SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-171
District Docket No. XIV-2009-0143E

IN THE MATTER OF	:	
DANIEL DONK-MIN KIM	:	Decision
AN ATTORNEY AT LAW	:	

Argued: October 16, 2014

Decided: December 11, 2014

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

Frederick J. Dennehy appeared on behalf of respondent.

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

This matter was before us on a recommendation for disbarment, filed by Special Ethics Master Edwin H. Stern, P.J.A.D. (ret.), based on his finding that respondent knowingly misappropriated escrow funds in two matters, a violation of RPC 1.15(a), RPC 8.4(c), and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985). The special master also found that respondent violated RPC 1.15(d)

(failure to comply with the recordkeeping requirements of R. 1:21-6). For this violation he recommended the imposition of a censure, in the event that either we or the Court disagrees with his finding that respondent knowingly misappropriated trust funds.

We find that the record does not establish, by clear and convincing evidence, that respondent knowingly misappropriated trust funds. For respondent's admitted violation of RPC 1.15(d) we determine to impose a three-month suspension, due to his extreme recklessness in handling client and escrow funds for so many years. In addition, we require respondent to provide the OAE with monthly reconciliations of his trust accounts, on a quarterly basis, for a period of two years.

Respondent was admitted to the New Jersey bar in 1991 and to the New York bar in 1992. At the relevant times, he maintained an office for the practice of law in Palisades Park. He has no history of discipline.

This matter proceeded to a disciplinary hearing on three of four counts of the formal ethics complaint.[1] The first two counts charged respondent with knowing misappropriation of escrow funds in two client matters. The fourth count charged him with recordkeeping violations, which, the complaint alleged, were not the cause of the misappropriation of escrow funds detailed in counts one and two.

Respondent maintained attorney trust and business accounts in New Jersey and New York with Woori America Bank (Woori), with locations in both states. These accounts will be referred to as "NJTA," "NJBA," "NYTA," and "NYBA."

COUNT FOUR - RECORDKEEPING VIOLATIONS

Although the recordkeeping charges were the subject of the fourth count of the complaint, we address them first because respondent's non-compliant recordkeeping and accounting system

[1] The third count, which charged respondent with misrepresentations on a HUD-1 form, lack of candor toward the United States Bankruptcy Court, and conduct prejudicial to the administration of justice, was dismissed prior to the ethics hearing.

factors into his defense to the knowing misappropriation charges. Respondent admitted the following violations:

- Trust receipts and disbursements journals were not maintained, contrary to R. 1:21-6(c)(1)(A);
- Individual trust ledger cards were not maintained for each client, contrary to R. 1:21-6(c)(1)(B);
- Individual client trust ledgers had debit balances, contrary to R. 1:21-6(d);
- Monthly three-way trust account bank reconciliations were not prepared, contrary to R. 1:21-6(c)(1)(H);
- A running trust checkbook balance was not maintained, contrary to R. 1:21-6(c)(1)(G);
- Trust account deposit slips lacked sufficient detail, contrary to R. 1:21-6(c)(1)(A);
- Funds unrelated to respondent's practice of law were commingled and maintained in respondent's trust account, contrary to R. 1:21-6(a)(1) and RPC 1.15(a); and
- Trust account checks did not identify clients or describe the applicable transaction, contrary to R. 1:21-6(c)(1)(G).

[C4¶1.][2]

OAE disciplinary auditor Bruce Bethka, currently retired, described respondent's recordkeeping system as "poor." Bethka

[2] "C" refers to the formal ethics complaint, dated April 29, 2011.

testified that, on the one hand, respondent had assured him that, "at no time," had he invaded client funds because "he knew how much money was in the account in his head." Yet, on the other hand, respondent claimed that, in some instances, his "defective" recordkeeping system had caused the inadvertent invasion of trust account funds, rather than an intentional use of those monies for himself or others.

Respondent's forensic accountant, Chris McKay,[3] testified that respondent's recordkeeping practices not only failed to comply with R. 1:21-6, but also failed to comply with "generally accepted accounting practices fully." Indeed, according to respondent, his system of identifying and keeping track of all financial transactions involving clients, fees, and business expenses was so inadequate that, after the grievance was filed in this matter and after the OAE demanded to see respondent's financial records, he had to retain McKay to help him understand

[3] McKay was employed by the OAE as a random auditor from 1983 until approximately 1991, when he started his own company, Accounting for Attorneys. Accounting for Attorneys educates attorneys about the recordkeeping requirements in R. 1:21-6 and conducts forensic accounting.

what the OAE was seeking and then to create the requested documents, because they did not exist.

Respondent testified that, although he had taken a skills and methods course on recordkeeping and had received materials from that course, he did not apply what he had learned, when he opened his law office, in 1992. Instead, he relied on the advice of a criminal lawyer with whom he shared office space, who suggested, for example, that he deposit fees in his trust account and draw them down, as required, a practice that respondent adopted.

Respondent moved his fees from the trust account to the business account, as needed, "for the purpose of running the business and [his] personal use," including the payment of household expenses and student and car loans, some of which caused negative balances in the NJBA. McKay noted that the business account balance was in the negative "repeatedly" and conceded that repeated negative balances in a business account that are constantly covered by transfers from the trust account are, upon initial impression, a "problem." But he added that this alone does not establish knowing misappropriation.

McKay had seen this type of "accounting system" with other attorneys. He claimed that some banks are willing to operate as

if a line of credit has been established. Thus, when checks are presented against insufficient funds, instead of bouncing them, the bank provides the attorney with the opportunity to make the account whole. Although McKay claimed that this was the arrangement that respondent had with Woori, there were many occasions when Woori charged fees to respondent for insufficient funds.

To keep track of the available funds in the trust accounts, either respondent or his associate, attorney Danbee Kim,[4] would call the bank, presumably daily, and asked "what checks came in for what amount." Respondent would check the amounts against the check stubs "to make sure it all matche[d]." The problem with this method, according to McKay, was that the check stubs did not always identify a client matter and were sometimes blank.

McKay testified that, when he updated respondent's financial records, there were more than 22,000 individual transactions. Yet, he could not account for all of them, due to

[4] Danbee Kim, who worked as respondent's associate from 2005 to 2010, is not related to him. Because many witnesses and parties share the same or similar surnames, we will refer to them by their first and last names.

the absence of necessary information on the check stubs. McKay classified transactions that had no client designation as "unknown." He then sought the assistance of either respondent or Danbee Kim in identifying the unknown transactions.

McKay explained that, more often than not, the unknown transactions involved fees taken from the trust account, in even dollar amounts, and deposited into the business account. Because these checks had nothing written on the memo line or the stub and the fees could have been drawn against any number of thirty to forty cases, McKay had to classify them as unexplained. According to McKay, respondent's recollection varied as to individual checks. McKay explained:

> On talking about a case, he would recall the parties that were involved in the case, he would recall the general, you know, facts about the case, the type of injury, even the insurance carrier. But for recalling exactly how he structured pulling his fee from that case, there would be a recollection about some of the amounts, but an even numbered or an even amounted check, there would be -- there would be no recollection whether it was on one, two, or three different cases.
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> So that's where the recollection comes in. Court dates, parties involved, there was a lot of good recollection about that. Cases where he would have waived his -- waived the costs or reduced the fee, things

like that. So that's where I termed it as good recollection.

[7T113-23 to 7T114-14.][5]

McKay did not agree with the OAE's suggestion that respondent's accounting system was designed to prevent him from knowing whether he was using client trust funds. Rather, he stated, respondent's system "was designed so that he could actually keep track – believe it or not, keep track of fees at all times in his trust account" and, therefore, client funds.

McKay explained that, for many years, respondent's law practice was limited to personal injury matters. McKay told the special master that, in a personal injury practice, the funds are received, the client's portion is disbursed to the client, and what remains is the fee. By leaving the fees in the trust account, respondent could track them and know "how much he could take down little by little."

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[5] "1T" refers to the transcript of the hearing on September 23, 2013. "2T" refers to the transcript of the hearing on September 24, 2013. "3T" refers to the transcript of the hearing on September 26, 2013. "4T" refers to the transcript of the hearing on September 27, 2013. "5T" refers to the transcript of the hearing on November 6, 2013. "6T" refers to the transcript of the hearing on November 8, 2013. "7T" refers to the transcript of the hearing on December 9, 2013.

