioned the validity of Aquil's bill, as well as the number of visits reflected in the bill, and claimed that her lien was invalid under N.J.S.A. 2A:44-35 (filing medical liens) and N.J.S.A. 2A:44-38 (excessive fee). Respondent is mistaken. Clearly, the proceeds from Rasul's

personal injury claim were assignable. By executing the "letter of protection," Rasul made a valid assignment of the settlement proceeds to Aquil. Respondent was aware of the assignment and was a signatory on the document. He, therefore, had an obligation to pay Aquil's bills. Under Cronin v. McKim-Gray, 353 N.J.Super. 127 (App.Div. 2002), once respondent had valid notice of the assignment, he could not "close [his] eyes to the language of the assignment and decline to pay the [bills] out of the settlement proceeds, unless there was a bona fide dispute as to the amount of those bills that would require holding the funds in escrow until the dispute was resolved." Id. at 131. Had respondent truly believed that Aquil's bill was improper, excessive, or fraudulent, his recourse was to seek relief through the judicial process, not to exercise self-help. He was required to maintain the funds inviolate until the dispute over them was resolved.

The complaint alleged that respondent failed to prepare a contingent fee agreement and a written disbursement sheet for Rasul (the client in the Aquil matter), in violation of R. 1:21-7, R. 1:21-6, and RPC 1.15. Indeed, as to the retainer agreement, respondent was unable to explain why he did not have a copy in his file. We find that such failure violated RPC 1.5(c), the more applicable rule, rather than RPC 1.15

(presumably (d)). Although the complaint did not specifically cite RPC 1.5(c), the facts recited therein gave respondent ample notice that he was being charged with failure to execute a contingent fee agreement, which is a violation of RPC 1.5(c).

As to the disbursement sheet, respondent stated, in his answer, that, although he did not have a copy signed by Rasul, she had received it and approved it. We find no clear and convincing evidence in the record that respondent failed to prepare the written statement required by RPC 1.5(c). We, therefore, dismiss that charge. On the other hand, respondent's failure to produce a copy for the investigator violated RPC 8.1(b), as charged in the complaint.

We dismiss, however, the allegation that respondent further violated RPC 8.1(b) when he did not submit a copy of the Rasul retainer agreement during the investigation of the Aquil grievance. One cannot produce what one never had.

One other item that respondent failed to honor was the investigator's request for the Rasul file. Respondent deemed that request unreasonable, as it "require[d] extensive photocopying and compromise[d] privileged information." He claimed that he had offered to make the file available for the investigator's inspection. Here, too, respondent failed to

cooperate with disciplinary authorities, a violation of RPC 8.1(b).

Finally, in Metz, respondent took no action to prevent Metz's case from being dismissed – he failed to request an adjournment or to appear at the trial call. After the case was dismissed, respondent took no steps to have the case reinstated. Unlike the DEC, we find that respondent grossly neglected the matter, as well as lacked diligence in pursuing it, violations of RPC 1.1(a) and RPC 1.3.

After Metz moved to Alaska, respondent took no action to contact her, even though he had her mother's address and telephone number. Metz had instructed him to contact her through her mother. As a result, he failed to notify Metz of the trial date or to timely inform her that her case had been dismissed, a violation of RPC 1.4(b). By the time Metz learned of the dismissal, it was too late to have her complaint reinstated.

In all, we find respondent guilty of violating RPC 1.15(a) and RPC 1.15(b) in Bost; RPC 1.2(a) and RPC 1.15(b) in Glaud; RPC 1.5(c), RPC 1.15(b), RPC 4.1(a), and RPC 8.1(b) in Aquil; RPC 1.1(a), RPC 1.3, and RPC 1.4(b) in Metz; and RPC 1.15(d) and R. 1:21-6 (recordkeeping).

