SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-094
District Docket No. XIV-06-98E

IN THE MATTER OF	
DORCA IRIS DELGADO-SHAFER	
AN ATTORNEY AT LAW	

Decision

Argued: June 19, 2008

Decided: September 9, 2008

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

David H. Dugan, III appeared on behalf of respondent.

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

This matter came before us on a recommendation for a one-year suspension filed by Special Master Joseph A. McCormick, Jr., based on his finding that respondent had commingled client and personal funds, engaged in two separate conflicts of

interest, and made a false statement of material fact to a third person. By a vote of five to four, we determine to impose a two-year suspension for respondent's commingling client and personal funds, making a false statement of material fact to a third person, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and engaging in a conflict of interest.

Respondent was admitted to the New Jersey bar in 2002. At the relevant times, she maintained an office for the practice of law in Camden. She has no disciplinary history.

On February 26, 2007, the OAE filed a seven-count complaint against respondent, alleging that she had committed a multitude of ethics infractions, including the knowing misappropriation of client funds, all of which occurred during a four-week period.

The first count charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(a) (failure to safeguard client funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979). This charge stemmed from respondent's allegedly unauthorized use of client funds to pay the mortgage arrearages on her home and other personal expenses. The funds allegedly belonged to respondent's

clients, Juan and Elizabeth Rios, and had been deposited into respondent's trust account for safekeeping until the closing on the Rioses' purchase of a home, at which time the funds were to be applied toward the purchase price. The specific amounts alleged to have been knowingly misappropriated are $35,611.36 and $11,000.[1]

The second count charged respondent with knowingly making a false statement of material fact to a third person, in violation of RPC 4.1(a)(1) "and/or" RPC 8.4(c), as a result of (1) respondent's statement, in an October 6, 2005 letter to the Rioses' mortgage company, that $41,843.66 of the Rioses' money was deposited into her trust account on September 7, 2005, even though, as of the date of the letter, the trust account balance was only $29,092.32, and (2) her attachment to the letter of an altered bank statement that showed the deposit, but had "blacked out" the subsequent transactions. These transactions would have demonstrated that some of the Rioses' funds were no longer available.

[1] At the hearing below, the complaint was amended to include an $11,000 transfer of funds from respondent's trust account to her business account.

The third count charged respondent with knowingly making a false statement of material fact in a disciplinary matter, in violation of RPC 8.1(a) "and/or" RPC 8.4(c). Specifically, respondent allegedly made the following false statements to the Office of Attorney Ethics (OAE), during its investigation of the Rioses' grievance: (1) the Rioses' had loaned her $41,843.66; (2) Elizabeth Rios had called a mortgage company to obtain the figure required to reinstate the mortgage on the property where respondent and her family lived when, in fact, it was respondent's brother, Angel Delgado, who had called for the figure; and (3) Elizabeth had gone to Commerce Bank with respondent's driver's license number and obtained a $35,611.35 cashier's check, payable to the mortgage company, when, in fact, it was respondent's then-husband, Christopher R. Shafer, who had conducted the transaction.

The fourth count of the complaint alleged that respondent had either committed perjury, in violation of N.J.S.A. 2C:28-1, or made a false statement under oath, in violation of N.J.S.A. 2C:28-2, when, during a fee arbitration hearing, she testified that a $10,000 payment from her to Elizabeth represented a portion of the Rioses' funds held in her trust account, when, in fact, the source of the funds was a $10,000 loan to her from her

brother, Hector Delgado. According to the complaint, this false statement under oath constituted a violation of RPC 8.4(b) (criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), RPC 8.4(c), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

The fifth count alleged that respondent commingled personal and client funds and improperly used her trust account for personal purposes, in violation of RPC 1.15(a) and (c) and R. 1:21-6. According to the complaint, respondent deposited into her trust account more than $53,000 in proceeds from the sale of her Hainesport property and used those funds to pay personal expenses (such as private school tuition) and a fee arbitration award in a matter unrelated to this case.

The sixth count charged respondent with having engaged in a conflict of interest, in violation of RPC 1.8(a), as a result of her assertion that the Rioses had loaned her a portion of the $41,843.66. Specifically, this count alleged that the loan "did not contain any basic terms;" the terms of the loan were not in writing; the terms were not fair and reasonable; the clients were not advised in writing of the desirability of seeking the advice of independent legal counsel; and respondent did not obtain their written consent to the transaction.

The seventh and final count of the complaint charged respondent with having engaged in another conflict of interest, in violation of RPC 1.7(a)(2), as well as conduct prejudicial to the administration of justice (RPC 8.4(d)). This charge arose out of respondent's representation of her brother Angel in a foreclosure action against a Lumberton property that was the primary residence of respondent and her family, but which was owned by Angel. Respondent and Shafer, according to the complaint, "were responsible for and had been making the monthly mortgage payments . . . until such time as they failed to remit payment," which resulted in Angel's defaulting on the mortgage. Because Angel had a potential cause of action against respondent and Shafer, there was "a significant risk that the representation of Angel Delgado [would] be materially limited by respondent's personal interest." Yet, the complaint alleged, respondent failed to obtain Angel's informed consent, in writing, prior to undertaking the representation.

In addition, the complaint alleged that respondent did not disclose to either the judge presiding over the foreclosure action or to the plaintiff's attorney that she resided at the Lumberton property and was responsible to Angel for paying the mortgage.

The special master presided over a six-day hearing, in September and October 2007. He found only that respondent had (1) made an improper withdrawal from the trust account by writing a trust account check payable to "cash," in violation of R. 1:21-6(c)(1)(A); (2) "effectively" made a misrepresentation of material fact, in violation of RPC 4.1(a)(1), when she wrote the letter to the Rioses' mortgage company, on the day before the closing, stating that $41,843.66 had been deposited into her trust account on September 7, 2005, but failing to inform the company of the balance as of the date of the letter (October 6, 2005); and (3) engaged in a conflict of interest, in violation of RPC 1.7(a)(2), when she represented her brother Angel in the foreclosure action instituted against him with respect to the Lumberton property, in the absence of "informed consent, confirmed in writing, after full disclosure and consultation." Finally, the special master found that, based on respondent's admissions, she had commingled personal and client funds in her trust account (RPC 1.15(a)) and engaged in a conflict of interest with respect to the alleged loan from the Rioses, by failing to obtain their informed, written consent (RPC 1.8(a)).

Based on these infractions, the special master recommended that respondent be suspended for one year and suggested that she

"use this period as an opportunity to reflect and consider if a return to practice is appropriate."

At this juncture, we discuss, by way of background, the proceedings that gave rise to the relationship between respondent and the Rioses, as well as two real estate transactions to which respondent was a party.

In May 2004, the Burlington County Bar Association referred the Rioses to respondent. At the time, the Rioses required legal representation in a breach-of-contract action and a "dog-bite" case against them. The breach-of-contract action arose out of a lease-purchase agreement in connection with a Willingboro home. The dog-bite case resulted from the Rioses' dog's biting a letter carrier on their uninsured Camden property.

The contract action was resolved in April 2005. The Rioses obtained the Willingboro home for $100,000 and received $5834 in damages. On October 4, 2005, the dog-bite case went before an arbitration panel, which awarded the plaintiff $45,000.

Meanwhile, on January 31, 2005, Elizabeth became respondent's employee. She continued to work for respondent until October 10 of that year.

The parties agreed that Elizabeth's secretarial duties included entering time detail into respondent's computer system and generating pre-bills, as well as entering billing and client payments, including those pertaining to the Rioses' matters.[2] However, Elizabeth denied that she had access to respondent's trust account and claimed that she never made an electronic transfer of funds either into or out of her trust account. For her part, respondent claimed that Elizabeth also "made payments for me" and did the bookkeeping.