In 2005, respondent realized that Korean E-2 investors were falling victim to scam artists, who were setting them up in businesses that were not legitimate.[6] When the businesses failed, the investors lost their E-2 visas and had to return to Korea.

In order to protect investors from these scammers, respondent began to represent clients in commercial transactions and E-2 and EB-5 visa matters. He deposited and maintained those fees in his trust account, as well as "prospect money," which included "loans or funds that [he] could use for [a] project" suitable for an EB-5 investment. McKay claimed that respondent's bookkeeping system did not work with these types of

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[6] Danbee Kim explained that investment visas were either E-2 or EB-5. An E-2 visa is a temporary visa, whereas an EB-5 is permanent. An "alien entrepreneur" who wants to obtain an EB-5 visa must invest at least $1 million in a U.S. business. According to respondent's client, Myung Doo Chung, an EB-5 visa is valid for two years. If, after that period, the federal government is satisfied that the business is legitimate, the holder of the visa is granted permanent resident status and a "green card." Permanent status also is granted to the holder's "derivative family members." www.uscis.gov/working-united-states-permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process.

matters, because the multiple disbursements made it more difficult to "juggle the mental ball."

The difficulties created by respondent's "defective system" came to light in February 2009, when Kyung S. Kim, the purported former owner of a Korean restaurant that was sold to respondent's client Misoya, Inc. (Misoya), filed a grievance against respondent.[7] Bethka testified that attached to respondent's reply to the grievance was an "all banks" trust account ledger card for Misoya's business loan closing, which showed an October 3, 2006 trust account deposit of $70,000 that was not identified in the ledger and also showed the disbursements made against those funds, including two payments to the New York State Department of Taxation & Finance (the NYSDTF), totaling $36,918.43.

Danbee Kim testified that she had gathered the above information for respondent's review and prepared the trust account ledger for the Misoya matter. She did not know whose

[7] Presumably, Kyung Kim is not related to respondent. The restaurant was owned by Joon & Kim Corp. (Joon & Kim), which was owned by Kyung Kim's husband, Nam S. Her. Nam Her is relevant to the first count of the complaint, which involves the sale of the restaurant to Misoya.

decision it was to include all of the bank accounts on the ledger. She explained that respondent did not maintain client ledgers "like that" for other client matters.

After the OAE's receipt of respondent's reply to the grievance, Bethka compared respondent's ledger for Misoya with the NJTA bank statement, which reflected the October 3, 2006 $70,000 deposit, but not the disbursements to the NYSDTF. When Bethka asked respondent for an explanation, he stated that the disbursements had been made from the NYTA, not the NJTA.

In this regard, respondent asserted that his NJTA and NYTA were "interchangeable," because they were both Woori accounts. He considered the two trust accounts to be a single, "global trust account." Eventually, this "global trust account" grew to include a business checking account for Mi & Sun International Corporation (Mi & Sun).[8] That account held only "prospect" money for Myung Chung and other Korean nationals seeking EB-5 visas, as well as a $200,000 down payment by these EB-5 clients to the

[8] Mi & Sun was owned by Korean national Myung Chung, his wife, Sun H. Lee, and another Korean couple, Pon Hee Han and his wife, Mi Ae Seo. Mi & Sun was established so that Myung Chung and Pon Han could each invest at least $1 million in a U.S. business and, thus, receive an EB-5 visa and permanent resident status for themselves and their "derivative family members."

trust account of the law firm representing the seller in a $2 million investment involving a permanently-moored ferry (called the "Binghamton") and two accompanying vessels, located on the Hudson River, in Edgewater, New Jersey.

McKay testified that respondent viewed his two attorney trust accounts, the Mi & Sun business account, and the $200,000 deposit as a single total. Therefore, when McKay reconciled respondent's trust accounts, he included the Mi & Sun account, because he had to consider "any place where . . . trust funds may be moved, not by design, but I would just say through negligence."

According to McKay, respondent did not know what three-way reconciliations were until McKay explained them to him; respondent's reconciliations were in his head. McKay acknowledged that respondent's accounting system was "doomed to fail," because an attorney cannot maintain a trust account, fail to perform three-way reconciliations, and expect to be totally accountable for those funds; for example, the attorney may not be aware of a bank error or a bounced check.

McKay testified that, without the basic records required by R. 1:21-6, such as ledger cards and deposit slips identifying the client matter, it was difficult to "pick up the pieces and

create a formulation of what was going through the account." Nevertheless, McKay did not uncover any evidence that a client had not been paid or had even complained that a disbursement was late.

McKay stated that respondent was "very proud of his own system." Indeed, "every time that [McKay] would indicate where [respondent] was coming up short as far as the recordkeeping rule, [respondent] felt that he had, through his own mechanics, covered all those areas." For example, respondent was "shocked," when McKay told him that all earned fees had to be deposited into the business account and recorded properly and that, at times, his NJTA had a negative balance. Thus, McKay added, "it was a lengthy process to get [respondent] to come around to understand how his own system was inadequate."

In addition to legal fees, respondent deposited and maintained personal loans in his trust accounts, which he drew down "on an as-needed basis." The following loans were at issue:

Date	Lender	Amount	Account
06/06/06	Danbee Kim	$ 20,000	NJTA
03/19/07	Daniel Kim	$ 56,400	NJTA
11/08/07	Byung Cho	$100,000	NJTA
11/16/07	James Lee	$350,000	NJTA

These loans -- and their timing -- factored into the knowing misappropriation charges. The OAE asserted that the loans were taken in order to cover shortages in respondent's trust accounts. Respondent countered that the loans "had nothing to do with correcting client shortages." Rather, he stated that he would secure large loans in anticipation of large disbursements, "whether it be a large payment that he needed to make on a business matter or a personal matter or business prospect matters."

McKay testified that he devoted more than one thousand hours to reconciling respondent's accounts. He taught Danbee Kim to perform reconciliations and, with his assistance, she performed the required recordkeeping tasks for respondent's NJTA and NJBA, until she left respondent's employ, in October 2010. As of November 8, 2013, McKay continued to maintain and reconcile respondent's books and records.

COUNTS ONE AND TWO - KNOWING MISAPPROPRIATION OF ESCROW FUNDS

Count one of the complaint charged respondent with the knowing misappropriation of a portion of the $70,000 escrow mentioned above, which was carved out of a $450,000 commercial loan from Woori to Misoya, in September 2006. Count two charged

respondent with the knowing misappropriation of a $20,000 deposit in a commercial transaction, involving the sale of his client's Nutley dry-cleaning business, Excellent Cleaners, as well as a portion of a $90,000 escrow (which included the $20,000 deposit), carved out of the proceeds of that sale, for the payment of taxes and liens. We address these counts in reverse order to observe the chronology of the events.

I. THE EXCELLENT CLEANERS TRANSACTION

In December 2005, J.K. Kim[9] retained respondent and another attorney to represent him in "an ongoing FBI mortgage fraud investigation" involving home equity lines of credit (HELOCs). The fee for the FBI matter was to be a maximum of $50,000, to be billed on an hourly basis. Only respondent worked on the matter, however.

Respondent insisted that the time that he had devoted to the mortgage fraud matter equaled the $50,000 cap, but he provided no time records to support his claim. In fact, he maintained that the services provided to J.K. Kim exceeded the

[9] J.K. Kim's full name is Jyung Kyu Kim. He will be referred to as J.K. Kim. He is not related to respondent.

scope of the retainer agreement, as he also had represented J.K. Kim with respect to his immigration status, which had been compromised by the criminal matter. Respondent, thus, believed that he was more than entitled to the entire $50,000 fee.

Ultimately, J.K. Kim agreed to cooperate with the government. The agreement required him to make restitution. Because the agreement is not a part of the record, its terms are not known, including the amount of restitution that J.K. Kim was required to make.

Respondent's testimony suggested that, at the time that the deal was struck with the government, the sale of J.K. Kim's Nutley dry-cleaning business, Excellent Cleaners, may have been pending. In addition to that business, J.K. Kim owned a laundromat in New York, which he had purchased with some HELOC funds. J.K. Kim told the government that he would sell the laundromat business to raise the funds required to satisfy his restitution obligation, but that it would take some time to accomplish that. According to respondent, the government informed him that, in the meantime, J.K. Kim would have to "show good faith, do something." At this point, J.K. Kim told the government that he was selling Excellent Cleaners.