The only issue left for determination is the proper quantum of discipline for respondent's numerous ethics violations. The

improper release of escrow funds, as in Bost, has generally resulted in discipline ranging from an admonition to a reprimand. See, e.g., In the Matter of Karl A. Fenske, DRB 98-211 (May 25, 1999) (admonition imposed on attorney who, although obligated to hold a real estate deposit in escrow, released it to his client, the buyer, when a dispute arose between the parties; in mitigation, it was considered that there was some confusion as to the proper escrow holder and contractual dates); In the Matter of Joel Albert, DRB 97-092 (February 23, 1998) (admonition for the release of a portion of escrow funds to pay college tuition costs of a daughter of a party to the escrow agreement, without first obtaining the consent of the other party; the attorney had a reasonable belief that consent had been given); In the Matter of William E. Norris, DRB 97-400 (December 30, 1997) (admonition where, after the cancellation of a real estate contract, the attorney who held the deposit in escrow returned it to the buyers, instead of depositing it with the court, as specified in the contract of sale); In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to the client funds escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney relied on a legal theory to argue that the former attorney had

either waived or forfeited her claim for the fee); In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold in trust a fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order); In re Milstead, 162 N.J. 96 (1999) (attorney reprimanded for disbursing escrow funds to his client, in violation of a consent order); In re Margolis, 161 N.J. 139 (1999) (reprimand for attorney who breached an escrow agreement requiring him to hold settlement funds in escrow until the completion of the settlement documents; the attorney used part of the funds for his fees, with his client's consent); and In re Flayer, 130 N.J. 21 (1992) (reprimand for attorney who made unauthorized disbursements against escrow funds; the attorney represented himself in the purchase of real estate).

If the improper release of escrow funds is accompanied by other, serious infractions, a term of suspension may result. See, e.g., In re Hasbrouck, 186 N.J. 72 (2006) (three-month suspension for attorney who released to his matrimonial client $600,000, in violation of a court order that required him to keep the funds in escrow until the divorce matter was concluded; the attorney did not disclose to either the court or his adversary that he had disbursed the funds to his client; altogether, the above conduct violated RPC 1.15(a) (failure to

safeguard escrow funds), _RPC_ 3.3(a)(5) (lack of candor toward tribunal), _RPC_ 3.4 (c) (knowingly disobeying an obligation under the rules of a tribunal), _RPC_ 8.4(c) (misrepresentation), and _RPC_ 8.4(d) (conduct prejudicial to the administration of justice); the attorney was also guilty of recordkeeping deficiencies, a violation of _RPC_ 1.15(d); mitigating factors were the attorney's lack of a disciplinary record, civic and community activities, and several letters attesting to his good personal and professional character; aggravating factors were respondent's experience in matrimonial matters at the time of his misconduct; the harmful consequences of his conduct, such as, the unnecessary taxing of judicial resources, and the client's spouse's non-receipt of her share of the equitable distribution, at least as of the date of the ethics hearing, and the attorney's steadfast refusal to acknowledge any wrongdoing) and _In re Moore_, 175 _N.J._ 100 (2003) (one-year suspension for attorney who prematurely released escrow funds to his client, albeit with a reasonable belief that he could do so; the attorney also made numerous misrepresentations about the status of the escrow in pleadings to a court and in correspondence to two attorneys, a surety, and the OAE; the attorney also failed to cooperate with the OAE by not producing records for an audit and did not comply with the Court's order for the production of

the documents; thereafter, the attorney failed to appear on the return date of the Court's order to show cause; the attorney also practiced law while ineligible).

Generally, a failure to release escrow funds, as in Glaud, results in a reprimand. See, e.g., In re Epstein, 195 N.J. 186 (2007) (attorney failed to disburse funds to the clients for almost two years and then only after the OAE filed an ethics complaint against her; she had previously ignored an OAE letter directing her to disburse the funds; she was also guilty of failure to cooperate with disciplinary authorities; prior censure in a default matter); In re Dorian, 176 N.J. 124 (2003) (attorney failed to turn over escrowed funds to a doctor until more than five months after a grievance was filed against him and more than one year after the doctor had provided him with proof of his right to the funds; prior admonition and reprimand); and In re Tutt, 163 N.J. 562 (2000) (attorney failed to distribute funds to one of the beneficiaries of a will for four years after the distribution to other beneficiaries, failed to cooperate with disciplinary authorities, failed to communicate with the client, failed to explain a matter to the client, and lacked diligence).