Prior to Elizabeth's employment, Shafer had been performing many of her duties, since he had lost his job as a technology consultant in 2004. Shafer taught Elizabeth how to enter time detail for billing purposes, using the Time Slips program.

Respondent's and Elizabeth's relationship extended beyond that of attorney-client and employer-employee. During Elizabeth's employment, they exchanged gifts. On two occasions, Elizabeth spent a week at respondent's rented shore house.

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[2] According to respondent, pre-bills could be modified, while final bills could not.

In late summer 2005, the Rioses and respondent were involved in separate real estate transactions. In addition, a foreclosure action had been instituted against respondent's home. These three events are central to the knowing misappropriation charge.

The first event was the foreclosure action. On August 22, 2005, Mortgage Electronic Registration Systems, Incorporated (MERS)[3] instituted a foreclosure action against respondent's brother Angel, who owned the Lumberton property. Respondent represented Angel in the foreclosure action.

Respondent testified that, since 1999, the Lumberton property had belonged to her and Shafer and that they had had a house constructed there, where they lived with their children.[4] In 2004, however, the house "was going into foreclosure," after Shafer had become unemployed. Angel then offered to purchase

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[3] In fact, the mortgage payments were to be paid to Americas Servicing Company (ASC), which serviced the mortgage loan on the Lumberton property. Presumably, ASC registered the mortgage with MERS, which instituted the suit on ASC's behalf. Hereafter, the mortgage creditor will be referred to as ASC.

[4] As of the date of the hearing below, respondent and Shafer were estranged, but continued to live together at the Lumberton property. They have since divorced.

the property, so that respondent could reduce her debt and continue to live in the house.

On August 31, 2004, respondent and Shafer conveyed the Lumberton property to Angel for $560,000. Angel obtained one hundred percent financing for the purchase from ASC. Shortly thereafter, Angel executed a power of attorney and a deed, transferring the house back to respondent only. She remained responsible for all expenses relating to the house, including the payment of the mortgage.

As to the second event, on August 29, 2005 (a week after the Lumberton property foreclosure action was instituted), the Rioses entered into a contract for the purchase of a Mt. Laurel home for $240,000. The contract provided for a closing date of September 30, 2005. The Rioses made a $3000 down payment and were required to obtain a mortgage commitment of $192,000. They were, thus, required to take $45,000 to the closing.

The third transaction involved the sale of respondent's office building in Hainesport. The closing took place on September 16, 2005, and resulted in the payment of $53,749.17 in net proceeds to respondent.

In terms of the charges against respondent, the parties disagreed on nearly every material fact. Given the number of

charges and disputed facts, we recite the specific facts and analyze the charges seriatim.

I. THE KNOWING MISAPPROPRIATION CHARGE

A. Respondent's Use of $41,843.66 Belonging to the Rioses

As stated previously, on August 29, 2005, the Rioses contracted to purchase a Mt. Laurel home. Two days later, they refinanced their Willingboro home and received $41,843.66, which was deposited into respondent's trust account on September 7, 2005. Elizabeth testified that she and her husband Juan were going to apply these funds to the purchase of the Mt. Laurel home and that respondent had suggested that the monies be deposited into her trust account so that they would be "safe from the dog-bite people." The dog bite case was scheduled for arbitration on October 4, 2005.

Respondent denied that Elizabeth had stated to her that any the funds were to be used toward the purchase of another home. Instead, she said, she and Elizabeth had agreed that $15,000 was to go toward her legal fees, an unidentified "lump sum" was to be set aside in anticipation of an award in the dog-bite case, and the balance was to be invested in a company called Side Jobs, which was owned by the Rioses. According to respondent,

Elizabeth prepared the deposit slip for the $41,000 and wrote "Side Jobs" on it.

OAE investigator M. Scott Fitz-Patrick testified about the transactions in respondent's trust and business accounts during the relevant time. On September 7, 2005, the Rioses' $41,843.66 was deposited into respondent's trust account at Commerce Bank. Prior to this deposit, the account balance was $10.14. The Rios deposit increased the balance to $41,853.80.

Four days later, on September 11, 2005, respondent signed trust account check no. 137, payable to "cash," in the amount of $35,611.36. The memo line read "22 Sunflower Road Rios," the address for respondent's Lumberton property. The check was endorsed by respondent's then-husband, Christopher Shafer, and presented to Commerce Bank on September 12, 2005. Commerce Bank, in turn, issued a cashier's check in the same dollar amount, payable to ASC. ASC serviced the mortgage loan on the Lumberton property, where respondent and Shafer lived and which was then in foreclosure. The $35,611.36 check reduced the balance in respondent's trust account to $6,242.44.

On September 16, 2005, $6000 was transferred from respondent's trust account to her business account. Prior to that transfer, respondent's business account had a negative

balance of $285.55. After the transfer, respondent's trust account balance dwindled to $243.15.

That evening, respondent deposited into her trust account the $53,749.17 in proceeds that she had received earlier that day, at the closing on her Hainesport property. Fitz-Patrick testified that these funds were not credited to the account until three days later (September 19, 2005), at which point the trust account balance rose to $53,992.32.

On September 20, 2005, $11,000 was transferred from the trust account to the business account. By October 4, 2005, after a number of debits to respondent's trust account were posted, including the payment of $2000 in tuition to a prep school and a $5000 fee arbitration award, the balance in respondent's trust account had dropped to $29,092.32.

Finally, on October 6, 2005, respondent wrote a $29,000 trust account check to Elizabeth, which was cashed the next day, reducing the trust account balance to $92.32.

B. The Alleged $35,611.36 Loan from Elizabeth to Respondent

Elizabeth testified that, for many months prior to respondent's use of the Rioses' $35,000, respondent had been

telling her that she was having trouble paying the mortgage and that she was going to lose her house to foreclosure.

As stated previously, the foreclosure action was instituted on August 22, 2005. Angel testified that it was not until September 2005 that respondent informed him that she was behind in the mortgage payments.

On September 8, 2005, respondent directed Elizabeth to call ASC and determine the amount required to reinstate the mortgage. Elizabeth emphatically denied that she had spoken with anyone at ASC, claiming instead that she was only able to leave a voice mail message.

Angel testified that, on that same date, respondent also asked him to call ASC to obtain a reinstatement figure. Angel and Elizabeth were together when he placed the call. ASC gave him the name, address, and telephone number of its attorney and told Angel to talk to him.

Respondent maintained that, unbeknownst to her, on that day, Elizabeth drafted and faxed a letter to ASC's attorney, Vladimir Palma, identifying herself as someone from the accounting department of the Larchmont Law and Professional Center (where respondent's office was located) and requesting the "information necessary to take care of this matter."

At the hearing below, Elizabeth identified the September 8, 2005 letter to Palma and admitted that she had faxed it to him. She acknowledged that the letter was for the purpose of authorizing the mortgage company to talk to her about Angel's mortgage.

The words "Elizabeth Rios, Accounting Department" were at the top of the letter, in different font. The letter was addressed to "Glad Palma, Esquire" and read:

> Dear Mr. Glad [sic],
>
> Pursuant to my communication with your office, here is the authorization sing [sic] by my client in order to get the amount due one [sic] the foreclosure. Please provide this office with all the information necessary to take care of this matter.
>
> Thank you for your time and courtesies.

Underneath the body of the letter was what purported to be Angel's signature. Elizabeth and respondent testified that Angel did not sign the letter; Elizabeth claimed that respondent had signed his name.