Respondent proposed to the government that, out of the proceeds of the sale of Excellent Cleaners, he would take his $50,000 fee for the criminal matter.[10] He assured the government that J.K. Kim would get "none of it," presumably meaning the proceeds generated by the transaction. Respondent also offered to keep the HELOC loan intact until the sale of the laundromat, at which time the HELOC would be paid off with the proceeds from that sale. Because, as stated above, the agreement between the government and J.K. Kim was not introduced as an exhibit, the record does not reveal whether the government accepted respondent's proposal.

On February 3, 2006, Sanghwan Hahn, the attorney for Kyung Man Chang, the buyer of Excellent Cleaners, sent a fax to respondent confirming the parties' agreement to a $180,000 purchase price, which included a $20,000 deposit, and identifying an existing lien of $90,000, which represented an outstanding mortgage from J.K. Kim to the previous owner of the

[10] Inconsistently, respondent testified, on the one hand, that the government had told him that he could not take the $50,000 fee from the proceeds of the sale, while, on the other hand, his testimony suggested that the government had not objected to his taking the fee.

business. When respondent asked J.K. Kim about the lien, he claimed that all liens against the business had been satisfied. Respondent testified that he heard nothing more from Sanghwan Hahn about the $90,000 lien or the results of any UCC searches.

On an unidentified date in March 2006, J.K. Kim entered into a written agreement of sale with Kyung Chang, calling for a $180,000 purchase price, to be paid as follows: a $20,000 deposit, $80,000 in cash at closing, and an $80,000 promissory note from Kyung Chang to J.K. Kim, secured by a mortgage on the premises. As the seller's attorney, respondent was required to hold Kyung Chang's $20,000 deposit in escrow.

The contract was conditioned on the buyer's ability to obtain a lease with certain terms. If the buyer were not able to do so, he could cancel the contract and the $20,000 deposit would be returned to him. If the buyer obtained a suitable lease, but did not follow through with the transaction, the $20,000 would become J.K. Kim's liquidated damages. The contract did not specify that the $20,000 had to remain in escrow until closing.

On March 9, 2006, respondent deposited Kyung Chang's $20,000 deposit into his NYTA, even though Excellent Cleaners was in New Jersey. Respondent testified that he was not sure

why he had done this, though he posited that it could have been a mistake because the trust accounts were "interchangeable." After the deposit, on March 9, 2006, the NYTA balance was $32,585.82. By March 20, 2006, however, the balance had decreased to $17,578.20. By the last day of the month, it was down to $5,783.05.

On April 27, 2006, the closing went forward on the sale of Excellent Cleaners. On the day before, the balance in the NYTA was $2,286.13; the combined balance in the NYTA and NJTA totaled only $16,660.29.[11] Thus, even under respondent's "global trust account" position, his global trust account had a $3,339.71 shortage for Kyung Chang's $20,000 deposit.

Respondent testified that, on April 26, 2006, the day before closing, he learned that the buyer had procured a lease assignment consistent with the terms of the agreement of sale. Respondent claimed that, because the escrow condition had now been satisfied, he began to draw down the $20,000 deposit because those funds now belonged to J.K. Kim, who owed

[11] At this point, respondent had not yet received any funds related to the Mi & Sun matter, including the $200,000 down payment.

respondent money for fees.[12] Respondent qualified his statement, however, by saying that he lacked a specific memory of drawing down the funds.

Bethka testified that there was no documentation linking any NYTA disbursement, during the month of March 2006, to the $20,000 deposited in that account for the Excellent Cleaners transaction. Specifically, none of the checks contained a notation indicating a payment to respondent for fees owed by J.K. Kim. No testimony or other evidence was produced identifying the payees for the disbursements.

Moreover, the record contains no evidence that respondent disbursed the monies without the consent of the buyer and the seller. Indeed, Bethka acknowledged that he never interviewed either the buyer, Kyung Chang, or the seller, J.K. Kim, neither of whom testified at the hearing. Nevertheless, respondent

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[12] Respondent's real estate transaction expert, attorney Bruce Kleinman, testified that, arguably, once the lease assignment was obtained, "equitable title to the assets being sold passes from the seller to the buyer" and "all rights to the deposit would . . . vest in the seller." Nevertheless, Kleinman's practice would be to keep the deposit in escrow until the closing.

acknowledged that client funds held in escrow or in trust had to remain intact "until it comes due."

Respondent claimed that, at the April 27, 2006 closing, Sanghwan Hahn mentioned nothing of potential liens against Excellent Cleaners and that he was not aware of any lien at that time. Nevertheless, on the day of closing, respondent prepared an escrow agreement that provided, in pertinent part:

> Purchaser and Seller agree that Seller's attorney shall hold $100,000.00 less seller's legal fee in the amount of $10,000.00 totaling $90,000.00 in escrow at the closing and all money purchase mortgage payments from 25th month due which is June 1, 2008 up to last payment due which is May 1, 2009 to be held in the seller's escrow accountant [sic], to assure the following:
>
> 1) For taxes and creditors of Seller for 90 days or until tax release letter is obtained from New Jersey Taxation, whichever is later; and
>
> 2) Known lien holders from various banks as shown on the lien search annexed hereto and all other creditors, claims, lawsuits or obligations unknown at the time of the closing.
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> [Ex.P42.]

Respondent acknowledged, at the ethics hearing, that the escrow agreement had been "poorly drafted," claiming that he had copied and pasted it from another escrow agreement that he had

prepared in a different matter that took place in New York. He contended that he had told Sanghwan Hahn, "from day one," that he was not a commercial lawyer. Indeed, he had to request a copy of a form contract of sale from Sanghwan Hahn, in order to prepare the agreement of sale for Excellent Cleaners.

Respondent explained that, under the terms of the escrow agreement, he would receive a $10,000 legal fee for the transaction and that $90,000 would be placed in escrow at the closing and, in addition, he would escrow Kyung Chang's final year of mortgage payments, from June 2008 through May 1, 2009. He added that the mortgage payments would be escrowed because potential claims by customers of the dry cleaner store might arise. For example, a customer of J.K. Kim could claim that the customer's clothes had been lost or "that kind of thing" that was not covered by liability insurance.

Respondent explained that the purpose of the first numbered paragraph of the escrow agreement was to protect the buyer from taxes and creditors for a period of ninety days from the closing or until a tax release letter was obtained from the New Jersey Division of Taxation. According to respondent, instead of "later," paragraph one should have stated "whichever is sooner,"

an omission that he labeled a mistake caused by his inexperience.

As to the second paragraph, respondent explained that its purpose was limited to protecting the buyer from "unknown small" customer claims against the business, as no lienholders had ever been identified at the time of the closing. He testified that the reference to an annexed lien search in the agreement was to a lien search that he had received from the U.S. Attorney's Office. The lien search is not in the record.

In respondent's view, he also could use the escrow monies to pay his $50,000 fee in the FBI criminal matter and to keep the HELOC payments current, until the laundromat was sold and the HELOC could be paid off. Thus, as shown below, respondent continued to draw against the remainder of the $20,000 deposit and disbursed $32,400 to himself, out of the $70,000 balance, to satisfy the $50,000 owed to him in the FBI fraud matter. He also paid several liens, which, he claimed, were unknown at the time of the closing, but surfaced nearly a year later.

On April 27, 2006, the date of the closing, respondent deposited $80,450 into his NJTA, which included an $80,000 check from Kyung Chang, a $250 check from Kyung Chang, and a $200 check from Washington Mutual Bank, N.A. He took his $10,000 fee

in two payments: $6000 on May 4, 2006 and $4000 on May 9, 2006. After the $6000 check cleared the NJTA, on May 4, 2006, the trust account balance was $78,333.42. After the $4000 NJTA check cleared the account, on May 9, 2006, the balance was $73,264.16, instead of $90,000. On that same date, the balance in the NYTA was $5,276.13.

Respondent explained that, on May 10, 2006, he received a tax clearance letter from the New Jersey Division of Taxation. Thus, he claimed, he was permitted to take his $50,000 fee for the FBI matter, which he drew down gradually.

Between May 10 and July 14, 2006, respondent disbursed to himself $32,400, in the form of fourteen trust account checks, drawn against either the NJTA or the NYTA, containing the notation "f/Jung K. Kim" or "JK Kim."[13] Bethka stated that respondent was "[a]bsolutely not" permitted to remove funds from the Excellent Cleaners matter for fees that were previously owed to him in the federal case against J.K. Kim, because the escrow agreement for the Excellent Cleaners transaction provided that respondent would receive only a $10,000 fee.

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[13] According to Bethka, "f" was an abbreviation for "fees."

During his OAE interview, respondent took a contrary position, contending that the escrow agreement permitted him to take the additional legal fees. At the ethics hearing, he testified that, when he drew down the additional fees, he had no idea that there were outstanding liens against the business and that, when he first learned of the existence of a lien, in January 2007, he was "shocked."

Bethka challenged respondent's claim that he had no idea that there were unsatisfied liens, based on some documents that Bethka had seen in respondent's files. The record, however, does not contain a single document substantiating the existence of a list of liens.

Bethka prepared an analysis of respondent's receipts and disbursements for the sale of Excellent Cleaners, based on bank records, McKay's disbursements and client ledgers, and the language of the escrow agreement. At the conclusion of the transaction, a $47 balance should have remained.

Bethka testified that the deposits for the Excellent Cleaners transaction totaled $108,134, but the disbursements amounted to $161,487.50, thereby creating a negative balance of $53,353.59 for that matter. According to Bethka, no document

supported respondent's entitlement to $52,400 ($20,000 + $32,400) from the proceeds of the sale of Excellent Cleaners.

Bethka testified further that, after the closing, $94,130.59 in liens had to be paid on J.K. Kim's behalf and that, therefore, respondent was under an obligation to make those payments to the lienholders, pursuant to the terms of the escrow agreement. According to Bethka, respondent did pay all $94,000 in liens, some of which were satisfied with respondent's own money. Nevertheless, as of March 27, 2008, Sanghwan Hahn claimed that the buyer, Kyung Chang, was still receiving collection letters from J.K. Kim's creditors.

II. THE MISOYA TRANSACTION

On April 30, 2006, Sophia Lee, through Misoya, purchased a Korean restaurant from Joon & Kim and renamed it Shanghai Mong. The restaurant was located in New York City. Respondent was not involved in this transaction.

On September 28, 2006, Sophia Lee retained respondent to represent her in a business loan closing with Woori, on the following day. According to respondent's reply to the grievance, Misoya needed the loan so that it could clear Joon & Kim's "encumbrances, judgment, UCC liens and pending lawsuit, an

obligation that Misoya had assumed when it purchased the restaurant." Woori lent $450,000 to Misoya, $70,000 of which respondent was to hold in escrow for the purpose of satisfying an outstanding New York state "sales tax issue." In addition, the loan included a $1000 fee to respondent.

Respondent testified that he was not experienced in the area of commercial loan transactions, but that, because he was working on his first two EB-5 visas at the time, he "thought [he] should know about it." He called Woori's lawyer, Jerry Kim, to learn what was required to represent Sophia Lee at the closing.

According to respondent, at the September 2006 closing, Jerry Kim instructed him to escrow $70,000 solely for the payment of an outstanding sales tax issue and respondent's fee. This testimony is in direct contradiction to respondent's reply to the grievance, in which he stated that the purpose of the $70,000 escrow was to satisfy outstanding judgments of the business, or of its previous owner, or UCC liens. The Woori net proceeds disbursement sheet does not reflect what was to be done with the $70,000. Bethka did not interview any Woori representative or Jerry Kim. Neither testified at the hearing below.

As stated previously, respondent deposited the $70,000 into his NJTA, on October 3, 2006, even though the restaurant was located in New York. Respondent contended that he had done so on the advice of Jerry Kim, who had told him to put the monies in the trust account "close to [his] house." In retrospect, respondent realized that Jerry Kim was joking, but, at the time, he understood Jerry Kim to say that it did not matter where the funds were deposited.

Respondent did not disburse any monies for the Misoya matter until more than a year after the $70,000 deposit, when he issued a $36,868.43 NYTA check to the NYSDTF, on October 25, 2007. He made a second disbursement five months later, by issuing a $50 NYTA check to the NYSDTF, on March 30, 2008, representing a penalty "for the late filing of [sic] sales tax return" on that date.

According to the OAE, between October 3, 2006, when the $70,000 was placed in respondent's NJTA, and October 25, 2007, when he made the first disbursement, the $70,000 did not remain intact. Bethka testified that, during this period, there were occasions when the combined balance for the NJTA and the NYTA was less than $70,000. On other occasions, when the balance exceeded $70,000, if one were to subtract the amount that

respondent should have been holding in his NYTA for one particular client (Darryl Rivers), the balance would be less than $70,000.[14]

On March 15, 2007, nearly six months after the Misoya loan closing and seven months before the $36,000+ payment to the NYSDTF, respondent's NJTA balance was only $47,217.68, after the bank posted a $90,000 NJTA check (no. 1415) to the account. Three days later, the balance was $44,555.16. Respondent challenged the OAE's claim that the $90,000 payment was a knowing misappropriation of trust funds. He explained that he had taken a $56,400 loan from his brother, Donald Kim, to cover the payment of the $90,000 check so that client and escrow funds would not be invaded, but that, due to a banking industry practice unknown to him, the monies that he had borrowed did not arrive in the NJTA until after the check was paid. At this point, some history becomes necessary.

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[14] On January 20, 2007, respondent deposited $92,500 into his NYTA on behalf of Darryl Rivers. The balance on the Darryl Rivers ledger gradually decreased. On July 28, 2008, the ledger balance was $29,317.97. Respondent was not charged with any improprieties in connection with the Darryl Rivers matter.

Respondent testified that, in March 2007, real estate broker Andy Kim, who was helping respondent locate a business for Mi & Sun, had asked him for a $90,000 loan so that, in turn, Andy Kim could lend that money to business woman Ki Kim, in order to build a "bonding relationship" with her. Respondent agreed, but he had to come up with the $90,000 to lend to Andy Kim. He "mentally calculated" what was required. He determined that he would need $56,400 and that he would ask his brother for a loan. The remaining $33,600 would come from "the fees, and, you know, process money, all that was there."

On March 13, 2007, respondent issued a $90,000 NJTA check to "E2 Business Investment Group," with "Andy Kim" written on the memo line. At that time, respondent's NJTA balance was $110,217.68.

Respondent was adamant that, neither in this instance nor in any other, had he written a check from the trust account on the expectation that he would be receiving funds to cover a deficiency that might be created the next day or shortly thereafter. Rather, he claimed, he had issued the check to Andy Kim after respondent's brother, Donald Kim, had called respondent from the bank to say that he had completed the deposit of the loan into respondent's NJTA.

Respondent and Donald Kim testified that respondent had asked Donald Kim for the loan on March 13, 2007, which, respondent claimed, was the day before he had issued the check to Andy Kim, despite the fact that the check was dated March 13, 2007. However, Donald Kim could not get to the bank until the next day, March 14, 2007. As stated above, at that time, the NJTA should have held $70,000 for Misoya.

On March 14, 2007, Donald Kim obtained a $56,400 cash advance against a Bank of America credit card, which he transferred to respondent's NJTA in the form of a direct deposit balance transfer. Donald Kim testified that he called respondent from the bank, on March 14, 2007, right after the bank manager had told him that the transaction had been completed. According to McKay, a screen snapshot of Donald Kim's credit card account showed that the $56,400 was charged to Donald Kim's account at 5:35 p.m. on March 14, 2007.

Respondent conceded that he did not verify that the $56,400 had arrived in his trust account, prior to issuing the check to Andy Kim. He believed, however, that the funds were available to him "right away," given that a wire transaction is instantaneous. McKay confirmed that most attorneys would

believe that the funds would have been available upon completion of the transaction or, certainly, by the next day.

This was not the case, however. Because the funds were transmitted through one or more clearing houses, they did not get to respondent's NJTA until five days later, on March 19, 2007. By the time the $56,400 arrived in respondent's NJTA, on March 19, 2007, Andy Kim had cashed the $90,000 check, on March 15, 2007, leaving a $47,217.68 balance in the NJTA on that day. When the $56,400 loan from Donald Kim finally posted to the NJTA, on March 19, 2007, the balance rose to $83,092.68, which was enough to cover the $70,000 escrow.

Due to McKay's understanding of respondent's claim that his NJTA, NYTA, and the Mi & Sun account formed one "global trust account," McKay prepared a trust account balance analysis that considered the balances in all three accounts on any given day, between April 1, 2006 and July 31, 2008. This was necessitated by respondent's practice of depositing funds into one account and making disbursements from another account. Under these circumstances, according to McKay, all trust accounts had to be evaluated to determine whether there were "sufficient trust funds on hand to cover all the requirements."

As of March 14, 2007, respondent's NJTA held funds for Mi & Sun, which were not transferred to Mi & Sun's own account until it was opened, on May 21, 2007. However, in February 2007, $200,000 of Mi & Sun's funds were placed in the trust account of the law firm representing the seller of the Binghamton in the sale to the Mi & Sun investors. The $200,000 represented the deposit for that $2 million deal. Thus, based on McKay's analysis, the total balance for both attorney trust accounts, plus the $200,000 good faith deposit, on March 14, 2007, was $381,772.78. The next day, the total balance was $291,772.78 and remained so until March 19, 2007, when it increased to $327,647.78. Therefore, according to McKay, respondent was not really out of trust, when the bank posted the $90,000 check to Andy Kim, on March 15, 2007.

McKay's recreated ledger characterized the $56,400 as a deposit for Mi & Sun, with a description of "FIA CSNA," thus giving no indication to the OAE that the money came from Donald Kim, as a loan. When Bethka questioned respondent about the deposit, he stated that the monies were from his brother, but he did not say that they represented a loan. Thus, Bethka "assumed there might have been a relationship with [Donald] and Mi & Sun." Bethka testified that he did not learn that the $56,400

was a loan until Donald Kim testified at the hearing in this matter.

According to Bethka, by May 2, 2007, the NJTA balance was $33,107.42. Thus, for the Misoya matter, the trust account was short by $36,892.58 on that date. At the same time, Bethka claimed, respondent should have been holding monies belonging to other clients, including J.K. Kim and Darryl Rivers.[15]

On May 2, 2007, the NJBA balance was -$2,396.07.[16] On May 3, 2007, a debit memo transferred $3000 from the NJTA to the NJBA, which, according to Bethka, "contributed to correcting the [NJBA] from a negative to a positive." As seen below, the special master determined that this $3000 debit memo was a knowing misappropriation of Misoya escrow funds.

When respondent was asked whether, on May 3, 2007, he had $70,000 in the NJTA and NYTA combined, he replied that he believed that he did, plus the Mi & Sun funds. Indeed, the

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[15] Bethka testified that, based on his re-created ledger for the J.K. Kim matter, respondent should have been holding $60,500 for J.K. Kim, as of May 3, 2007. The actual amount appears to have been $53,704.92, however.

[16] The bank statement is not an exhibit.

combined balance for the two trust accounts, on that date, was $74,421.78. By the next day, however, that is, May 4, 2007, the aggregate balance was only $68,921.78.

Respondent did not recall making the $3000 transfer from the NJTA to the NJBA, on May 3, 2007. McKay testified that "there was no debit memo documented in the bank's statement and they had nothing to provide as far as the source of that." Thus, he posited, the debit memo could have been issued either at respondent's direction or at the direction of a bank officer, acting unilaterally, because the bank was "so used to transferring money from [respondent's] trust account to his business account."

Bethka testified that respondent never mentioned to him that Woori or anyone else had transferred funds from his trust account to his business account, without his knowledge. Indeed, Bethka uncovered no evidence that, other than respondent, anyone, including Woori, had ever transferred funds from respondent's NJTA to his business accounts, without respondent's consent.

Based on the bank records, Bethka learned that the $3000 debit memo had been made by telephone. Bethka "absolutely" rejected as impossible the suggestion that someone from the

bank, noticing the negative balance in the business account, would have transferred the funds unilaterally. As Bethka explained, there had been ongoing shortages in the business account on a regular basis and, thus, "there would be no reason for somebody to break out of the norm of operations to transfer this one time the money to cover a shortage."

The $3000 debit memo notwithstanding, respondent testified that, on May 17, 2007, Sophia Lee, Misoya's president, paid off the $450,000 loan and told him that he could do whatever he pleased with the $70,000 in escrow funds, after satisfying the tax liability and taking his attorney fees. Sophia Lee confirmed respondent's testimony in this regard.

On October 19, 2010, Sophia Lee signed an affidavit, in Korean, which was translated to English, detailing her pay-off of the $450,000 loan. Sophia Lee testified that, because she had paid back all $450,000 to Woori, the $70,000 escrow had "lost any meaning." Thus, as she stated in her affidavit, as of May 17, 2007, she could, and did, grant respondent "total control" of the $70,000 "per [her] wish," with the two exceptions noted above. Otherwise, she testified, the $70,000 was respondent's to spend "as he [saw] fit."

On cross-examination, Sophia Lee testified that, prior to May 17, 2007, the date on which she paid off the Woori loan, she did not "think" that she had told respondent that he could use some or all of the $70,000 for personal reasons.

Bethka saw no documentation that supported Sophia Lee's claim that she had paid off the Woori loan on May 17, 2007. McKay, in turn, testified that he had seen documentation showing the loan pay-off.[17]

Bethka testified that it was not until Sophia Lee's testimony that he had learned of the loan's repayment on May 17, 2007. Respondent had not mentioned the pay-off in his answer to the complaint. Sophia Lee's April 2009 affidavit, too, which was submitted with respondent's written reply to the grievance, had made no mention of it. Moreover, Bethka testified, respondent had made no reference to the loan repayment, in his November 17, 2008 letter to Woori's lawyer, Jerry Kim, as discussed below.

As to respondent's failure to keep the $70,000 untouched, Bethka offered detailed testimony on respondent's use of the

[17] No such document is in the record.

funds, but the use was after the date that Sophia Lee claimed to have paid off the loan (May 17, 2007). For example, as of June 1, 2007, the NJTA balance was $23,420.94, which represented a $46,579.06 deficiency for the Misoya $70,000 escrow. According to Bethka, the balance remained under $70,000 from that date through June 5, 2007 and then again, from June 8 through 13 and June 20 through 22, 2007, when it was as low as $12,159.23. These deficits were the result of checks written on behalf of other clients or for the payment of respondent's fees. At this point, respondent had yet to disburse any of the $70,000 Misoya escrow.

On July 20, 2007, the NJTA balance was $23,814.64, due to the deposit of two trust account checks, totaling $78,000, into the NJBA. The NJTA balance continued to dip until it reached a low of -$1,584.36, on August 21, 2007,[18] meaning that all of the Misoya escrow funds had now been depleted.[19] By August 28, 2007,

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[18] The bank did not notify the OAE of this overdraft or of another overdraft that occurred in June 2008. Bethka testified that the August 2007 overdraft was not caused by a Misoya disbursement.

[19] Bethka testified that, as of August 21, 2007, respondent should have been holding $70,000 in escrow for Misoya in the

(footnote cont'd on next page)

the NJTA balance had increased to $22,915.64, which was still deficient, but, by the end of the month, the NJTA balance was in the hundreds of thousands of dollars.

Bethka testified that none of the August 2007 transactions in the NJTA related to the Misoya matter. Respondent had disbursed to himself a total of $54,925 from that account, all of which he had characterized as fees for Mi & Sun. These disbursements were in even-dollar amounts and ranged from $750 to $19,000.

The NJTA balance remained below $70,000 from September 5 to 30, 2007. On October 3, 2007, the NJTA balance was $4,576.39.

As stated previously, the first disbursement of the $70,000 Misoya escrow monies took place on October 25, 2007, more than a year after the $70,000 was deposited into the NJTA. This represented payment of the NYSDTF's $36,868.43 tax liability

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(footnote cont'd)
NJTA, as well as $48,651.97 for Rivers in his NYTA. Yet, Bethka noted, on that date, even if both trust accounts were totaled, respondent did not have $48,000 for Rivers or $70,000 for Misoya. Specifically, the balance in the NYTA was $49,111.36, and the balance in the NJTA was $13,745.64, for a combined balance of $62,857, which was well under the $118,000 that respondent should have been holding for Rivers and Misoya on that date.

determination that was made in April 2007. Respondent claimed that the six-month delay between that determination and the payment was due to the State's instructions that certain missing sales tax returns be filed and that respondent wait for further notice.

Even though the $70,000 in escrow monies had been deposited in the NJTA, this first disbursement to the NYSDTF was not made from that account. Rather, the $36,868.43 check to NYSDTF was drawn against the NYTA.[20] Bethka testified that, because there were no Misoya funds in the NYTA at that time, the funds used to pay the NYSDTF "came from a different source." After the $36,868.43 payment to the NYSDFT was made, respondent should have been holding $33,131.57 for Misoya. Yet, the NJTA balance was only $27,986.29 on that date. Although the NYTA balance was $56,111.36, none of those monies belonged to Misoya because the $70,000 was deposited into the NJTA and none of the funds were ever transferred to the NYTA.

On October 26, 2007, the day after respondent paid the NYSDTF $36,868.43, he deposited an equal amount into the NYTA.

[20] The check cleared the NYTA on November 2, 2007.

According to Bethka, these funds came from the Mi & Sun account. Respondent testified that he transferred to the NYTA the funds necessary to satisfy the New York tax liability, because he thought that to be more appropriate; after all, he believed his trust accounts to be interchangeable.

Respondent deposited more funds into the NJTA during the month of November 2007. On November 1, 2007, he made three deposits, totaling $10,000, on behalf of other clients. A week later, he deposited $100,000 on behalf of Byung L. Cho, which McKay had listed under Mi & Sun. These monies were a loan from Byung Cho to respondent. On November 19, 2007, respondent deposited the $350,000 loan from James Lee into the NJTA.

After the $350,000 deposit into the NJTA, respondent disbursed $33,131.57 to himself and deposited it into his NYTA. He told Bethka that the purpose of that deposit was to fully fund the $70,000 belonging to Misoya in the NYTA, after subtracting the $36,868.43 payment to the NYSDFT.

In March 2008, respondent disbursed $50 to the NYSDFT, on behalf of Misoya. This disbursement was made from the NYTA.

Bethka testified that, during the month of August 2008, respondent should have been holding approximately $33,000 for Misoya in his NYTA, which he had funded on Misoya's behalf, in

November 2007. However, from August 26 through August 31, 2008, the balance in that account was around $22,000. In all of September 2008, the NYTA balance was well below $33,000, ranging from $9600+ to $22,000+.

As of October 23, 2008, the NJTA contained no funds for Misoya. Up until October 23, 2008, the balance in respondent's NYTA, during that month, also was under $33,000. On that date, respondent issued to himself a $30,000 check from the NJTA, with the notation Mi & Sun, and deposited it into the NYTA.

On October 31, 2008 respondent drafted an "escrow release" document, which was executed by Sophia Lee and representatives of and agents for Joon & Kim. Woori was not a party to the agreement. Respondent testified that the purpose of the release was to provide a history of the Misoya sale, because the seller, Nam Her, had been claiming that respondent had represented him in that transaction.[21]

The agreement stated that, "[p]ursuant to the Escrow Release obtained from NYS Taxation Dept.," the $70,000 in escrow was to be released as follows: $5000 to settle pending

[21] The original grievant, Kyung Kim, is Nam Her's wife.

litigation against Joon & Kim and $17,032 to Joon & Kim's attorney's trust account. The agreement also included the $36,968.43 that had already been paid to the State of New York. As shown below, respondent claimed that he was holding the remaining $10,999.57 in escrow.

On October 31, 2008, respondent issued a $17,032 check to Pak and Cho, P.C., with the notation Joon & Kim Corporation. It was characterized on respondent's trust account ledger as "escrow release as per client's direction." In short, the $17,032 was Nam Her's debt to the firm, but Sophia Lee testified that, out of generosity, she had directed respondent to pay the monies to Pak and Cho, on Nam Her's behalf, because Nam Her had always struggled financially.

On November 7, 2008, respondent disbursed $5000 to settle the lawsuit against Joon & Kim. Ten days later, he wrote to Woori's attorney, Jerry Kim, stating, in part: "This letter serves to memorialize our telephone conversation in which your client Lender has no objection to the release of the escrow funds." Respondent enclosed the October 31, 2008 escrow release agreement, stated that he continued to hold $11,000 of the $70,000 in escrow, "pending approval from my client and the

seller," and confirmed that Woori "has no objection to the release of the escrow funds."

According to Bethka, respondent disbursed $7,000 out of the $11,000 to himself, in three payments: the first payment on November 25, 2008 and the next two payments on January 28, 2009. On January 28, 2009, respondent transferred the remaining $4,049.57 to another Misoya matter. All of these monies were in his NYTA. Respondent testified that these payments were to compensate him for unpaid legal services that he had provided to Sophia Lee's husband, over the years.

Sophia Lee testified that she was satisfied with respondent's legal representation and that he had behaved "honorably and honestly."

* * *

Over the years, respondent had experienced financial difficulties, particularly due to Mi & Sun's June 13, 2007 acquisition of the Binghamton and the accompanying vessels. Although the Binghamton had been converted to a restaurant, it was being used as a nightclub at the time.

Respondent testified that he was going to get the business up and running, as his EB-5 investor client, Myung Chung, had "absolutely no interest in running the office." Rather, Myung

Chung's only interest was to obtain a green card. Respondent claimed that, because he was going to do all the work to find the business, if that business became successful, he would return Myung Chung's entire investment to him, including the $150,000, and the business would become his. If the business failed, respondent intended to return "as much money as possible" to Myung Chung.

From beginning to end, the Binghamton acquisition and renovation were a disaster and respondent was in over his head. He sunk a lot of money, much of it borrowed, into the vessels. After the February 28, 2007 agreement to acquire the Binghamton was signed, the nightclub was cited for selling liquor to a minor, a second offense that jeopardized the liquor license. In addition, "there was [sic] problems with the integrity of the hull," which had to be fixed, and the roof had to be replaced. Finally, on April 17, 2007, a $3 million default judgment was entered against the vessel in a federal court personal injury action and another action was pending in New Jersey state court.

Respondent decided to resolve the problems with the Binghamton himself. He was successful, insofar as the liquor license had only been suspended, not revoked. In addition, the seller agreed to escrow $250,000 until the license issue was

resolved, to hold Mi & Sun harmless for the default judgment, and to reduce the purchase price by the cost of repairs to the vessel. Given these concessions, respondent believed that it was in the interest of his clients to close on the project.

The Binghamton deal closed on June 13, 2007, at a price of $2 million. Shortly after the closing, federal marshals seized the boat because, according to respondent, "[a]pparently, the three million dollars judgment was not taken care of." Respondent testified that he desperately tried to make the investment work by beginning repairs to the boat, learning what he needed to do to create and operate a steakhouse, and coming up with a business plan, among other things. He borrowed $100,000 from Byung Cho and $350,000 from James Lee to save the business. He vehemently denied that the loans were to cover shortages in client funds.

Ultimately, the federal government waived the job-creation requirement. The investors and their family members obtained permanent resident status, despite the problems with the Binghamton.

Respondent testified that, in addition to money, when all was said and done, he had spent thousands of hours on the Binghamton enterprise. Danbee Kim had spent "a lot of time,

too." Indeed, at respondent's request, Danbee Kim accounted for the hours that she had spent on the matter, which she estimated to be worth more than $50,000.

Despite respondent's efforts, the project was a complete failure. In 2008, respondent was cited by Edgewater Township for various code violations, such as the lack of a second means of egress from the restaurant and a sprinkler system. In the end, Superstorm Sandy destroyed the Binghamton, in October 2012.

Danbee Kim testified about respondent's financial problems, which pre-dated the Binghamton acquisition. In 2006, she lent him $20,000. She did not know how respondent had used those funds, although she recalled that they had been deposited in one of his trust accounts. Danbee Kim and respondent agreed that he was to make monthly payments to her and that, at some point, he had repaid the loan. However, Danbee Kim testified that, when she asked respondent to pay the entire balance of the loan, because she was purchasing a condominium and needed the money, it took him several months to do so.

In addition to the loan, Danbee Kim used her personal credit card to pay office expenses, for which respondent reimbursed her. Eventually, American Express offered her a business account credit card, which respondent described as a

line of credit. With respondent's permission, she opened the account and obtained a card for herself, respondent, and a paralegal. Respondent claimed that Danbee Kim had "excitedly" asked him if he would like to use her credit line, to which he had replied, "[S]ure, thank you."

Both Danbee Kim and respondent testified that, each month, he paid the minimum amount due on her credit card. Respondent's testimony suggested that, as of November 6, 2013, he continued to provide Danbee Kim with the minimum payment amount, every month.

Danbee Kim also testified that, during the last two years of her employment with respondent, he was late in paying her salary, causing her to leave his employment. An "embarrassed" respondent admitted that he still owed Danbee Kim six weeks' salary, from 2010. He claimed that he was unable to pay her at the time, because he had stopped taking clients and "Binghamton was not helping at all." As of 2010, "the Binghamton just kept costing me money;" he was being fined daily for the lack of sprinkler system and, at the same time, he could not open for business.

In addition, respondent was devoting considerable time to straightening out his recordkeeping issues and he was without

the assistance of Danbee Kim, on whom he had relied heavily as a lawyer and as the person who maintained the ledgers. In short, he had "no income." Respondent testified that, although he had given Danbee Kim, in 2011, an unspecified amount of money to cover her salary, she had elected to use those funds to pay her credit card bills. According to respondent, he continues to drop off money to Danbee Kim to cover the monthly credit card payments.

Respondent stated that he has "every intention" of paying Danbee Kim her salary. He was adamant that, as soon as this disciplinary matter is concluded, he will "pay off as soon as possible."

Respondent's brother, dentist Donald Kim, also testified about respondent's financial problems. Although Donald Kim asserted that he did not know why respondent needed the loan from him, in March 2007, he stated that, in 2012, respondent had asked him for a second loan due to his "financial situation."

Respondent expressed shame for the "stupid" and "defective" accounting system that he had implemented, prior to the filing of the grievance in this matter. Consequently, he "stop[ped] working as any representative of the community," has disassociated himself from certain people, and has become a

better person. He testified that he now understands that his responsibilities as an attorney are broader than the trust between him and his clients and include attention to the manner in which he handles client funds. To insure that he does not mishandle any financial obligations, he continues to rely on McKay.

Reverend John Hiemstra, pastor of the Reformed Church of Closter, which is a church of Korean- and English-speaking people, wrote a "reference letter" on respondent's behalf and testified as a character witness. Hiemstra stated that respondent did a lot of good for the church. Respondent translated the sermon every Sunday, guided the board of directors in making decisions, and assisted other congregations in the sale of various properties, on a pro bono basis, as well as in other matters. In short, respondent is a man "of great help and great integrity."

According to Hiemstra, respondent's reputation is "of the highest order." Further, respondent is "a very honest, straightforward person and loved and respected by all." It would be "totally incomprehensible" to Hiemstra that respondent would have taken money that did not belong to him, although Hiemstra did not know the specifics of the ethics charges

pending against respondent, at the time that he wrote the "reference letter." Ultimately, the reverend stated, "[t]ruth is truth and honesty is honesty, regardless of culture."

Respondent affirmed Hiemstra's testimony about his involvement in church matters. In addition, he offered character letters from four other individuals, New York attorneys Christopher Lynn, Michael J. Sweeney, and Robert J. Feldman, and Media Korea TV president, Benjamin Yoo. Respondent admitted, however, that he did not tell either Feldman or Yoo that he had been charged with knowing misappropriation.

Finally, respondent testified that, from 2002 to 2006, he had served as vice-president of Kyong Tong, a South Korean constitutionally-formed organization. In 2007, he became vice-president of the Korean American Association of Greater New York.

* * *

The special master's report was brief, containing little detail. With respect to the Misoya commercial loan (count one), the special master found that, on May 4, 2007, the aggregate balance in both of respondent's trust accounts fell below $70,000, the amount that respondent was required to hold in escrow for the purpose of satisfying unpaid tax obligations to

the state of New York. The balance in the NJTA on that date was $24,607.42, resulting from a $3000 transfer from that account to the NJBA the day before, on May 3, 2007, to cover a shortage.

The special master observed that the $3000 transfer had been made before the Woori bank loan to Misoya had been paid off and that there was no evidence that either Misoya or Woori had approved the release of the monies. The special master rejected respondent's claim that the bank had made that $3000 transfer without his knowledge, finding that the transfer "was necessitated [sic] because of Respondent's total lack of attention to his accounts over an extensive period of time and the absence of any endeavor to assure that the accounts were in balance." Citing Hollendonner and In re Gifis, 156 N.J. 323 (1998), the special master concluded that there were "sufficient inferences to sustain the charge of a 'knowing' misappropriation" of the $3000.

As for the sale of Excellent Cleaners (count two), the special master found that the "repeated and numerous occasions" when respondent's trust account was out of trust were the result of recordkeeping practices that were "tantamount to abandonment of the obligation to oversee accounts" and amounted to "willful ignorance." The special master concluded that respondent

knowingly misappropriated escrow funds in that matter as well, contrary to Hollendonner and Gifis.

For respondent's knowing misappropriation of escrow funds, as found in counts one and two, the special master recommended his disbarment, under Hollendonner and Wilson.

With respect to the recordkeeping violations (count four), the special master recommended the imposition of a censure, in the event that either we or the Court disagree with his finding that respondent knowingly misappropriated the Misoya and Excellent Cleaners escrow monies. In this regard, the special master noted that respondent admitted the recordkeeping violations charged in the complaint. In recommending the censure, the special master considered the serious nature of the recordkeeping violations, respondent's willful blindness, as concerned his attorney accounts, and the "invasion of client funds over time."

Following a de novo review of the record, we are satisfied that the special master's finding that respondent failed to comply with the recordkeeping requirements of R. 1:21-6 was fully supported by clear and convincing evidence. We are unable to agree with the special master's findings that respondent knowingly misappropriated escrow funds. We find that the record

lacks clear and convincing evidence to support those determinations.

In Wilson, supra, 81 N.J. at n1., the Court described knowing misappropriation as follows:

> Unless the context indicates otherwise, "misappropriation" as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under *In re Wilson,* 81 *N.J.* 451 (1979), disbarment that is "almost invariable," *id.* at 453, consists simply of a lawyer 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. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant; it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. To the extent that the

> language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" – all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since *Wilson*, it has been invariable.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

To establish knowing misappropriation in this case, there must be clear and convincing evidence that respondent deliberately took the escrow funds and used them, knowing that the parties who had an interest in them had not authorized him to do so. Hollendonner, supra, 102 N.J. 21. The unauthorized use element of knowing misappropriation cannot be established upon a mere showing of a shortage in the attorney's trust account, as in this matter. As the Court stated, in In re Konopka, 126 N.J. 225 (1991),

> [w]e insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. . . . If all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no

> disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [Id. at 234.]

Specifically, in the Excellent Cleaners matter, the special master's broad-brushed determination that respondent's willful ignorance led to numerous occasions when the trust account was out of trust is insufficient to establish knowing misappropriation of escrow funds on respondent's part. Consider the buyer's $20,000 deposit. The record clearly and convincingly establishes only that respondent received the funds, that he deposited them into his NYTA, and that, by the closing date, the combined total in his NYTA and NJTA was only $16,660.29. This is insufficient to prove knowing misappropriation, by clear and convincing evidence. That standard was described in In re James, 112 N.J. 580, 585 (1988), as

> [t]hat which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established," evidence "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

Respondent did not claim that his poor recordkeeping practices resulted in an invasion of the $20,000 deposit or even

concede that there was an invasion in the Excellent Cleaners matter. Rather, he argued that, in addition to the $10,000 fee for the sale of Excellent Cleaners, he was entitled to $50,000 in legal fees for the mortgage fraud matter and that the escrow agreement, as drafted, permitted him to take the entire $50,000 fee from the proceeds generated by the sale of Excellent Cleaners. Thus, he asserted, once the lease assignment condition was satisfied, on April 26, 2006, which was the day before the closing, the $20,000 became J.K. Kim's monies and, because J.K. Kim owed him $50,000 in legal fees, the fees could be taken from the $20,000. Accordingly, respondent drew down his fees from the $20,000 on the date that it became J.K. Kim's, that is, April 26, 2006.

It is true that the record clearly demonstrates that respondent spent most of the $20,000 prior to the April 27, 2006 closing, thus contradicting his testimony that he took the monies after the buyer had obtained the lease assignment on April 26, 2006. However, to establish a clear and convincing case of knowing misappropriation, the proofs had to demonstrate not only that respondent took the monies before he was entitled to them and that he used the funds for a purpose unrelated to the transaction, but also that he was not authorized to do so by

both the buyer and the seller, each of whom had an interest in the funds until the date of closing (April 27, 2006) or, at the earliest, the date that the buyer had obtained a suitable lease arrangement (April 26, 2006). The record does not show any of this. Indeed, neither Kyung Chang nor J.K. Kim were even interviewed. Hence, the record establishes nothing more than a shortage.

Moreover, with respect to the remaining $70,000 that, together with the $20,000 deposit, was to form the $90,000 escrow from which lienholders and other creditors were to be paid in the Excellent Cleaners matter, this record does not support the finding that respondent knowingly misappropriated any of those monies. Respondent claimed that he was not made aware of any liens that existed at the time of the closing. Although Bethka testified that he had seen documents reflecting the presence of liens, not one was produced at the hearing. Thus, there is no evidence, to a clear and convincing standard, that, at the closing, respondent was made aware of any liens that had to be satisfied out of the proceeds of the sale. Consequently, there is a lack of clear and convincing evidence to support the determination that, when respondent took more

than $30,000 in additional legal fees, he knowingly misappropriated escrow funds.

As with the $20,000 deposit, respondent did not claim that he mistakenly took these funds because of his poor recordkeeping practices. Rather, he asserted that he took the monies because he was entitled to them and that the escrow agreement had given him the right to do so.

Indeed, respondent claimed that J.K. Kim owed him $50,000 in legal fees for the fraud matter. That was not disputed. Moreover, after the closing, all of the funds collected belonged solely to J.K. Kim, as the record lacked any evidence that Sanghwan Hahn had proven the existence of any unsatisfied liens and presented them to respondent, at or before closing, for payment. Thus, under the terms of the escrow agreement, after the tax clearance letter was received, the funds that had been set aside at the closing could be utilized for the payment of "all other creditors, claims, lawsuits or obligations unknown at the time of closing." Of course, respondent's claim for the $50,000 in legal fees was not "unknown at the time of closing." However, that respondent may not be telling the truth is insufficient to establish knowing misappropriation. More importantly, though, no attorney has ever been disbarred for

taking client funds when the attorney has a reasonable belief of entitlement to the monies. See, e.g., In re Frost, 156 N.J. 416 (1998) (two-year suspension imposed on attorney who, among other serious improprieties, took his fee from the proceeds of his client's refinance, based upon the erroneous belief that he had reached an agreement with one of the client's creditors to settle an outstanding judgment).

Finally, the record lacks clear and convincing evidence that respondent knowingly misappropriated any portion of the $70,000 escrow in the Misoya matter. First, the special master limited his knowing misappropriation finding in the Misoya matter to the May 3, 2007 $3000 debit memo to the NJTA, which, by the following day, had caused the combined balance in both trust accounts to dip below $70,000. As stated above, the special master determined that there was no evidence that either Misoya or Woori had approved the release of the monies. To prove that respondent knowingly misappropriated these monies, however, the record must affirmatively show that neither Misoya nor Woori consented to respondent's use of the monies to correct a deficiency in the NJBA. It is the presenter's burden to prove, by clear and convincing evidence, each and every element of the knowing misappropriation offense, including lack of

authorization to use of the funds. Only then does the burden of going forward shift to respondent to show that he had such authorization. R. 1:20-6(c)(2)(B) and (C).

Moreover, the record does not support the finding that the debit memo invaded Misoya funds. After the $3000 was transferred from the NJTA to the NJBA, on May 3, 2007, the balance in the NJTA was reduced to $30,107.42. On that same date, the NYTA balance was $44,314.36. These balances represented a total combined trust account balance of $74,421.72, which is obviously more than $70,000.

Second, there is a distinction to be drawn between respondent's use of the monies before May 17, 2007, when Woori had an interest in the escrow funds, and after May 17, 2007, when that interest evaporated, because Sophia Lee paid off the loan on that date. Both respondent and Sophia Lee testified that she paid off the Woori loan on May 17, 2007. Thus, Woori no longer had an interest in what was done with the $70,000 after that date. It had been repaid and, if Misoya chose not to pay the outstanding taxes, it would not affect Woori's interest, because Woori had recouped its money.

We note that, at the hearing and in the parties' submissions, much was made of the Korean culture's aversion to

written contracts. Instead of a written agreement, Koreans operate on trust and honor. We will not burden this decision with a discussion of this issue because, in this case, the $20,000 deposit, the $90,000 escrow, and the $70,000 escrow were each subject to a written agreement. Moreover, cultural practices do not negate a New Jersey lawyer's obligation to comply with the Rules of Professional Conduct.

Much was made, too, of the Korean culture's "kye," which is a group of Korean friends who trust each other, pool their money, and loan it to individual members. Kye loans are not documented because they are based on trust. Although respondent borrowed funds from members of the local Korean community, he claimed that none of them were kye loans and that he had repaid all of them.

Our independent review of the record leads to the conclusion that the only charge that stands on this record is respondent's admitted recordkeeping violations. In this regard, the special master recommended a censure, in the event that his findings of knowing misappropriation are rejected. If nothing else, the record contains clear and convincing evidence of an accounting system and recordkeeping practices that were so horrendous as to be reckless. Respondent's willful disregard of

his recordkeeping obligations placed his clients' funds at great risk. His arrogance in believing that his mental juggling of his trust funds was sufficient is, in a word, astonishing.

Respondent acknowledged that he did not even understand what the documents that the OAE had requested were, including three-way reconciliations. He had to retain McKay to explain to him what they were. His "accounting system," of which he was proud, was more than deficient – it was non-existent. McKay spent 1000 hours reconciling respondent's attorney records.

Ordinarily, recordkeeping violations lead to the imposition of an admonition. See, e.g., In the Matter of Sebastian Onyi Ibezim, Jr., DRB 13-405 (March 26, 2014) (attorney maintained outstanding trust balances for a number of clients, some of whom were unidentified); In the Matter of Stephen Schnitzer, DRB 13-386 (March 26, 2014) (an audit conducted by the Office of Attorney Ethics revealed several recordkeeping deficiencies; the attorney also commingled personal and trust funds for many years; prior admonition for unrelated conduct); In the Matter of Thomas F. Flynn, III, DRB 08-359 (February 20, 2009) (for extended periods of time, attorney left in his trust account unidentified funds, failed to satisfy liens, allowed checks to remain uncashed, and failed to perform one of the steps of the

reconciliation process; no prior discipline); In the Matter of Jeff E. Thakker, DRB 04-258 (October 7, 2004) (attorney failed to maintain a trust account in a New Jersey banking institution); In the Matter of Arthur G. D'Alessandro, DRB 01-247 (June 17, 2002) (numerous recordkeeping deficiencies); and In the Matter of Marc D'Arienzo, DRB 00-101 (June 29, 2001) (failure to use trust account and to maintain required receipts and disbursements journals, as well as client ledger cards).

Here, however, even the special master believed that the degree of respondent's misconduct justified a censure, a recommendation that we view as overly indulgent. Rather, we determine that, in this case, nothing short of a three-month suspension is sufficient for this respondent, due to his extreme recklessness in handling client and escrow funds for so many years. In addition, we require him to provide the OAE with monthly reconciliations, on a quarterly basis, for a period of two years.

Members Gallipoli and Zmirich voted for a six-month suspension. Member Singer voted for a censure, believing that respondent's lack of a disciplinary history and the fact that he has learned his lesson because he has been educated on proper recordkeeping justify that measure of discipline.

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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daniel Donk-Min Kim
Docket No. DRB 14-171

Argued: October 16, 2014

Decided: December 11, 2014

Disposition: Three-month suspension

Members	Six-month Suspension	Three-month Suspension	Censure	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh		X				
Clark		X				
Gallipoli	X					
Hoberman		X				
Rivera		X				
Singer			X			
Yamner		X				
Zmirich	X					
Total:	2	6	1			

Ellen A. Brodsky
Chief Counsel