For failure to promptly remit funds to satisfy a lien, such as in the Aquil matter, attorneys have either been admonished or

reprimanded. _See_, _e.g._, _In the Matter of Douglas F. Ortelere_, DRB 03-377 (February 11, 2004) (admonition for attorney who settled a personal injury case, disbursed his legal fee to himself, withheld money to pay outstanding medical liens but did not promptly disburse those funds, and failed to reasonably communicate with the client about the status of the settlement proceeds, despite her numerous requests; the attorney was also ineligible to practice law during the period of the representation); _In the Matter of Craig A. Altman_, DRB 99-133 (June 17, 1999) (attorney did not promptly pay a doctor's bill despite having signed a letter of protection); and _In re Lowenstein_, 190 _N.J._ 58 (2007) (reprimand for attorney who failed to notify an insurance company of the existence of a lien that had to be satisfied out of the settlement proceeds; the attorney's intent was to avoid the satisfaction of the lien).

Conduct involving gross neglect, lack of diligence, and failure to communicate with clients, such as in the Metz matter, ordinarily results in either an admonition or a reprimand, depending on the number of client matters involved, the gravity of the offenses, the harm to the clients, and the seriousness of the attorney's disciplinary history. _See_, _e.g._, _In re Russell_, ___ _N.J._ ___ (2009) (admonition for attorney found guilty of gross neglect and lack of diligence where the attorney's failure

to file answers to divorce complaints against her client caused a default judgment to be entered against him; the attorney also failed to explain to the client the consequences flowing from her failure to file answers on his behalf); In the Matter of Keith T. Smith, DRB 08-187 (October 1, 2008) (admonition imposed when attorney's inaction in a personal injury action caused the dismissal of the client's complaint; the attorney took no steps to have it reinstated; also, the attorney failed to communicate with the client about the status of the case); In re Uffelman, 200 N.J. 260 (2009) (reprimand for attorney guilty of gross neglect, lack of diligence, and failure to communicate with the client; although the attorney had no disciplinary record, the reprimand was premised on the extensive harm caused to the client, who was forced to shut down his business for three months because of the attorney's failure to represent the client's interests diligently and responsibly); and In re Aranguren, 172 N.J. 236 (2002) (reprimand for attorney who failed to act with diligence in a bankruptcy matter, failed to communicate with the client, and failed to memorialize the basis of the fee; prior admonition and six-month suspension).

In fashioning discipline for respondent, we have given great weight to the aggravating factors present in this case. While individually, each of respondent's violations would result

in either an admonition or a reprimand, his multiple ethics violations in four client matters and failure to correct recordkeeping improprieties, despite having certified to the OAE that he had done so, require significantly greater discipline. We have also considered respondent's obvious refusal to conform to the ethical standards of the profession: (1) his testimony in the Bost, Aquil, and Metz matters was not credible. For example, in Bost, he fabricated an improbable excuse for improperly releasing funds to his client, even in the face of the overwhelming evidence gainst it. He retracted his testimony two months later; (2) by his own admission, if given the opportunity again, he would have turned over to Austin the excess escrow funds, rather than give them to the Bosts or deposit them with the court; and (3) rather than rely on the judicial process when faced with a dispute over the distribution of funds, respondent imposed his own form of justice.

In all, respondent's multiple violations in four cases, his failure to correct recordkeeping improprieties, his significant ethics history, his deceitful conduct, and his aim at self-benefit mandate that he be suspended for one year.

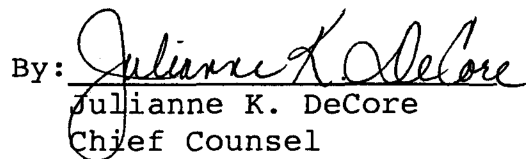
In addition, we determine that, prior to reinstatement, respondent should provide proof of satisfactory completion of ten hours of professional responsibility courses, practice under

the supervision of an OAE-approved proctor until the OAE deems him capable of practicing unsupervised, and provide to the OAE, until further order of the Court, monthly reconciliations of his attorney records, on a quarterly basis, certified by an OAE-approved accountant.

We further require respondent to provide proof, within thirty days of an order in this matter, that he has either turned over the remaining escrow funds to the Bosts or has deposited the funds with the court, until any dispute over the funds is judicially resolved.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

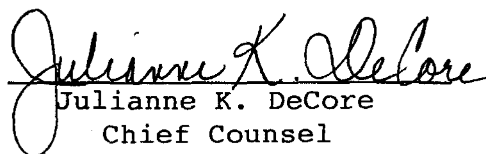
In the Matter of Marvin S. Davidson
Docket No. DRB 09-280

Argued: January 21, 2010

Decided: April 13, 2010

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh		X				
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		9				



Julianne K. DeCore
Chief Counsel