The letter was signed by Elizabeth also. Elizabeth testified that respondent had dictated the letter to her, but that she, Elizabeth, had not read it before signing it, because she trusted respondent.

Elizabeth denied that she had typed "Accounting Department" next to her name. She also denied the truth of the statement in the letter that she had had a conversation with someone at Palma's office. She noted that she had been unable to talk to anyone when she called ASC. She added that, after the letter had been faxed to Palma, someone called respondent's office and left a message that $35,611.36 was due.

The day after the letter was faxed to Palma (Friday, September 9, 2005), respondent and Angel went to Palma's office, presumably to determine what was required to reinstate the mortgage on the Lumberton house. Angel testified that, because the law firm did not have "all the information pertaining to" the property, he and respondent left Palma's office, called ASC (presumably), and spoke to someone named Chris, who told him that $35,611.36 was due and that it could be paid within the next seven days, without an additional late fee.

Palma, in turn, testified that, when respondent and Angel appeared at his office on Friday, respondent claimed that she had the money required to cure the arrears and demanded to know the amount required to do so. Palma informed respondent that he would have to obtain a reinstatement quote from the lender and that he would forward the number to respondent, when the quote

was issued. According to Palma, respondent stormed out of the office.

Palma also testified that, on Monday, September 12, 2005, respondent wrote a letter to ASC and enclosed a $35,611.36 cashier's check. The check was returned to respondent because ASC had not yet issued the reinstatement quote. In fact, Palma testified, ASC never accepted any payments tendered by respondent.

Respondent's version of the events was that, on September 8, 2005, Elizabeth gave her the reinstatement amount and stated that, because they were like family, respondent should use the Rioses' escrow monies to bring her mortgage current. According to respondent, she never asked Elizabeth for the money and, in fact, Elizabeth insisted that respondent borrow the money from her "as if she was doing something great for me." Respondent testified that, because Elizabeth knew that the Hainesport closing was scheduled for the following week, she offered to lend the money to respondent "for a matter of three to four days."

Respondent acknowledged that she did not advise Elizabeth to seek the advice of independent counsel. According to respondent, the loan was an oral agreement requiring the funds

to be repaid with the proceeds from the September 16, 2005 closing on her Hainesport property; there was no interest rate, no security interest, and no lender rights upon default, as they "treated each other like family."

Respondent testified that, on Friday, September 9, 2005, she wrote out trust account check no. 137, dated September 11, 2005 (a Sunday), payable to "cash," in the amount of $35,611.36, which she intended to use to reinstate the mortgage. Respondent claimed that she drafted the check in front of Elizabeth and that she instructed Elizabeth to make a copy of the check for herself. She stated that the "22 Sunflower" notation on the memo line of the check referred to the Lumberton property, and that the "Rios" notation served as a record of where the money had come from, that is, the Rioses' funds. She explained that the check was payable to cash so that it could be exchanged for a cashier's check.

According to respondent, after she drafted the trust account check, she gave it and her driver's license to Elizabeth, instructed her to go to the bank, show the teller the license, and obtain a cashier's check payable to the mortgage company. Respondent testified that Elizabeth did all of the above.

The trust account check was presented to the bank on September 12, 2005. As seen below, Elizabeth denied that she went to the bank and denied that she authorized respondent's use of her funds.

Shafer testified that, at Elizabeth's direction, he was the one who presented the check to the bank. He endorsed it with his signature and driver's license number. He denied knowing anything specific about the check transaction.

Elizabeth testified that she never authorized respondent to use the $41,843.66 for any purpose. She never loaned respondent any of the Rioses' funds held in respondent's trust account. However, she acknowledged that, at the time, she knew that respondent's Hainesport property would be closing soon.

Angel testified that, when he called the mortgage company from respondent's office on September 8, 2005 to determine the reinstatement figure, he turned to Elizabeth and asked: "How is she going to pay for this mortgage?" Angel claimed that Elizabeth replied that she was going to loan respondent the money. Angel then asked respondent how she intended to re-pay Elizabeth, and, according to him, she stated that she would use the proceeds from the sale of the Hainesport property.

Elizabeth testified that she had nothing to do with the withdrawal of $35,000 from the trust account. She denied that respondent had asked her to take the check to the bank; she knew of Shafer's going to the bank and obtaining the cashier's check; she directed Shafer to go to the bank and obtain a check; and she had any knowledge of a check being taken to the bank.

C. The Alleged Payment of $10,000 in Legal Fees

Respondent testified that, as of September 20, 2005, Elizabeth owed her about $14,000 in legal fees, plus expenses. Accordingly, respondent continued, on that date and at her request, Elizabeth had transferred $11,000 from the trust account to her business account to satisfy her legal bill.

Elizabeth denied that she ever transferred any trust account funds to respondent's business account or authorized respondent to transfer any funds from the trust account to the business account. Elizabeth testified that, over time, the Rioses had paid respondent a total of $11,000, but not in a lump sum.

The Rioses executed retainer agreements in the dog-bite case and in the contract action. The retainer agreements required respondent to bill them monthly. Elizabeth testified,

however, that respondent never sent a bill to them. Respondent testified that she did not provide hard copies of bills to the Rioses because Elizabeth had access to the billing information on the office computer. As stated previously, one of Elizabeth's duties was to enter billing and client payments, including those pertaining to the Rioses.

Elizabeth left respondent's employ on October 10, 2005. On October 27 and 28, 2005, respondent issued individual bills in the contract action, the Mt. Laurel real estate transaction, and the dog-bite case. In the contract action, the Rioses were billed a total of $9,068.75 (including $17.16 in interest) in fees and expenses, credited with $2,797.37 in payments, and carried an unpaid balance of $6,271.38. In the Mt. Laurel real estate transaction, they were billed $1650 in fees, which remained unpaid. In the dog-bite case, they were billed $12,540.75 in fees and expenses and credited with $4,483.66 in payments, thereby leaving an unpaid balance of $7,697.09. Thus, as of October 28, 2005, the Rioses had purportedly paid respondent a total of $7,281.03. They still owed her $15,618.47.

Respondent attempted to recover the $15,000 in Superior Court, where she managed to obtain a default judgment against

the Rioses for $15,627.47. In April 2006, a Superior Court judge vacated the default because respondent had failed to comply with R. 1:20A-6 (fee arbitration). The parties went to fee arbitration, where respondent claimed that the Rioses owed nearly $30,000 in fees and costs.

In November 2006, the fee arbitration panel found that respondent's total reasonable charge was $12,131.37 and that the Rioses had already paid $11,631.37 (in checks, not credits), and awarded respondent "the token sum of $500."

Elizabeth testified that, prior to respondent's lawsuit for unpaid fees, they had never seen the October 28, 2005 bill in the dog-bite case. By October 28, 2005, the Rioses had settled into their Mt. Laurel home. The bill was addressed to their previous address in Willingboro.

The bill reflected a $2,843.66 payment on September 16, 2005. Eizabeth denied that the Rioses ever made this payment. She pointed out that this amount was the difference between the $41,843.66 deposited into respondent's trust account and the $39,000 that she eventually repaid to them.

According to Elizabeth, the same bill reflected a $10,000 payment on September 20, 2005 payment, but the credit was

removed from the bill on October 7, 2005 and characterized as a "refund to allow purchase of property."

As will be discussed below, respondent gave Elizabeth $29,000 on October 6, 2005, and $10,000 on October 7, 2005. Thus, she paid the Rioses a total of $39,000. Respondent, therefore, never returned the $2,843.66 that the October 28, 2005 bill had incorrectly represented was paid.

D. The Closing on the Rioses' Mt. Laurel Home

When respondent removed the $35,000 (September 12, 2005) and the $11,000 (September 20, 2005) from her trust account, the Rioses were preparing for the September 30, 2005 closing on the Mt. Laurel home. By September 12, 2005, respondent was aware that the Rioses intended to purchase the Mt. Laurel property. Elizabeth testified that respondent agreed to represent them for $500.

On September 12 and 19, 2005, respondent wrote letters to the seller's real estate agent, Thomas Wesley, Jr., of ReMax, identifying herself as the Rioses' attorney. She also prepared an addendum to the real estate contract.

On September 28, 2005, respondent wrote a letter to the title company, confirming that the closing would take place on

September 30, 2005, at 2:00 pm. The next day, the Rioses discharged their loan officer because he "couldn't get the loan together." On September 30, 2005, respondent wrote to the title company and rescheduled the closing for October 7, 2005, as the Rioses were now seeking their mortgage loan through Aaron Gregg at Argent Mortgage Company. The Argent loan required a twenty-percent down payment.

Elizabeth testified that she did not learn of respondent's use of the $35,000 and the transfer of $11,000 until the day before the October 7, 2005 closing. According to Elizabeth, by the morning of October 6, 2005, Gregg had made numerous requests for a letter and a statement showing where the Rioses' closing monies were located. Thus, Elizabeth emphasized to respondent the need to provide him with the letter. Respondent wrote a letter to Gregg, stating that $41,843.66 was deposited into her trust account on September 7, 2005. According to Elizabeth, respondent made a copy of the bank statement, which Elizabeth faxed to Gregg with the letter.

The copy of the statement that respondent attached to the October 6, 2005 letter to Gregg reflected only the $41,000 deposit and the payment of seventy-one cents in interest. The amounts of all debits were redacted, as was the current balance.

According to Elizabeth, respondent told her that she did not want Gregg to see the account number. Elizabeth testified that she had no idea that the $41,000 was not in the trust account, as she had not seen an unredacted version of the statement. The unredated statement showed that, as of September 28, 2005, respondent's trust account had a balance of only $35,092.32.

Respondent testified that she did not dictate the Gregg letter. Rather, Elizabeth put three letters in front of her, stated that the mortgage company "needed these," and summarized the contents of the letters.

Elizabeth testified that, after she faxed the letter and the statement to Gregg on October 6, 2005, she asked respondent for the trust account funds so that she would have them at the closing on the following day. According to Elizabeth, respondent told her that she would not be giving her the money because she, respondent, had used most of it to pay a student loan. Elizabeth asked respondent to give her what remained in the account, but respondent refused. Nevertheless, before respondent left the office that day, she gave Elizabeth a $29,000 trust account check, with "side Jobs" written on the memo line.

Elizabeth asked respondent where the rest of the money was. Respondent replied, "what do you want me to do?" Respondent then wrote a $2000 business account check to Elizabeth, which the bank could not honor because the account had insufficient funds to cover it.

Elizabeth testified that, after respondent left the office for a court appearance on October 6, 2005, Elizabeth called Gregg and told him that she only had $29,000 for the closing, rather than $41,000, because respondent had taken the money. Gregg responded that the amount of the mortgage and the interest rate would have to be increased and that the closing likely would not be able to take place the next day.

At the hearing below, Gregg confirmed Elizabeth's testimony. He stated that, when Elizabeth called him, she was frantic. The bank "had to raise the loan up a little bit higher more than she was going to get the first time." In particular, the interest rate increased, though Gregg did not know by how much. Moreover, Greg explained, the Rioses had to "borrow money from friends and family to cover the differences and closing costs and stuff like that."

The closing was scheduled for the next day, October 7, 2005. Throughout the morning, Elizabeth called respondent at

her home and asked about the rest of the money. Elizabeth repeatedly told respondent that she needed the money or else she risked losing her home. Respondent stated that she did not have it. Finally, at around noon, respondent arrived at the office and gave Elizabeth a $1500 business account check with the notation "escrow" on the memo line. When the Rioses deposited the check on November 1, 2005, it was returned to them because respondent had put a stop payment on it.

Respondent told Elizabeth that, in addition to the $1500 check, she also had $10,000 for her. Respondent instructed Elizabeth to get the money at the home of Maria Vosgerichian, who was the girlfriend of respondent's brother, Hector Delgado. In truth, Vosgerichian had no money for Elizabeth.

Hector testified that, on the morning of October 7, 2005, he called Vosgerichian and asked if she could loan him $10,000 because respondent needed the money to pay a student loan. Hector had agreed to loan the money to respondent solely on the belief that she needed it to pay the loan. Vosgerichian agreed to loan Hector the money. Hector then instructed her to have respondent sign a promissory note, before giving the check to respondent.

Respondent confirmed that, when Hector asked her why she needed $10,000, she told him that it was to pay her student loans. She did not tell him that the loan was for Elizabeth, or he would have refused to part with the money. At the bottom of the note that Hector required her to sign, respondent wrote "loan to Eliz Rios" with a reminder: "$10,000 – removed from 1 civil." This was the $10,000 "refund" identified on the October 28, 2005 bill.

Elizabeth testified that, when she arrived at Vosgerichian's home, she identified herself and asked Vosgerichian for the $10,000. Vosgerichian denied that she had a check for Elizabeth, stating that the money was to pay respondent's student loan. When Elizabeth began to cry, Vosgerichian called Hector, who would not agree to have the funds given directly to Elizabeth. According to Vosgerichian, Elizabeth was distraught and continued to cry, stating to Vosgerichian that respondent had taken her money for the settlement scheduled for that afternoon. A sympathetic Vosgerichian took Elizabeth to the court house where respondent had an appearance.

There, respondent signed the note and endorsed the check over to Elizabeth. She directed Elizabeth to deposit the check

into respondent's account, but Elizabeth refused because she did not trust her. Elizabeth never deposited the check.[5]

Elizabeth returned to respondent's law office where there were many telephone messages inquiring about the status of the closing. Ultimately, the closing took place on October 11, 2005.

October 10, 2005 was Elizabeth's last day as respondent's employee. When Elizabeth arrived at work, she found that the password to her computer had been changed, and that her "files" were missing. Elizabeth called respondent at home, informed her of the password and files issues, and asked her what was going on. Elizabeth could not recall what respondent stated in response. Nevertheless, during that conversation, Elizabeth stated that she could not continue to work for respondent.

As to the $35,000 loan, the special master found that, on September 7, 2005, $41,843.66 was deposited into respondent's trust account on behalf of the Rioses. He further found that,

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[5] Among the exhibits is a Commerce Bank "official check" in the amount of $29,000 with the notation "closing." Presumably, respondent obtained this check and gave it to Elizabeth, who cashed it.

on September 12, 2005, respondent removed $35,611.36 of the Rioses' funds from her trust account and obtained a cashier's check payable to ASC, in an effort to reinstate the mortgage on her Lumberton property. The special master also found that the funds were restored on September 16, 2005, when respondent deposited into the trust account $53,749.17 in proceeds from the sale of her Hainesport property.

The special master considered respondent's claim that Elizabeth had loaned the $35,000 to her and Elizabeth's denial that she had either loaned money to respondent or consented to her use of the funds. Finding no knowing misappropriation of the $35,000, and with scant analysis, the special master wrote:

> Proving this knowing misappropriation by the required standard is made very difficult because of the complicated relationship of the parties as attorney-client, employer-employee and perhaps, close friends. Both parties were clear in support of their contradictory positions with respect to the loan/misappropriation issue. Further, neither party's story was fully supportable.
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> [Special master's report at 14.]

The special master concluded, however, that respondent violated R. 1:21-6(c)(1)(A) when she drafted the $35,000 trust

account check and made it payable to "cash," which is expressly prohibited by the rule.

We agree with the special master's conclusion. The evidence did not clearly and convincingly establish either that respondent knowingly misappropriated the Rioses' $35,611.36 or that the funds were loaned to her. R. 1:20-6(c)(2)(C) places the burden of proof on the presenter, when seeking discipline; respondent has the burden of proof in establishing defenses. Ibid. Neither party met its burden. Here, the proofs established clearly and convincingly only that, on September 7, 2005, $41,843.66 belonging to the Rioses was deposited in respondent's trust account; that, on September 12, 2005, $35,611.36 was used to attempt to reinstate the mortgage on respondent's Lumberton property; that, on September 16, 2005, respondent returned the funds to her trust account; and that, on October 6, 2005, respondent gave $29,000 to Elizabeth, followed by the payment of $10,000 the next day.

Elizabeth testified that the funds were deposited into respondent's trust account for safekeeping and that she never agreed to lend any of the money to respondent. A number of facts tend to bolster her testimony.

First, when the $41,843.66 was deposited into respondent's trust account, on September 7, 2005, the Rioses were under contract to purchase a house just three weeks later. The agreement of sale required the Rioses to appear at the closing with $45,000 in cash. According to Elizabeth, the $41,000 was part of the $45,000.

Second, at the time of the deposit, Elizabeth was well aware that respondent had been having financial problems for "many months." Respondent had often told Elizabeth that she feared a foreclosure action because she was having difficulty paying her mortgage. Indeed, a foreclosure action was instituted in August 2005.

Third, on September 8, 2005, the day after the deposit of the Rioses' funds, Elizabeth learned that the Lumberton property was in foreclosure, as respondent had directed her to call the mortgage company that day to ascertain the sum required to reinstate the mortgage.

Under these circumstances, it would not have made sense for Elizabeth to have agreed to lend any money to respondent. Based on respondent's own testimony, Elizabeth had nothing more than respondent's promise to repay the monies. By lending the money to respondent, the Rioses would have risked breaching the

agreement of sale, losing their deposit, not closing on the house, and, perhaps, facing homelessness. It is outside the bounds of reason to believe that Elizabeth would have taken such a risk.

A number of other factors also undermine the credibility of respondent's claim that Elizabeth agreed to lend her $35,000 — worse yet, had "insisted" on lending her the money to reinstate her mortgage.

First, respondent's defense rested solely on her self-serving testimony and the testimony of her brother Angel, who had a strong interest in protecting his sister and her livelihood. Second, there was no written loan agreement. Third, to use respondent's own words, under the verbal loan agreement, Elizabeth had "no lender rights upon default." Fourth, there was no emergent need for respondent to pay the $35,000 in arrears to ASC on September 12, 2005 and, therefore, no reason why she could not have waited until the closing on the Hainesport property, four days later, to attempt to cure the default with her own funds. The payment of the arrears on September 12, 2005 would not have avoided foreclosure proceedings because a foreclosure action already had been filed, in August 2005.

Respondent knew that the September 12, 2005 payment would not have stayed the foreclosure proceeding or reinstated the mortgage. On September 9, 2005, ASC's own lawyer told respondent, in person, that she would have to wait to make the payment until after ASC issued a reinstatement quote, which would take some time. Thus, having been told by ASC's own lawyer, on Friday, September 9, 2005, that she would have to wait to make the payment, it defies logic that respondent urgently needed to pay $35,000 to ASC on Monday and could not have waited four more days, when she would receive $53,000 for the sale of the Hainesport property. Indeed, ASC refused to accept the September 12, 2005 check and never cashed it.

The urgency in respondent's need of the money was likely the desire to immediately appease Angel, who had just learned that she had not making the mortgage payments, resulting in the foreclosure action against him.

There is one other important factor to consider. On Friday, September 9, 2005, respondent went to Palma's office with, allegedly, the firm intent to offer payment for the mortgage default. Yet, she did not take a $35,000 check with her, on a day when Elizabeth was in the office. Instead, she waited to write the check on Sunday, September 11, 2005, when

Elizabeth was not at work. These circumstances strongly support the inference that respondent was acting behind Elizabeth's back and, that, therefore, the funds were not a loan.

On the other hand, certain facts relayed by respondent, if true, would tend to support her testimony that there was a loan. The Rioses purchased the Willingboro home at the conclusion of the breach-of-contract trial, in April 2005. Respondent testified that the Rioses had refinanced their mortgage loan in late spring/early summer of 2005, resulting in their receipt of $60,000. The Rioses financed the loan again in late August 2005, which netted them the $41,000 deposited into respondent's account. Respondent also testified that Elizabeth "intended" to refinance the Willingboro mortgage loan again, a process begun by respondent, which generated an additional $42,000 for the Rioses.

In addition, respondent claimed, the Rioses received $33,500, when they settled a dispute over the ownership of the Camden property. It is possible, thus, that these additional funds may have caused Elizabeth to agree to grant a short-term loan to respondent until she received the proceeds from the imminent closing on her Hainesport property.

With regard to the $10,000, the special master rejected as not credible Elizabeth's testimony that she neither authorized nor was aware of the application of $10,000 toward the payment of outstanding legal fees. According to the special master, the Rioses had executed retainer agreements that required them to pay respondent for her services. Moreover, Elizabeth had access to respondent's billing records and, therefore, did not authorize or was unaware of the transfer of funds. Thus, the special master concluded, the OAE failed to establish by clear and convincing evidence that respondent knowingly misappropriated the $10,000. Reluctantly, we agree.

In this case, it is open to debate whether she had Elizabeth's permission to transfer $11,000 from the trust account to the business account on September 20, 2005. At this point, the closing was only ten days away. Moreover, $11,000 was transferred, but only $10,000 was credited to the Rioses' outstanding fees.

Nevertheless, the Court has never found that an attorney who takes earned legal fees without the client's authorization has knowingly misappropriated those funds. In the Matter of Jack N. Frost, DRB 97-168 (December 16, 1997)(slip op. at 22). Instead, the attorney is typically found to have violated RPC

1.15(c) (when an attorney and another person claim an interest in property in the attorney's possession, attorney must keep the property separate until the dispute is resolved).

In In re Frost, 156 N.J. 416 (1998), we stated:

> Attorneys who have taken their fees from their retainer agreement without the clients' consent have not been disbarred for knowing misappropriation. More simply stated, if the attorney is entitled to the fee, the attorney's unauthorized removal of the fee from the trust or escrow account has never been called knowing misappropriation. Instead, it is considered failure to safeguard funds, that is, failure to segregate funds in dispute. In fact, such unauthorized removal, without more, is ordinarily met with an admonition . . . .
>
> [In the Matter of Jack N. Frost, supra, DRB 97-168 (December 16, 1997) (slip op. at 22.]

The Court accepted our recommendation for a two-year suspension in that case.

In such situations, attorneys will not be disbarred even if it turns out that they were not entitled to the funds. See, e.g., In the Matter of Steven S. Neder, DRB 99-081 (May 27, 1999) (admonition by consent for attorney who did not transmit to his client's wife funds that the client had given to the attorney for that purpose; instead, the attorney applied the funds to his client's outstanding legal fees; the attorney

violated RPC 1.15(b) and (c)). See also In re Banas, 144 N.J. 75 (1996).

In Banas, we determined to impose a six-month suspension on an attorney who violated RPC 1.15(b) when he failed to return to his client's mother (Mrs. Grant) the $5000 that she gave to Banas to pay for a bail application. According to Mrs. Grant, she told Banas that, if her son did not make bail, she wanted her money returned. Id. at 3. She also requested a receipt that confirmed Banas's agreement to her terms. Ibid.

When Mrs. Grant gave the money to Banas, he issued a receipt that identified the funds as having been received "on behalf of Carl Grant to be held for bail application. Money is returnable to M. Grant if bail not obtained." Id. at 4. Upon receipt of the $5000, Banas deposited it into his business account upon the understanding that it represented his fee for filing the bail application. Id. at 5.

Banas filed the bail application, which was granted at $100,000. Ibid. However, the client could not post bail because he was unable to raise the money. Ibid. Banas kept the $5000.

Banas contended that the conditions on the receipt had been fulfilled. Id. at 8. He prepared the bail application, which

was granted. Therefore, he had accomplished what he had been retained to do. Ibid. According to Banas and his expert bail bondsman, the meaning of the phrase "obtaining bail" was different from "posting bail." Ibid. One obtains bail through an attorney's application to the court. Ibid. One posts bail through a bail bondsman. Ibid.

The DEC found that Mrs. Grant was entitled to a return of her monies and that, therefore, Banas violated RPC 1.15(b) and (c) when he failed to return the funds to her and failed to keep the funds segregated, after she requested their return. Ibid.

We agreed that Banas had improperly and knowingly retained the $5000, because the evidence led to the "logical conclusion" that the money was "entrusted to Banas for the purpose of obtaining [the client]'s release from prison; otherwise, the $5,000 was to be returned to Mrs. Grant." By refusing to return the money to Mrs. Grant, Banas retained funds belonging to a third party, in violation of RPC 1.15(b). Id. at 11. Because we believed that Banas had contrived his claim that the funds were to be returned only if he did not succeed on the bail application, we voted to impose a six-month suspension. Id. at 11-12. Banas also was directed to refund the $5000 to Mrs. Grant. Id. at 12.

The Supreme Court agreed with our finding that Banas had wrongfully retained Mrs. Grant's money. In re Banas, 144 N.J. 75 (1996). However, the Court imposed a reprimand, due to mitigating factors, such as his unblemished disciplinary record and public service. Id. at 81.

Precedent, therefore, dictates that, even if respondent was not entitled to the $10,000 or $11,000 in attorney fees, she would not be disbarred for removing them from the trust account funds held on behalf of the Rioses. However, because she was charged only with knowing misappropriation, we cannot find that she violated any uncharged RPC. R. 1:20-4(b).

II. THE CHARGE OF FALSE STATEMENT OF MATERIAL FACT TO A THIRD PERSON

The second count of the complaint charged respondent with knowingly making a false statement of material fact to a third person, in violation of RPC 4.1(a)(1) "and/or" RPC 8.4(c), based on (1) her statement, in the October 6, 2005 letter to Aaron Gregg, that the full amount of the Rioses' money was being held in her trust account when, in fact, the trust account balance was $29,092.32, and (2) her attaching to the letter an altered bank statement that showed the deposit, but had the subsequent transactions "blacked out." These transactions would have demonstrated that the Rioses' funds had been invaded and were no longer available.

The special master found that respondent violated RPC 4.1(a)(1), but was silent as to RPC 8.4(c). RPC 4.1(a)(1) provides that, "[i]n representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person." Here, the special master accepted the truth of the statement in respondent's letter that $41,843.66 was deposited into her trust account on September 7, 2005. Nevertheless, he noted, at the time that respondent wrote the letter, she "knew that the represented deposit funds were no

longer in her Trust Account." Thus, he concluded, the letter was "effectively a misrepresentation of material fact."

We uphold the special master's finding in this context. After the mortgage commitment was issued, Gregg spoke to respondent and repeated to her what the commitment required to be given to the lender, prior to closing. One such item was an escrow letter, explaining where the Rioses' down payment funds were located.

On October 6, 2005, respondent sent an escrow letter to Gregg, in which she represented that $41,843.66 was deposited into her trust account on September 7, 2005. The text of the letter read:

> Dear Mr. Gregg:
>
> Enclosed please find a copy of the Attorney's Escrow Trust Account concerning the above parties. On or by September 7, 2005, we deposited $41,843.66 of their funds into the Trust Account.
>
> Thank you for your time and courtesies.

Attached to the letter was a copy of the trust account bank statement showing that the $41,000 was in the account as of that date. The bank statement attached to the escrow letter was redacted, except for the deposit of the Rioses' funds and a seventy-one-cent interest payment. Greg testified that he was

not "bother[ed]" by the redactions. He explained that other attorneys sometimes did the same thing and noted that banks "do their own verification." In this case, the bank never expressed a concern to Gregg.

Respondent maintained that the representations in the letter and its attachment were not false. Moreover, she claimed, the letter did not state that the funds were meant for the closing.

The special master correctly ruled that respondent violated RPC 4.1(a) when she signed the October 6, 2005 letter to Greg and had Elizabeth fax it to him. The letter was written on the day before closing. On that date, respondent's trust account balance was only $29,000.

The redactions plus the careful wording of respondent's letter demonstrated an attempt to evade the lender's inquiry. This is particularly so inasmuch as respondent had even redacted the current balance in the account.

While respondent truthfully stated that $41,000 was deposited into her trust account on September 7, 2005, she knew full well that this was not the extent of the inquiry. The mortgage company clearly wanted to know where the funds were located. They were not located in respondent's trust account.

Respondent violated RPC 4.1(a)(1) not by what she represented, but by what she deliberately omitted, knowing that the information about the amount and whereabouts of the funds was material to the lender's decision whether to issue a loan to the Rioses.

The OAE urged us to find that respondent also violated RPC 8.4(c), which, while charged, was not mentioned by the special master in his analysis of the second count. We agree with the OAE and so find.

RPC 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. At a minimum, respondent's letter was intended to deceive the lender into believing that $41,000 was in her trust account. Moreover, her silence with respect to the location of the funds, as of October 5, 2005, constituted a misrepresentation by silence. See, e.g., Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984) (sometimes "silence can be no less a misrepresentation than words").

We find, thus, that, respondent violated RPC 4.1(a)(1) and RPC 8.4(c) when she represented to Gregg, in the October 6, 2005 letter, that the $41,000 had been deposited on September 7, 2005 but failed to inform him that the full amount of the funds was

no longer in the account as of the date of her letter. Respondent's statement and omission were compounded by the redacted trust account statement, which prevented Gregg and the lender from seeing that the funds had been dissipated.

III. THE CHARGE OF A FALSE STATEMENT OF MATERIAL FACT TO DISCIPLINARY AUTHORITIES

The third count charged respondent with knowingly making a false statement of material fact in a disciplinary matter, in violation of RPC 8.1(a) "and/or" RPC 8.4(c). Specifically, it was alleged that respondent falsely stated to the OAE, during its investigation, that: (1) the Rioses had loaned her $41,843.66; (2) Elizabeth Rios had called ASC to obtain the figure required to bring the mortgage current when, in fact, it was Angel, who had called; and (3) Elizabeth had gone to the bank with the $35,000 trust account check and obtained a $35,611.35 cashier's check, when, in fact, it was Shafer who had conducted the transaction.

Because the special master found that the OAE had failed to prove that respondent had knowingly misappropriated the Rioses' funds, he could not find that respondent lied to the OAE during its investigation. The special master also found no

misrepresentation when respondent stated to the OAE that Elizabeth had called ASC to obtain the reinstatement figure, because Elizabeth testified that she did call ASC. Finally, the special master ruled against the OAE with respect to respondent's statement that Elizabeth had taken the trust account check to the bank, because she later corrected the statement in her answer.

We accept some and reject some of the master's findings. RPC 8.1(a) prohibits an attorney from knowingly making a false statement of material fact "in connection with a disciplinary matter." As stated previously, RPC 8.4(c) prohibits dishonesty, deceit, fraud, and misrepresentations.

Because we could not find that respondent knowingly misappropriated the Rioses' $35,000, we cannot find that respondent lied to the OAE when she stated that Elizabeth had lent the monies to her. We cannot find that respondent lied when she stated to the OAE that Elizabeth had taken the trust account check to the bank, even though Elizabeth testified that she did not go to the bank, because respondent corrected the statement in her answer. Finally, we cannot find that respondent lied to the OAE when she stated that Elizabeth had

placed a call to ASC to obtain a reinstatement figure, because Elizabeth testified that she did make such a call.

IV. THE CHARGES OF THE COMMISSION OF A CRIMINAL ACT REFLECTING ADVERSELY ON THE LAWYER'S HONESTY, TRUSTWORTHINESS OR FITNESS AS A LAWYER; CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION; AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

The fourth count of the complaint alleged that respondent either committed perjury, in violation of N.J.S.A. 2C:28-1, or made a false statement under oath, in violation of N.J.S.A. 2C:28-2, when, during the fee arbitration hearing, she testified that the $10,000 that she gave to Elizabeth represented a portion of the Rioses' funds held in respondent's trust account, when, in fact, the source of the funds was a $10,000 loan to respondent from her brother Angel. According to the complaint, this false statement under oath constituted a violation of RPC 8.4(b) (criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), RPC 8.4(c), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

At issue is the following testimony at the fee arbitration hearing:

Mrs. Rios: I have another question. The $10,000 that you claim I paid to you, where did it come from? Do you have any recollection where it came from?

Ms. Delgado-Shafer: Yes. It came from your funds held in the trust account.

[Ex. R35 at p.55, ll. 4-9.]

As the special master found, the complaint misconstrued the question and the answer. Elizabeth did not ask respondent the source of the $10,000 that she gave to Elizabeth on October 7, 2005. Rather, Elizabeth asked respondent to identify the source of the $10,000 that respondent claimed the Rioses paid her on September 20, 2005. Those funds were transferred from respondent's trust account to her bank account. Therefore, respondent's answer to the question was truthful. Accordingly, we sustain the special master's finding that the OAE failed to prove that respondent violated 8.4(b),(c), and (d) in this instance.

V. THE CHARGE OF COMMINGLING AND RECORDKEEPING VIOLATIONS

The fifth count of the complaint alleged that respondent commingled personal and client funds and failed to keep separate funds that were in dispute, in violation of RPC 1.15(a) and (c) and R. 1:21-6, when she deposited into her trust account the

$53,000 in proceeds from the sale of her Hainesport property and then used those funds to pay personal expenses (such as private school tuition) and a fee arbitration award.

The parties stipulated that respondent's deposit into her trust account of the $53,000 in proceeds from the sale of her Hainesport office and the issuance of $13,400 in checks against these personal funds represented commingling and the improper use of a trust account, contrary to RPC 1.15(a), RPC 1.15(c), and R. 1:21-6. Respondent further testified that she did not maintain a ledger for the Rioses funds. There was no written bill directed to the Rioses with respect to the $10,000 transfer of funds from the trust account to the business account.

Accepting the stipulation and respondent's testimony, the special master found that there was no need to discuss the count further.

We agree with the special master's finding that respondent violated RPC 1.15(a) and R. 1:21-6, but not RPC 1.15(c). RPC 1.15(a) requires an attorney to keep the attorney's funds separate from the client's. The $53,000 that respondent received at the closing on the Hainesport property was payable to her personally. By placing personal funds into the trust account, respondent violated this rule.

In addition, respondent violated R. 1:21-6 when she failed to maintain a ledger card for the Rioses' legal matters and issued a trust account payable to cash. RPC 1.15(c), however, requires an attorney to segregate funds that are subject to a dispute between the attorney and another person. The rule does not apply here because the $53,000 was not the subject of a dispute between respondent and any other person.

VI. THE CHARGE OF A CONFLICT OF INTEREST (LOAN FROM THE RIOSES TO RESPONDENT)

The sixth count charged respondent with having engaged in a conflict of interest, in violation of RPC 1.8(a), as a result of her claim that the Rioses had loaned her $41,843.66. Specifically, it charged that the terms of the alleged loan were not fully disclosed to the Rioses in writing; the terms were not fair and reasonable; the clients were not advised, in writing, of the desirability of seeking the advice of independent legal counsel; and respondent did not obtain their written consent to the transaction.

Respondent stipulated the violation of this rule and the special master accepted the stipulation. Nevertheless, we must

dismiss this count of the complaint because there was no clear and convincing evidence that there was or there was not a loan.

VII. THE CHARGE OF A CONFLICT OF INTEREST (RESPONDENT'S REPRESENTATION OF ANGEL IN THE FORECLOSURE ACTION)

The final count of the complaint charged respondent with having engaged in another conflict of interest, in violation of RPC 1.7(a)(2), as well as conduct prejudicial to the administration of justice (RPC 8.4(d)), when she represented her brother Angel in the foreclosure action. The complaint alleged that Angel had a potential cause of action against respondent, whose failure to make the mortgage payments on the Lumberton property caused Angel to default and, consequently, a foreclosure action to be instituted against him. This potential claim of Angel's created "a significant risk that respondent's representation of Angel [would] be materially limited by respondent's personal interest." Yet, the complaint alleged, respondent failed to obtain Angel's informed consent, in writing, prior to undertaking the representation.

The complaint also alleged that respondent violated RPC 8.4(d) when she failed to disclose to the judge presiding over the foreclosure action and Palma, ASC's counsel, that she

resided at the Lumberton property and was responsible to Angel for the mortgage payment.

In terms of the conflict of interest, respondent testified that she and Angel had the same interest in the foreclosure matter, that is, to keep the home. She disagreed that Angel had a potential cause of action against her because they are family and help each other out. Respondent denied that her representation of Angel was materially limited by her personal interest. According to respondent, the siblings "give each other whatever we have financially, materially, without a second thought."

Angel was satisfied with respondent's representation of him in the foreclosure action. He testified that, even if he were dissatisfied with her work, he would not sue respondent because she is his sister.

Respondent denied that she failed to disclose to the judge and Palma that she resided at the property and was responsible for making the mortgage payments. According to respondent, the discovery in the foreclosure action included copies of her canceled checks and homeowner's insurance policy in her name and proof that she held a power of attorney over the property. In fact, she added, at the first conference, the judge told

respondent that, if she could not afford to pay the mortgage, then she should move out of the property. Her adversary also saw the documents. The two of them discussed the matter, with counsel acknowledging that she lived in the house.

The special master found that respondent engaged in a conflict by representing Angel, but that she did not prejudice the administration of justice by failing to disclose her interest in the property to the judge and Palma. Without any analysis, the special master concluded that respondent's representation of Angel in the foreclosure action "was and is materially limited by the personal interest of the Respondent." Moreover, he found "no evidence that Angel Delgado gave informed consent, confirmed in writing, after full disclosure and consultation." Finally, "his interests were not adequately safeguarded in the pleadings."

As for the charge that respondent engaged in conduct prejudicial to the administration of justice, the special master found that the OAE failed to prove it by clear and convincing evidence. Specifically, Palma testified that, although he did not recall a full disclosure to the judge, he believed that respondent was the true owner of the property. Moreover, he noted, respondent testified that the judge was aware that she

was the true owner. Finally, respondent had "provided" canceled checks and a copy of an insurance policy in her name, which would have provided "some indication" of her interest in the Lumberton property.

We uphold the special master's finding that respondent engaged in a conflict of interest, in violation of RPC 1.7(a)(2), when she represented her brother in the foreclosure action. RPC 1.7(a)(2) prohibits a lawyer from representing a client "if the representation involves a concurrent conflict of interest," which exists when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . . or by a personal interest of the lawyer." In this case, respondent's and Angel's interests were not the same. Her actions resulted in a foreclosure action against him. Respondent's actions created a cause of action in favor of Angel against her.

Respondent's personal interest in seeing the dismissal of the foreclosure action might have resulted in her negotiating a settlement that simply avoided the loss of the house. This was in respondent's best interest, but not necessarily that of Angel, who might have faced increase expense in making that

happen. Moreover, Angel may have incurred costs that he might have been able to recover from respondent in a breach-of-contract action, but would have lost because respondent did not advise him to sue her. Regardless of respondent and Angel's belief that, because they are family, no ill would befall them as a result of the conflict, respondent's obligation as a lawyer required her to decline representation of Angel in the foreclosure matter. She violated RPC 1.7(a)(2) when she represented Angel.

With respect to respondent's failure to disclose her interest in the property to the judge and Palma, the allegations in the complaint do not tie respondent's nondisclosure to the charged violation. Moreover, the testimony on the issue was scant.

It matters not that either Palma or the judge or both knew informally that respondent lived at the Lumberton property. If there were no conflict of interest, respondent's interest would have been disclosed fully and formally either in Angel's answer to the complaint or in a third-party complaint filed on behalf of Angel against respondent. Respondent's failure to do either, given the conflict, is another indication — similar to that demonstrated with the redacted bank statement submitted to Gregg

in connection with the Rioses' closing – of her playing fast and loose with her professional obligation of honesty. To the extent that she failed to disclose her interest in the property and that she was responsible for its foreclosure status, respondent engaged in conduct prejudicial to the administration of justice and, therefore, violated RPC 8.4(d).

To conclude, in our view, the facts surrounding "the loan" are as close as they can get to knowing misappropriation. Respondent is saved from disbarment solely on the lack of clear and convincing evidence of a knowing misappropriation and our doubts (and the special master's) about Elizabeth's credibility. Nevertheless, we are left with an attorney who, we find, to have committed a misrepresentation of material fact to a third person, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, commingled personal and client funds, committed recordkeeping violations, engaged in a conflict of interest, and engaged in conduct prejudicial to the administration of justice.

An admonition is the appropriate measure of discipline for the commingling of legal fees and trust account funds. In re Farynyk, 143 N.J. 302 (1996) (the attorney had accumulated almost $431,000 in legal fees in his trust account, which we

considered to be the "passive commingling of personal and client trust funds" in violation of RPC 1.15(a); In the Matter of William P. Deni, Sr., DRB 07-337 (the attorney routinely deposited earned legal fees into his trust account rather than his business account).

The minimum measure of discipline for a conflict of interest is a reprimand. "[I]n cases involving a conflict of interest, absent egregious circumstances or serious economic injury to the clients involved, a public reprimand constitutes appropriate discipline." In re Berkowitz, 136 N.J. 134, 148 (1994). Accord In re Olivo, 189 N.J. 304 (2007); In re Mott, 186 N.J. 367 (2006); In re Poling, 184 N.J. 297 (2005); In re Schnepper, 158 N.J. 22 (1999); In re Kessler, 152 N.J. 488 (1998).

A misrepresentation in any context typically results in the imposition of at least a reprimand. The Court has consistently imposed reprimands for misrepresentations to clients, third parties, disciplinary authorities, and the courts. See, e.g., In re Kasdan, 115 N.J. 472, 488 (1989) (attorney intentionally misrepresented to a client the status of a lawsuit); 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 settlement proceeds; the attorney's intent was to avoid the satisfaction of the lien). In re Sunberg, 156 N.J. 396 (1998) (attorney lied to the OAE about the fabrication of an arbitration award and also failed to consult with a client before permitting two matters to be dismissed; mitigating factors included the attorney's unblemished disciplinary record, the passage of time since the incident, the lack of personal gain and harm to the client, the aberrational nature of the misconduct, and his remorse); In re Powell, 148 N.J. 393 (1997) (attorney misrepresented to the DEC that an appeal had been filed, and committed gross neglect, lacked diligence, and failed to communicate with his client); In re Manns, 171 N.J. 145 (2002) (attorney mislead the court in a certification in support of a motion to reinstate a complaint as to the date attorney learned that the complaint had been dismissed; he also lacked diligence, failed to expedite litigation, and failed to communicate with the client); and In re Kantor, 165 N.J. 572 (2000) (attorney misrepresented to a municipal court judge that attorney's vehicle was insured on the date it was involved in an accident when, in fact, the policy had lapsed for nonpayment of premium when attorney's girlfriend

had misplaced the envelope containing the bill and the payment and, consequently, never mailed it).

A reprimand also was imposed on an attorney who failed to safeguard funds, made a false statement to a third person, and engaged in conduct that was both dishonest and prejudicial to the administration of justice. In re Frey, 192 N.J. 444 (2007).

Notwithstanding the fact that a reprimand would ordinarily be imposed for the infractions committed by respondent, we find her overall conduct so unprofessional and so close-to-the-edge of the bounds of outright theft, we are constrained to impose the greatest possible discipline, which, under the circumstances of this case, is a two-year suspension. She is reckless both in terms of how she practices law and how she runs her practice. She knows no boundaries when it comes to business with friends and family.

There is no indication that, after Angel had financed his "purchase" of the Lumberton property from respondent and Shafer, the mortgage company was aware of his transfer of the deed back to respondent. Moreover, although respondent claimed to have borrowed the Rioses' $35,611.36 trust account funds upon the promise of repayment after the September 16, 2005 closing on the Hainesport property, the Rioses were forced to postpone their

October 7 closing and incur a mortgage at a higher rate because respondent had failed to abide by her promise and repay the monies.

We are troubled greatly by respondent's penchant for deceit and dishonesty. First, when respondent sent the escrow letter to Gregg, she included a "redacted" version of her trust account statement so that the lack of sufficient funds for the closing would not be detected. While her letter accurately stated that the $41,843.66 had been deposited into her trust account, the redacted statement was submitted for the purpose of concealing that the full amount of the deposit was no longer in the account.

Second, although we did not find as an RPC violation respondent's failure to expressly disclose to the judge in the foreclosure action and to Palma that she resided in the Lumberton property, we nevertheless find it corroborative of her inclination to deceive.

Co-Chair Pashman and members Baugh, Boylan, Clark, and Doremus voted for a two-year suspension. Vice-Chair Frost and members Lolla, Stanton, and Wissinger voted for disbarment, finding clear and convincing evidence that respondent knowingly misappropriated the Rioses' $35,611.36.

Prior to reinstatement, respondent must present to the OAE proof of satisfactory completion of twelve hours of professional responsibility courses. Upon reinstatement, respondent must practice law under the supervision of a proctor for two years.

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 Dorca I. Delgado-Shafer
Docket No. DRB 08-096

Argued: June 19, 2008

Decided: September 9, 2008

Disposition: Two-year suspension

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:	4	5				

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel