SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-170
District Docket Nos. XIV-07-185E,
XIV-07-186E, and XIV-07-187E

IN THE MATTER OF	:
ANDREW M. KIMMEL	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 17, 2008

Decided: September 25, 2008

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (disbarment) by Special Master Robert C. Shelton, Jr. The complaint charged that, as executor and trustee of a decedent's estate, respondent knowingly misappropriated estate trust funds, grossly neglected the estate, charged excessive

fees, failed to safeguard client funds, and engaged in conduct prejudicial to the administration of justice. We recommend respondent's disbarment.

Respondent was admitted to the New Jersey bar in 1968. He has no prior final discipline. However, he was temporarily suspended, on May 23, 2006, for failure to cooperate with the Office of Attorney Ethics ("OAE") and failure to appear before the Court on its order to show cause ("OTSC") associated with the OAE's motion for temporary suspension. He remains suspended to date.

At our March 20, 2008 session, we voted to censure respondent for his combined misconduct in two matters, including failure to return a file upon termination of the representation and practicing law while ineligible for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection ("CPF"). In the Matters of Andrew M. Kimmel, DRB 07-341 and DRB 07-342 (May 8, 2008)). These matters are currently pending with the Court.

At our July 17, 2008 session, we also considered a second matter, under DRB 08-084, alleging gross neglect in a single client-matter. There, we determined to impose a reprimand.

A May 19, 2008 CPF report for respondent shows that, on February 20, 2008, the Fund paid a $53,255 claim in this matter to the estate of Emanuel Richter, the estate at issue here.

The following background facts are uncontested.

Respondent represented Dr. Emanuel Richter and his wife, Ann, beginning in 1983. Ann Richter passed away on September 17, 1994, predeceasing Dr. Richter. Ann's will established a trust for the benefit of Dr. Richter. Upon his death, the trust was to continue, with the principal and income to pass to their son, grievant Adam Richter.

In November 1994, as attorney for Dr. Richter, respondent filed an application for probate of Mrs. Richter's will. He also wrote a letter to Princeton Bank and Trust Company, seeking its services as trustee.

COUNT ONE

Count one of the complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), and RPC 1.15(b) (failure to promptly remit funds to a third person) in connection with his handling of both Ann's and Dr. Richter's estates.

At the outset of the hearing before the special master, the presenter withdrew the allegation that respondent had neglected Ann's estate, focusing solely on Dr. Richter's estate.

When OAE investigator Mary Jo Bolling was assigned to investigate Adam's grievance, in December 2005, she became the third OAE investigator involved in the matter. According to Bolling, she subpoenaed information from various companies with whom Ann and Dr. Richter held stock, as well as records from Wachovia Bank and Hudson City Savings Bank, in order to establish the assets of Dr. Richter's estate. She then prepared a spreadsheet and charts, showing how payments came into and were disbursed from the estate account.

First Union National Bank records showed that, over the course of respondent's representation of Dr. Richter's estate, respondent had deposited in the estate account a total of $250,007.52 in "cash, life insurance, bonds, and a few checks." The subpoenaed records also established that about twenty checks had been made payable to the estate, on account of a note executed by Eulene Sinclair. Sinclair, a friend of Dr. Richter, had borrowed $50,500 from the doctor. According to Bolling, Sinclair's bankruptcy trustee confirmed that he had sent numerous checks to respondent on account of Sinclair's debt, but respondent had never negotiated many of them.

Respondent admitted that he had failed to attend to certain aspects of the estate, including the Sinclair bankruptcy checks. He sought to diffuse his inaction by stating that, even though he had not deposited the checks, the funds were still owed to the estate.

Respondent further admitted that he had allowed other checks to go stale, instead of depositing them into the estate account. The checks represented dividends from companies in which Ann and Dr. Richter owned stock.

According to Bolling, General Motors and BellSouth stock, originally owned by Ann Richter, was still throwing off dividends after Dr. Richter's death. Company records indicated that respondent had failed to negotiate a total of forty-seven checks, dated between May 2005 and February 2006, and totaling about $1,500. Respondent did not challenge Bolling's account.

Bolling also obtained records from Norfolk Southern, during the OAE investigation. Those records revealed that it had electronically deposited dividends to a Wachovia Bank account, presumably belonging to Dr. Richter, from June 10, 1993 through March 10, 2003, almost three years after Dr. Richter's April 23, 2000 death. Dividends paid from March 10, 2003 through June 10, 2004 escheated to the State of New Jersey.

The record shows that, on June 16, 2004, respondent contacted Norfolk Southern about the outstanding dividends, seeking instructions on how to redeem the missed dividends. Norfolk Southern replied on November 2, 2007, removed a "Lost code" from its system, and thereafter sent dividend checks, care of respondent, from September 10, 2004 through September 10, 2007. Norfolk Southern records show that none of those checks were negotiated. Respondent did not take issue with the contents of those records.

Respondent admitted the allegation of the complaint that he had neglected to transfer Dr. Richter's stock in various companies to stock in the estate name. He sought to minimize his inaction, stating that he had not misused the shares of stock and that he still held the original stock certificates in a fire-proof safe.

Adam testified about his interactions with respondent. According to Adam, he had repeatedly requested, among other items, an accounting, a copy of his mother's will and the status of collection proceedings against Sinclair. Adam wrote several letters to respondent, in May and July 2001. Respondent never complied with his requests for information.

According to Adam, soon after his father died, he and respondent had agreed that he would receive monthly payments for

medical and living expenses, under the terms of his father's trust. He claimed that respondent was erratic in making the monthly trust payments, on which he depended. Adam recalled receiving his first monthly payment in 2003, long after his father had passed away. He also recalled calling respondent constantly, in order to prod him to action or to provide him with details about the trust.

On cross-examination, Adam conceded that his January 18, 2005 grievance was erroneous to the extent that he claimed that, in the first three years after his father's death, he had received only about $2,400 from the trust. In truth, Adam conceded, respondent had disbursed over $100,000 to him by that time, much of it for the purchase of a house and an automobile.

In all, Adam agreed that he had received $133,473.67 from the trust, plus $34,000 in $2,000 increments from respondent, which were paid from respondent's business and personal accounts. As seen below, these payments were in satisfaction of a $30,000 loan that respondent had taken from the estate. Adam testified that he was unaware of this loan.

Finally, Adam testified that, as of October 26, 2007, the date of the ethics hearing, he had retained an attorney to pursue the turnover of the estate assets to a new trustee,

Maurice Fiorenza, who is his wife's son. Adam did not know the status of the assets remaining in the estate.[1]

In his answer, respondent claimed to have given Adam a copy of his mother's will as a courtesy. Also in his answer, respondent admitted that he had prepared no accountings for Adam.

COUNT TWO

Count two charged respondent with having violated RPC 1.5(a) (excessive fees), RPC 1.15(a) (failure to safeguard funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and In re Wilson, 81 N.J. 479 (1979) (knowing misappropriation of trust funds).

Specifically, this count alleged that, between August 11, 2000 and November 10, 2004, respondent disbursed to himself excessive fees for work that he performed for the estate of Dr. Richter and that he knowingly misappropriated the estate's funds over and above those fees. It also alleged that respondent depleted the estate funds, forcing him to make payments to Adam from his law firm and personal funds.

[1] According to a May 24, 2008 certification from respondent, as of May 22, 2008, the estate stocks were valued at $101,405.

Between August 11, 2000 and November 10, 2004, respondent disbursed $87,511.20 of the estate's funds to himself or to his law firm. A portion of that amount ($12,500) was for fees earned and billed to Dr. Richter. Two of the checks to respondent were dated the same day, March 22, 2004. One check was made out to cash ($24,500) and the other to respondent ($5,500). Respondent cashed both of the checks, which totaled $30,000. In addition, respondent collected $21,756 for fees to May 1, 2001, and $23,255 for fees from May 1, 2001 to November 10, 2004.

Respondent denied that his fees were excessive or that he had misappropriated any of the estate funds:

> It is true that what the estate paid out to me amounted to $87,511.00, and I reference there C118. That was one of their spreadsheets, and it shows the total distribution paid to – what am I called – respondent? . . . And that's accurate. . . . Of that amount, $12,500 was paid to me for services rendered to Dr. Richter prior to his death. And that bill is set forth in R16. Yes, it is. So after taking that into account, there was a balance of $75,011.00, I dropped the cents, that had been disbursed or distributed to me from the estate. During the period April 24, 2000, the day after Dr. Richter's death to April 30, 2001, period of a year and a week, total distributions from the estate to me amounted to $21,620, time for services rendered and additional $136.20, which I rounded off to $136.00, was paid to me in reimbursement of disbursements that I incurred. **After taking those two amounts into account, it would have left a balance of $53,255 for me to explain** [emphasis added]. I have also this comment,

> that in one of the submissions of the [OAE], they had no problem with and did not fault the distribution to me of $12,500.00 and $21,756.00, which is the sum of 21,620 plus 136. So that left a balance of $53,250 that was paid to me. How come? And incidentally, I explained in the bracketed language that my hourly rate was $300.00, remained fixed from the period of April 2000 to April 2006. And thus my May 4, 2001 bill – that was the date of the bill, and it covered services from April 24, 2000, to April 30, 2001 – reflected the fact that I had spent during the course of that one year and one week, 72.1 hours on services rendered. That's what it shows on [$]21,620. . . .
>
> [3T62-8 to 3T64-2.]

According to respondent, he maintained daily time sheets for legal services rendered to the estate, but "discarded them after [he] did a bill" (3T106). Instead, respondent gave the OAE copies of two bills for legal services to the estate. The first bill, as respondent testified above, was for $21,756.20. This initial bill contained a highly detailed explanation for his charges from April 24, 2000 to May 10, 2001, but did not break them down by amount of time spent.

Respondent's second (and final) bill to the estate, dated November 11, 2004, was for $23,255. It contained virtually no usable detail about the services rendered. It stated, in whole:

> **FOR PROFESSIONAL SERVICES RENDERED** in connection with the above-described matter during the period commencing May 1, 2001 and ending November 11, 2004 including, more particularly: At least two or more lengthy

> telephone conferences each week with Adam Richter starting around 7:00 a.m. (variously made to my home telephone, to my cellphone, or to my office phone) regarding Mr. Richter's demands that the Estate increase his monthly payments to an amount in excess of $2,000 and/or reimburse him or pay him, by of example [sic], for the cost of a new car, for dental costs, a vacation to Italy, other vacation costs, home improvement/maintenance costs and expenses, cost of living increases, and other costs and expenses; And further including various other miscellaneous tasks in connection with the administration of the estate of Emanuel J. Richter.
> FEE FOR ABOVE SERVICES $23,255
>
> [Ex.R-16.]

Respondent explained the above bill:

> My chart also shows, and I'm testifying to this, that during the period from May 1, 2001 to November 11, 2004, the total distribution from the estate to me for services rendered amounted to $23,255.00. . . . Thus the November 11, 2004 bill reflects the fact that I spent 77-and-a-half hours, which is the fee portion of the bill. . . . And actually, your Honor, I didn't do this on the chart here, or on my presentation, but if you divide 1.8 hours monthly total by 4.3 weeks in a month, it comes to approximately .42 hours that I spent [per] week on the Richter estate. . . .
>
> [3T64-10 to 3T65-10.]

The OAE presented no witnesses or documentary evidence regarding the reasonableness of respondent's total fees.[2]

Respondent went on to clarify the remainder of the $53,255 sum:

> [I]t leaves for me to explain a further disbursement of $30,000. And this was a loan from the estate to me. And so around March 22, 2004, I borrowed the sum of $30,000 from the estate of Emanuel J. Richter as evidenced by a promissory note payable on demand and bore interest at the rate of 9 percent per annum. I commenced to repay that loan on December 1, 2004, and I paid it by paying $2,000.00 per month for a period of 17 consecutive months, and so the total payment was $34,000.00, of which $30,000.00 was principal and $4,000.00 was interest.
>
> [3T65-12 to 24.]

In his answer, too, respondent explained the details of the above loan, which is the subject of the knowing misappropriation charge in the second count:

> $30,000 was a loan from the Estate to Respondent, made on March 22, 2004, payable on demand, bearing interest at the rate of 9% per annum, and evidenced by a Promissory Note to that effect. The Note, together with interest thereon, was repaid in seventeen equal monthly installments made to Adam Richter, commencing on or around December 1, 2004 and ending on or around March 5, 2006.

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[2] Respondent also claimed to have accumulated 34.0 hours of unbilled legal services to the estate, from November 11, 2004 until his April 2006 temporary suspension (Ex.R-16).

N.J.S.A. 3B:14-23 grants specific powers to fiduciaries 'in the absence of contrary ... provisions ... in the will.'

N.J.S.A. 3B:14-23(c) grants the trustee the power:

> 'To invest and reinvest assets of the estate of trust under the provisions of the Will ..., and to exchange assets for investments and other property upon terms as may seem advisable to the fiduciary.'

N.J.S.A. 3B:14-23(u) grants the trustee the power 'to acquire ... an asset, including ... personal property ... for cash or on credit ...'

N.J.S.A. 3B:14-23(w) provides as follows:

> 'The powers set forth in this section are in addition to any other powers granted by law, and by a will ... or other instrument.'

Pursuant to Article Twelfth of his Last Will and Testament, Dr. Richter set forth certain powers granted to his Executor and Trustee which were 'in addition to, and without limiting, any powers and authority which are granted to or vested in my Executors by any of the other Articles of this Will or by law ...' Among those specific powers, is the power to 'invest and reinvest in any property, whether or not such property shall be authorized by the laws of any jurisdiction for the investment of funds of estates or trusts.'

Pursuant to Article Twelfth of Dr. Richter's Last Will and Testament, the trustee was further granted an absolute authority to 'dispose of any property, at such time or times, and upon such terms and conditions, including terms of credit, with or without security, as they shall deem advisable; **and, in general, to exercise, personally or by attorney, any and all rights and powers which might be exercised by an absolute owner of any property at any time held under**

> **this Will, all at such times, and in such manner and on such conditions as they shall deem advisable.'**
>
> [2A¶2.][3]

Respondent testified that the credit language in Article Twelfth of Dr. Richter's will

> obviously included, quite specifically, the power to loan money because it spoke about disposing, for any purpose, property upon such terms and conditions as the trustee deems advisable, including terms of credit with or without security. So the only way terms of credit, whether with security or without security would arise, would be pursuant to a loan made, and that was my language for 30 years, and that's what the language always meant to me.
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> [3T60-19 to 3T61-3.]

COUNT THREE

Count three alleged that respondent violated RPC 1.1(a) (gross neglect), RPC 1.15(b) (failure to promptly remit funds to a third party), RPC 1.15(a) (failure to safeguard funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), and In re Wilson, 81 N.J. 479 (1979). This count alleged that respondent so depleted the estate's funds

[3] "2A" refers to the second count of respondent's verified answer.

that he could not make a specific bequest contained in Dr. Richter's will.

The will provided for a specific bequest of $6,000 to the Hadassah Medical Relief Association. Respondent conceded that he had not forwarded the bequest. He stated, "I wrote to them telling them that they were a beneficiary. . . . For the life of me, I don't know why I didn't satisfy that bequest." However, he denied that this failure was the result of having spent all of the estate assets:

> In count three, paragraph 3, that's mind boggling, and the complainant should have known better. [The complaint] says, 'Respondent's knowing misappropriations depleted all the fund [sic] in the estate of Dr. Emanuel J. Richter so this bequest cannot be paid', and it's referring to the bequest of $6,000.00 to Hadassah. But the complainant knew or should have known, or could have asked me, whether Dr. Richter's estate still consisted of those various stocks, the originals of which I provided to the complainant, but that complainant made copies of, and could have done the same research I did to determine what the values were. So paragraph 3 is false. And in fact, there remains in the estate of Dr. Richter $88,000.00 — in excess of $88,000.00. So the bequest to Hadassah Medical Relief Association of $6,000 can, obviously, be made.
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> [3T74-9 to 3T75-2.]

COUNT FOUR

Count four charged respondent with having violated RPC 3.3(a)(1) and (2) (lack of candor toward a tribunal), RPC 8.1(b) (failure to cooperate with an ethics investigation), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

This count alleged that, in late 2005 and early 2006, when the OAE sought respondent's explanation for large distributions from the estate to himself, respondent failed to cooperate with the investigation, leading to his temporary suspension. The complaint further alleged that respondent lied to the Supreme Court, in a reply to the OAE's motion seeking his temporary suspension.

According to Bolling, the OAE sent respondent letters, in early 2006, seeking his explanation for two large withdrawals (that made up the $30,000 "loan") from Dr. Richter's estate, and rescheduling a February 27, 2006 demand audit that respondent had not attended. A March 21, 2006 letter to respondent noted their contemporaneous telephone conversation, in which respondent had requested, and Bolling had denied, an indefinite adjournment of his matter, due to his mental illness. Bolling recalled recommending that respondent apply instead for disability inactive status. A second March 21, 2006 letter to respondent enclosed a general medical release and a release

directed to Norfolk Southern, both of which required his signature to permit the OAE to obtain that company's records.

On April 6, 2006, the OAE sent respondent a letter, questioning his claimed inability to cooperate with that office. According to the letter, Adam had advised the OAE, that day, that he had contacted respondent at respondent's office, on April 4, 2006, and that he and respondent had discussed the estate, disbursements, and the like. Because respondent appeared to the OAE to be well enough to conduct business at his office, it concluded that he was well enough to cooperate with its investigation. The letter advised respondent that, based on his failure to cooperate with the OAE, that office intended to file a motion for his temporary suspension.

On April 27, 2006, the OAE filed a petition for respondent's temporary suspension.

Respondent admitted that he had failed to cooperate with the OAE, but claimed that he "did not do that on purpose." He conceded that his May 3, 2006 response to the motion for his temporary suspension stated that, "At the present time, I'm not emotionally/psychologically/medically able to handle overly demanding and draining proceedings such as a court proceeding and the like, and am only able to engage in 'light office

work'". However, he denied that he had thereby lied to the Court.

Respondent likewise denied that he had lied in his reply to the Court, which, according to the complaint, stated, "In point of fact, I have not participated in any adversarial proceeding in court or otherwise for the last two years. This has been the situation for me since June 2003. In most weeks, I am out of the office two days and in the office three days."[4]

Respondent introduced into evidence his February 13, 2007 letter to the Court, in which he challenged the OAE's assertion that he had lied in his materials:

> Mr. Gronikowski writes that on March 20, 2006, I requested an 'indefinite postponement of the audit for medical reasons.' Mr. Gronikowski also stated, as though he were a physician in addition to being a lawyer, that 'OAE takes the position that if [I am] unable to cooperate in this investigation indefinitely for medical reasons, then [I am] unable to practice law indefinitely for medical reasons.' The parallel is without basis and illogical. I am fully capable of preparing a Will for a client, or securing an inclusive educational program for a child with a disability, or

[4] Respondent's May 3, 2006 letter containing this quote is a part of Exhibit C-62, the OAE's motion for respondent's temporary suspension. Respondent objected to this exhibit's introduction midway through the hearing, on the grounds that it contained legal argument that should be admitted upon the conclusion of the case. Apparently, Exhibit C-62 was never admitted into evidence.

> handling a real estate transaction, even though I was unable – psychologically and emotionally – to cooperate in Mr. Gronikowski's tilted, frightening and flawed investigation.
>
> [Ex.R-8 at 7.]

After respondent failed to appear on the May 23, 2006 return date of the Court's OTSC, the Court issued an order for his temporary suspension.

Respondent also addressed the specific allegation that, on May 26, 2006, he had appeared pro se as plaintiff in a civil matter in Monmouth County Superior Court. According to respondent, on March 20, 2006, he filed a complaint against Maureen Maimone, seeking an equitable interest in the house they had shared for fifteen years. Respondent was pro se at the time, because he could not afford an attorney. Respondent had a motion for Maimone's deposition, returnable on May 26, 2006. Although respondent had been suspended three days earlier, he claimed that he only learned of his temporary suspension in court, that day, from his adversary.

In addition, in a January 14, 2008 post-hearing submission to the special master, respondent explained that, had he been "medically" capable of attending the Court hearing, he would have done so "and would not have been suspended." Respondent went on to comment that "Mr. Gronikowski admitted that [much] in

his internal email to [OAE investigator] Bolling dated May 1, 2006," in which he stated:

> 'Now that Kimmel will likely make some sort of appearance, the Court will probably not suspend him but will require him to cooperate w/ us w/in 30 days (and when) he doesn't cooperate, the Court will suspend him on our word alone.'
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> [Respondent's January 14, 2008 brief to the special master at 12.]

COUNT FIVE

Count five charged respondent with violating RPC 8.4(d) (conduct prejudicial to the administration of justice). This count alleged that respondent violated a temporary restraining order entered against him on January 19, 2006, prohibiting respondent from contacting either Maimone or her son, JC, at home. Respondent admitted that he violated the order by telephoning Maimone on February 6, 2006.

In an April 5, 2007 letter to the OAE, respondent "revisit[ed] the complaint . . . to identify those allegations which at this point I do not dispute, and those that I do dispute." Respondent explained that, from 1988 to 2003, he had lived with Maimone and her son JC, since he was three years old. According to respondent, JC has Down Syndrome. In early January 2006, Maimone told respondent that he would no longer be

permitted to speak to JC or to see him again. Respondent recalled that the prohibition was devastating to him:

> On February 6, 2006, in the evening, I telephoned Ms. Maimone, admittedly in violation of the restraining order, for the purpose of speaking with her son, JC, who I had known, nurtured, cared for, and loved for eighteen years – from the time that he was three years old until January, 2006, when he became twenty-one years old on January 21, 2006. . . . But all that I wanted to do was to tell JC that I missed him and that I loved him. She hung up on me. I then attempted to kill myself.
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> [October 22, 2007 letter from respondent to Lee A. Gronikowski, Esq. at 5.]

COUNT SIX

This count charged respondent with failure to comply with the provisions of R. 1:20-20, dealing with suspended attorneys. Specifically, the rule required respondent, who was temporarily suspended in May 2006, to file a detailed affidavit, within thirty days of the suspension, setting forth the actions taken to comply with the rule.

Respondent admitted that he had not timely filed the required affidavit. He testified that he finally accomplished that task on April 5, 2007, almost a year after his suspension.

With regard to count one, the special master found no violations in connection with Ann Richter's estate, as

respondent had neither represented that estate nor acted in a trustee or executor capacity.

With respect to Dr. Richter's estate, the special master found respondent guilty of gross neglect and lack of diligence for his failure to transfer numerous stock certificates from Dr. Richter's name to the estate, failure to collect dividends for stock certificates in his possession, and failure to deposit numerous other dividend checks that belonged to the estate.

The special master dismissed the charge that respondent had failed to comply with Adam's requests for his mother's will, an accounting, and other forms of relief. Rather, the special master sided with respondent, not Adam, concluding that respondent had sent Adam a copy of the will. The special master noted that Adam, who was not respondent's client, could have requested interim accountings from the probate court.

As to count two, the special master found that respondent was wrong to place reliance on the provisions in Dr. Richter's will that allowed the executor broad discretion in investing estate funds. The special master found that "those powers conferred no authority that they be used [to] benefit the attorney-fiduciary." The special master specifically found that the $30,000 loan to respondent, which was repaid with interest, "could only have been valid if made **with the full knowledge and**

consent of the beneficiary." The special master concluded that, because respondent did not seek Adam's consent, the loan amounted to knowing misappropriation, for which disbarment was required.

The special master also found that respondent's fees were so excessive as to merit, without more, respondent's disbarment. He likened respondent's actions to those of the disbarred attorney in In re Ort, 134 N.J. 146 (1993). Ort had charged $32,000 in legal fees for representation of an estate valued at $250,000, in addition to having committed other serious improprieties. The special master considered respondent's fees to be more unreasonable than Ort's, insomuch as respondent charged $45,000 against a $250,000 estate.

With respect to count three of the complaint, the special master found respondent guilty of gross neglect, lack of diligence, failure to promptly remit funds to a third party, failure to safeguard funds, and conduct involving dishonesty, fraud, deceit or misrepresentation. Specifically, the special master found that respondent never made the $6,000 bequest to Hadassah and failed to transfer numerous securities in Dr. Richter's name to the estate. The special master remarked that, were this respondent's only infraction, a six-month suspension would be warranted.

The special master also found respondent guilty of the charge in count four. Specifically, the special master found that respondent lacked candor when he stated, in his reply to the Court's OTSC for his temporary suspension, that he was unable to appear for medical reasons. Yet, the special master noted, respondent appeared pro se in his own Monmouth County matter days later. The special master further found that respondent failed to cooperate with the OAE, for which he was temporarily suspended on May 23, 2006.

With regard to count five, the special master found that respondent engaged in conduct prejudicial to the administration of justice by violating a court order prohibiting him from contacting his ex-girlfriend, Maimone.

Finally, the special master found that respondent failed to timely file the affidavit in compliance with R. 1:20-20.

As previously stated, the special master recommended respondent's disbarment.

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

Count one charged respondent with misconduct related to both Ann's and Dr. Richter's estates. The special master correctly found however, that respondent did nothing wrong in

connection with Ann Richter's estate. Dr. Richter handled that estate until his death, at which time its assets were transferred to his estate.

We find, however, that respondent grossly neglected the handling of Dr. Richter's estate. Concededly, he failed to deposit into the estate account approximately twenty checks paid to the estate by Eulene Sinclair, a debtor. He also neglected to transfer stock certificates from Lucent Technologies, AT&T, BellSouth, Norfolk Southern, Nynex, and Bell Atlantic into estate shares.

Furthermore, respondent allowed numerous dividend checks to grow stale, failing to negotiate a total of forty-seven dividend checks from General Motors and BellSouth alone.

There were problems with Norfolk Southern dividends as well. Norfolk Southern's records revealed that it had electronically deposited dividends to a Wachovia Bank account from June 10, 1993 through March 10, 2003, including an almost three-year period after Dr. Richter's April 2000 death. In addition, Norfolk Southern dividends from March 10, 2003 to June 10, 2004 escheated to the State of New Jersey because of respondent's sloth. Unquestionably, thus, respondent's inaction amounted to gross neglect and lack of diligence.

Count two alleged that respondent charged excessive fees – fully thirty-five percent of the estate's corpus. Although we agree that respondent's fees were excessive, the OAE calculations, as well as those utilized by the special master, are somewhat inflated. According to the complaint, total cash assets ($250,007.52) divided by the amount disbursed to respondent ($87,511.20) equals the percentage of fees to respondent (35%). However, the $87,511.20 figure neglects to back out the $30,000 "loan" that respondent repaid and $12,500 in legal fees that respondent had earned and billed to Dr. Richter prior to his death ($87,511.20 minus $30,000 minus $12,500 = $45,011.20). The $45,011.20 sum reflects the true amount of fees that respondent received from Dr. Richter's estate.[5]

Respondent began performing legal services for the estate on April 24, 2000, the day after Dr. Richter's death. His first bill, in the amount of $21,756, was a very detailed account of his charges from April 24, 2000 to May 1, 2001. The charges were well documented in Ex.R-16. We find that respondent satisfied

[5] Respondent also claimed 34.0 hours of unbilled attorney time for legal services rendered to the estate from November 10, 2004 to April 2006.

his burden to show that the fees he charged for that time period were not excessive.

Respondent's second and final bill, however, in the amount of $23,255, was for services rendered from May 1, 2001 through November 10, 2004.[6] This latter bill covered a three and one-half year period, but was only one paragraph in length. It claimed fees for nearly eighty hours ($23,255 ÷ respondent's $300/hour attorney rate) of telephone calls with Adam, discussing almost exclusively Adam's monthly allowance and other reimbursements.

As noted earlier, Adam had complained bitterly to ethics authorities that he was forced to "hound" respondent for his monthly payments, because respondent had been so erratic about sending the funds to him. In fact, Adam did not receive monthly payments from respondent during most of the time covered by the second bill, May 2001 to July 2003. Payments resumed on August 18, 2003.

For his part, respondent complained sorely about receiving incessant telephone calls from Adam. According to respondent, the calls averaged thirty to forty-five minutes each. We find it grossly excessive that respondent billed the estate for almost

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[6] As expected, the two combined bills equal total legal fees ($21,756 + $23,255 = $45,011).

eighty hours of such calls. He should not be rewarded with an allowance for fees incurred by his own inaction. We believe that the $23,255 charge was not reasonable for "sitting on the phone" with Adam – a service that did not inure to the benefit of the estate. We find, thus, that respondent's charges on the November 11, 2004 bill were excessive, in violation of RPC 1.5(a).

Count two also charged respondent with knowing misappropriation of the $30,000 of estate funds that respondent characterized as a loan.

Respondent was adamant that he had not misappropriated the funds. In support of his position, he furnished a copy of a demand note that he had placed in the estate file, contemporaneously with the loan. He also provided proof that he had repaid the loan in seventeen equal installments of $2,000, made payable to Adam.

Respondent's testimony, verified answer, and written submissions provided his interpretation of the provisions of Dr. Richter's will and the governing statute, N.J.S.A. 3B:14-23. We note that neither the OAE's brief nor the special master's report discussed respondent's position.

N.J.S.A. 3B:14-23 grants a trustee the power to invest and reinvest assets of the estate under the provisions of the will

and to exchange assets for investments and other property upon terms as may seem advisable to the fiduciary.

Article Twelfth of Dr. Richter's will, which respondent drafted, granted the executor and trustee broad powers, including the power to invest and reinvest in any property, "whether or not such property shall be authorized by the laws of any jurisdiction for the investment of funds of estates or trusts." Article Twelfth also gave the estate's executor or trustee authority to exercise, personally or by attorney, the rights and powers of an absolute owner of the property. Finally, it granted an absolute authority to dispose of estate property, including by terms of credit, with or without security, as the executor or trustee deemed advisable. According to respondent, the will expressly permitted him to lend estate funds to others and, moreover, to himself.

We agree with the first of respondent's contentions, but not with the second. The will authorized him to make loans to third parties, as part of an investment plan. But he was not a classic third-party borrower. He was a trustee/fiduciary. In New Jersey, "a trustee does not have the power to borrow money from trust assets unless there is an express or implied power to do so from the terms of the trust instrument or unless the trustee seeks and obtains court approval." Clark v. Judge, 84 N.J.

Super. 35 (1964), affirmed 44 N.J. 550 (1965). Respondent claimed that he had the express authority from the will. He summarized his position at the hearing before the special master:

> Your Honor, I hope I didn't make any mistake, but I understood, genuinely believed, and am confident, I'm going to find case law given the broad powers that were bestowed upon me. And, in general, [the will] says exercise all the powers of an absolute owner of any property. I don't know how it could have been more clear than that. It's a broad power, because the testator, grantor, trusted me implicitly. I thought I had the power to loan myself that money. I didn't think I had the power to gift that money to me. I thought I had the power to loan that money to me. And I thought I especially had the power to loan that money to me at an interest rate that was 5 percent higher than the – than the prime – 5 percent higher than the prime rate at the time, which was approximately 4 percent.
>
> [3T66-7 to 22.]

As mentioned before, starting on December 1, 2004 (nine months after the $30,000 "loans"), respondent repaid the loan in seventeen installments of $2,000, sent directly to Adam, for a total of $34,000.

In urging respondent's disbarment for borrowing estate funds without the beneficiary's consent, the OAE relied on In re Wilson, 81 N.J. 451 (1979) (knowing misappropriation of trust funds leads to disbarment), which was extended to include escrow

funds in In re Hollendonner, 102 N.J. 21 (1985). The OAE and, later, the special master concluded that respondent had "committed a culpable act of self-dealing" and "breached the fiduciary duty to the late Dr. Richter and to the Trust's sole beneficiary, Adam Richter."

The OAE also relied on In re Noonan, 102 N.J. 157 (1986), a post-Wilson case stating that "the misappropriation that will trigger automatic disbarment . . . consists simply of taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." In re Noonan, supra, 102 N.J. at 160.

The OAE did not address respondent's persistent argument, throughout the proceedings, that he had a good-faith belief that the will, which he had drafted, authorized him to borrow estate funds. The OAE's brief was conclusory, stating that respondent held only powers "ordinarily granted to trustees under New Jersey law; they went no further. Respondent's powers did not permit him to self-deal as he did here."

We agree with the OAE and the special master that respondent's disbursement to himself of $30,000 in estate funds constituted knowing misappropriation. Although respondent may have believed that he had the authority, either expressly or impliedly, to borrow funds from the estate, it was an

unreasonable belief. The transaction was, at its very core, inconsistent with the duties of a trustee. There is no justification whatsoever for respondent's taking the estate funds for his own benefit.

As to the allegation of unreasonable fees, the OAE's position was that they were so "grossly excessive, unreasonable and largely undocumented" as to merit his disbarment on their own. The OAE relied on In re Ort, supra, 134 N.J. 146, in support of its position. We find that the two cases are distinguishable.

Ort was disbarred for mishandling the estate of a widow's deceased husband. The estate was uncomplicated and valued at about $300,000. Yet, Ort charged over $32,000 for legal services. The charges were so blatantly excessive that we characterized them as "egregious" and exploitation of "an inexperienced elderly widow." Ort also fabricated evidence to defraud the district ethics committee and this Board with time sheets "created simply to justify" his fee.

An additional element present in Ort is lacking here. Ort improperly obtained a home equity loan on the deceased husband's real estate, even though the widow had explicitly refused, on three occasions, respondent's request that she authorize the loan. Ort promptly used the home equity loan to pay himself his

"excessive, unjustified and unauthorized legal fees." The Court remarked that "[r]espondent's conduct in respect of the home-equity loan was flagrantly improper and alone warrants severe discipline."

Here, respondent's excessive fees were not accompanied by the kind or degree of wrongdoing seen in Ort. Therefore, we do not believe that respondent's excessive fees alone warrant his disbarment.

Respondent, however, committed other acts of misconduct. Count three alleged that he failed to pay a $6,000 bequest to Hadassah. Respondent conceded that he had failed to do so and seemed perplexed by his own inaction.

Count three also alleged that respondent knowingly misappropriated the Hadassah funds. We find no clear and convincing evidence that he did so. The most recent bank statement for the estate account, dated July 30, 2004, showed a balance of over $24,000. Thus, at least as of that time, the estate account was not depleted. In addition, as respondent stated during these proceedings, the estate still owned 1,350 shares of Norfolk Southern stock valued at about $77,000. For lack of clear and convincing evidence that respondent knowingly misappropriated the Hadassah bequest, we dismiss that charge.

Count four charged respondent with lack of candor toward the Supreme Court, failure to cooperate with the ethics investigation, and conduct prejudicial to the administration of justice.

When respondent did not cooperate, in late 2005 and early 2006, with the OAE's requests for information about the estate, the OAE filed an April 27, 2006 petition for his temporary suspension. Respondent filed a response with the Court, in which he claimed that he was emotionally, psychologically, and medically unable to handle a court proceeding. Respondent claimed to have been debilitated since June 2003. He also failed to appear at the May 23, 2006 OTSC, only to appear, three days later, as the pro se plaintiff in a civil matter in Monmouth County.

Respondent denied, however, that he lied to the Court about his condition in order to avoid his temporary suspension. He explained that, had he been "medically" capable of attending the oral argument before the Court, he was confident that he would have done so and would not have been suspended. Nevertheless, respondent had no explanation for his ability to appear in Superior Court a mere three days after the return date of the Court's OTSC.

So, too, in an earlier incident, on April 6, 2006, the OAE sent respondent a letter questioning his claimed inability, as of that date, to cooperate with the OAE due to mental illness. Adam had advised the OAE that day that respondent was in the office on April 4, 2006, and that the two had discussed disbursements and other estate issues. The OAE concluded that respondent was well enough to conduct business that day, when he claimed to be too ill to cooperate with the ethics investigation.

Based on these two incidents, it appears that respondent was well enough to conduct business of his own, while improperly claiming that he was too ill to cooperate with ethics authorities. Respondent cannot have it both ways. He maintained office hours in April 2006 and appeared pro se in a civil matter in Monmouth County, all the while claiming that he was incapable of doing those things for medical reasons. We find that his claims were untrue and a violation of RPC 3.3(a)(1), RPC 8.1(b), and RPC 8.4(d).

RPC 3.3(a)(2), which addresses failure to disclose facts regarding illegal, criminal or fraudulent acts of a client, is inapplicable to the facts of this case. We, therefore, dismiss that charge.

With regard to count five, respondent admitted that Maureen Maimone obtained a temporary restraining order, on January 19, 2006, prohibiting him from having any contact with her or with her son, JC. Respondent admitted that, on February 6, 2006, he called her house in an effort to speak to JC. Respondent knew, when he placed the call, that the restraining order was in place. Therefore, by disregarding it, respondent engaged in conduct prejudicial to the administration of justice, a violation of RPC 8.4(d).

Respondent also admitted the allegation of count six, that is, that he failed to comply with the provisions of R. 1:20-20, dealing with suspended attorneys. After his May 23, 2006 temporary suspension, respondent failed to timely file an affidavit of compliance with the rule. Respondent conceded that he did not file the affidavit until April 10, 2007, over eleven months later.

Respondent offered mitigation for his conduct. As he has done in prior matters before us, he submitted a certification detailing his lengthy battle with depression. In a May 22, 2007 certification, he stated that, starting in 2000, he began to feel very depressed. He consulted with a family physician, who prescribed antidepressant medication. The depression deepened in severity until July 2003, when he sought the advice of Richard

Carleton, a clinical psychologist. Carleton diagnosed respondent with Major Depressive Disorder, Recurrent. Carleton also referred respondent to a psychiatrist, Dr. Harvey Hammer.

Dr. Hammer immediately prescribed several drugs to combat respondent's depression, including Effexor XR, Seroquel, and Ambien. For at least two years, and as of May 22, 2007, the date of respondent's certification, he was taking Effexor XL (225mg/day), Clonazepam (3mg/day), Buspirone (40mg/day), and Seroquel (300mg/day). Respondent has seen Dr. Hammer on a weekly basis since September 2003. He has attended group-session therapy as well.

According to respondent, he abused alcohol in order to alleviate his depression, alongside his prescribed medications. He was so despondent that, on June 22, 2004, he mixed alcohol with prescription medication, in a suicide attempt. When a friend became concerned about him, the local police broke down the door to find him "asleep" on the floor. He was committed involuntarily to a psychiatric hospital (Summit Hospital) for the next few days. While at Summit Hospital, he was again diagnosed with Major Depressive Disorder.

In late 2005 and early 2006, respondent again became despondent. On January 6, 2006, Maimone cut off all contact between him and JC, for whom respondent had a strong stepfather

bond. Respondent was particularly hurt because the young man was about to celebrate his twenty-first birthday.

On February 6, 2006, respondent called JC (in violation of a restraining order), and was told by Maimone that he could not speak with him. A distressed respondent attempted suicide by the same method that night. Local police once again found him on the floor in his apartment, this time "comatose." Respondent was committed to an involuntary stay at St. Claire's Hospital, from February 7 to February 21, 2006.

After the February 2006 suicide attempt, Dr. Hammer diagnosed respondent with Major Depressive Disorder, Recurrent, Severe with Psychotic features.

Respondent claimed that

> [b]ecause of my psychiatric disorder, I was not able to be responsive to the [OAE] . . . I felt immobile, physically and emotionally. I felt as though I was in quicksand, and choking to catch my breath. Indeed, at the time, there were days and days on end when I was not able, emotionally/psychologically, to even get up and go to work. Instead, I spent the entire day in bed at home drinking and sleeping. There were days and days on end when I was so depressed that I was not able, emotionally/psychologically, to brush my teeth, or take a shower, or eat, or speak to anyone. I was in pain, sad, alone, and isolated. As a consequence, I was not able to submit an answer to the OAE's September 7, 2006 Complaint on a timely basis. A default was entered.
>
> [Ex.R-5¶11.]

In about February 2007, respondent claims, he came out of his deep depression. His "mix of medication (Effexor XR, Buspirone, Clonazepam and Seroquel)" seems to be working for him. Since that time, respondent has not had a drink, has enjoyed the birth of a grandson, and has cooperated with ethics authorities.

Finally, respondent submitted his certification in support of his verified answer and as an affirmative defense to the allegations of the complaint. He stated, "I respectfully submit that my medical condition from 2003 to 2006, as set forth above, also demonstrates that there were mitigating circumstances directly bearing on and explaining many of the factual assertions in the OAE's complaint."

In his materials to us, respondent included numerous medical records substantiating his mental illness (Exhibits R-1, R-2, R-3, R-5, and R-6). He did not, however, introduce evidence that he was so impaired that he did not know the difference between right and wrong, between 2003 and 2006. Although he alluded to tremendous personal problems and emotional stresses during the time period in question, there is no evidence that he "suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly, knowing, volitional and purposeful." In re Jacob, 95

N.J. 132, 138 (1984). In fact, at oral argument before us, respondent reiterated that he was not seeking to excuse his conduct by way of a mental illness defense.

In summary, we find respondent guilty of knowing misappropriation of estate trust funds (RPC 1.15(a) and RPC 8.4(c), In re Wilson, 81 N.J. 479 (1979), and In re Hollendonner, 102 N.J. 21 (1985)); gross neglect (RPC 1.1(a)); lack of diligence (RPC 1.3)); charging excessive fees (RPC 1.5(a)); failure to promptly remit funds to a third party (RPC 1.15(b)); lack of candor to a tribunal (RPC 3.3(a)(1)); failure to cooperate with ethics authorities (RPC 8.1(b)); two incidents of conduct prejudicial to the administration of justice (RPC 8.4(d)); and failure to comply with the rules governing suspended attorneys (R. 1:20-20).

For respondent's knowing misappropriation of estate trust funds, a five-member majority recommends his disbarment. Four members filed a dissenting decision, voting for a two-year suspension.

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 Andrew M. Kimmel
Docket No. DRB 08-170

Argued: July 17, 2008

Decided: September 25, 2008

Disposition: Disbar

Members	Disbar	Two-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh		X				
Boylan		X				
Clark		X				
Doremus		X				
Lolla	X					
Stanton	X					
Wissinger	X					
Total:	5	4				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel