SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-238
District Docket No. XIV-06-0359E

IN THE MATTER OF	:
RICHARD H. KRESS	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 15, 2009

Decided: April 21, 2009

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Robyn M. Hill 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 respondent's disbarment filed by Special Master Robert C. Shelton, Jr. We agree with that recommendation.[1]

[1] This matter was previously before us as a default. On July 21, 2006, after respondent filed a timely motion, we vacated the default and remanded the matter for a hearing on the merits.

The six-count complaint charged respondent with violating RPC 1.15 (a) and (c) (failure to safeguard funds), RPC 1.7(a) and (b) (conflict of interest), RPC 1.8(a) (conflict – prohibited business transaction), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), the principles of In re Wilson, 81 N.J. 579 (1979) (knowing misappropriation of client's funds), and In re Hollendonner, 102 N.J. 555 (1986) (knowing misappropriation of escrow funds), and RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority).

By letter dated December 29, 2008, respondent's counsel filed a motion to supplement the record, supported by a brief. The motion sought to allow the inclusion of a certification by respondent, claiming that he had recently discovered a second attorney business account, opened between 1996 and 2001. Among other things, respondent claimed that his former secretary had opened the account without his knowledge, that he was unaware of any activity on the account, and that more than $75,000 was missing from his accounts "over a several year period."

Appended to respondent's certification was a February 15, 2008 letter from him to the special master, referring to this unknown attorney business account and purportedly attaching a

letter from the bank, verifying the account. No such bank letter was attached to respondent's letter, however.

Respondent's certification also stated that, at the end of February 2008, he had met with an investigator from the Union County Prosecutor's Office, who had informed him that the statute of limitations had run on a criminal action against his former secretary. Respondent also accused the secretary of falsifying her W-2 forms and claimed that the IRS office in Mountainside, New Jersey, was in the process of "getting additional information concerning this matter." He also accused his former secretary's family of embezzling funds from a local school district.

Finally, respondent sought to supplement the record with what counsel termed "a short narrative by Dr. Zhongcong Xie, Assistant Professor at Harvard Medical School, discussing the cognitive decline frequently experienced following surgery." Respondent had surgery on August 19, 2003.

The OAE strongly objected to respondent's motion to supplement the record. We agree with the OAE that the information is not properly before us. Respondent certified to unsupported allegations concerning a bank account for which he failed to present any reliable evidence. Moreover, he provided no support for his allegations that he attempted to bring

criminal charges against his former secretary, that he presented the IRS with information about her wrongdoing, and that her relatives were guilty of embezzlement. Because respondent has had sufficient opportunity to produce the proposed documents and because it appears, on the face of the motion, that such documents are not material to the outcome of this matter, we denied respondent's motion to supplement the record and proceeded with our de novo review of the record developed below.

Respondent was admitted to the New Jersey bar in 1979. At the relevant times, he maintained a law office in Clark, New Jersey.

Respondent has a significant disciplinary history. In 1992, he was suspended for three months when, as a municipal court prosecutor, he participated in a representation to the court that the arresting officer did not wish to proceed with the case, but did not disclose to the court that the reason therefor was the arresting officer's desire to give a "break" to someone who supported law enforcement. In re Kress, 128 N.J. 520 (1992).

In 1996, respondent was reprimanded (by consent) for failure to timely file a reply to a motion for pendente lite support and a motion for reconsideration. He lacked diligence and failed to keep his client informed about the status of the matter. In re Kress, 143 N.J. 334 (1996).

In 2003, respondent was suspended for one year for a pattern of conflict of interest in his representation of an accounting firm, as well as its individual partners. After the conflict developed between the parties, respondent was not truthful in statements to others, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and engaged in conduct prejudicial to the administration of justice by attempting to create a sham transaction to deceive a third party that a mortgage had been assigned for bona fide consideration. He also made misrepresentations to the parties to the transaction. In re Kress, 177 N.J. 226 (2003).

In 2006, the Court suspended respondent for six months for misconduct in three matters (lack of diligence, failure to communicate with clients, failure to provide a client with a writing setting forth the basis or rate of his fee, failure to terminate the representation when his physical condition materially impaired his ability to represent his clients, and conduct involving dishonesty, fraud, deceit or misrepresentation). In a bankruptcy matter, respondent used his client's credit card to pay for a cruise as his fee, knowing that his client could not pay the credit card bill. He also failed to file an answer to a complaint served on the client, thereby permitting a default judgment to be entered against the

client, failed to so inform the client, and failed to discuss with his client his strategy in that case. In the second matter, he failed to pursue his client's underinsured motorist claim, failed to return his client's telephone calls, and failed to communicate with him to the extent necessary to allow the client to make informed decisions about the representation. In the third matter, which dealt with an appeal of a denial of Social Security Disability benefits, respondent failed to communicate with his client. He also engaged in a pattern of neglect and failed to terminate his representation in the three matters, when his medical condition impaired his ability to properly represent his clients. In re Kress, 186 N.J. 159 (2006).

Respondent was reinstated to the practice of law on December 5, 2006. In re Kress, 188 N.J. 585 (2006). The New Jersey Lawyers' Fund for Client Protection report indicates that respondent was ineligible for a one-month period in 2006 (September 25 to October 26, 2006).

FAILURE TO COOPERATE WITH THE OAE

Following a December 6, 2006 pre-hearing conference before the special master, respondent, who was acting pro se, failed to comply with the special master's directive to notify the OAE of the names of his potential witnesses and of the documents on

which he intended to rely at the ethics hearing. On the first hearing day, the special master again instructed respondent to provide that information to the OAE. To prevent further delay of the proceedings, the special master directed respondent to provide the OAE with a witness list at the next scheduled hearing date. The special master gave the OAE an opportunity to take the deposition of any of the witnesses that respondent named, "separate and apart" from the hearing testimony.

In addition, on numerous occasions over the course of the OAE's investigation, the OAE requested that respondent provide information about a potential witness for the OAE, Thomas Farrell. Respondent did not do so. He did, however, name Farrell as his own potential witness and produced him at the hearing.

During the November 28, 2007 continuation of the ethics hearing, respondent attempted to introduce into evidence several documents that he had not provided to the OAE. One document purported to be an authorization for him to take monies out of client Agnes Manuzza's trust fund. However, as the OAE pointed out, respondent admitted, in his answer, that he did not have Manuzza's authorization to use her funds. The special master, therefore, precluded respondent from using that document.

In 2004, OAE Disciplinary Investigator Gregory Kulinich was assigned to take over the investigation of this matter from

another OAE investigator, Robert Gudger.[2] On several occasions, Kulinich wrote to respondent, requesting the production of various documents. On February 4, 2005, Kulinich provided respondent with an opportunity to review the OAE's files generated from its investigation. Respondent neither turned over the requested information to the OAE nor contacted Kulinich to make an appointment to review the records in the OAE's possession.

Because of respondent's failure to supply the requested documentation, Kulinich served a subpoena on respondent's office landlord. A search of files stored with the landlord uncovered records relating to some of respondent's clients named in the ethics complaint, as well as a number of respondent's unopened bank statements. The OAE also subpoenaed records from banks and an insurance company to trace the path of funds moving in and out of respondent's business and trust accounts.

According to Kulinich, respondent failed to turn over a number of requested files and failed to appear at a number of scheduled demand audits, for which he sought no adjournment.

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[2] Brian Gillet and Thomas Carver were the OAE attorneys assigned to this matter before it was transferred to Janice Richter. The succession of OAE personnel assigned to this matter, as well as respondent's delay and/or failure to provide the OAE with requested information, account for the delay in proceeding to a hearing.

Respondent used as an excuse the destruction of his files in an office flood, but failed to compile a list of the lost files. Respondent also failed to provide the OAE with an accounting of client Emily Kosonen's funds, even though the OAE requested him to do so numerous times.

According to Kulinich, respondent accused the OAE of stealing his cash receipts journal, which he later found in his office. He also accused the OAE of not giving him an opportunity to review his bank records that were in the OAE's possession.

The complaint charged that respondent's failure to cooperate with the OAE violated RPC 8.1(b).

The facts in these matters were gleaned from the witnesses' testimony at the ethics hearing, their statements made to an investigator in connection with a parallel criminal investigation by the Union County Prosecutor's Office into respondent's use of certain funds, and their statements made during the OAE investigation.

THE EMILY KOSONEN AND WALTER GARTHWAITE MATTERS (COUNTS ONE AND THREE)

In connection with respondent's law practice, from 1998 to 2003, he maintained attorney trust and business accounts at

United Jersey Bank ("UJB") (also known as Summit or Fleet Bank) and Commerce Bank.

In June 1995, the Middlesex County Prosecutor's Office issued a search warrant that resulted in a June 30, 1995 search of Emily Kosonen's house for illegal drugs. During the course of the search, the police seized Kosonen's bank book, showing $87,644.61 in her account. Kosonen and her brother, Basil Luongo, were arrested and charged with possession of a controlled dangerous substance and possession with intent to distribute. The prosecutor's office seized and froze Kosonen's bank account.

At the ethics hearing, Kosonen testified that she had retained respondent to represent her and her brother in the criminal proceedings. Although her recollection of the 1995 events was somewhat hazy, she recalled that respondent had quoted her a $2,000 fee to get her funds back from the prosecutor's office. She understood that hers was a simple case that required merely showing that the seized funds were from her deceased husband's life insurance policy and not from illegal drug activity. She added that, because her case was not complicated, she would not have agreed to pay respondent a fee of one-third of the funds recovered, which she later discovered he took for his services. Respondent did not provide Kosonen

with a retainer agreement. Respondent's former secretary, Elizabeth Maurer, testified that respondent did not typically use fee agreements.

On September 27, 1995, a Middlesex County Grand Jury "no-billed" the criminal charges against Kosonen. Following "various legal proceedings" (forfeiture proceedings) in July 1998, respondent obtained the release of Kosonen's funds from the prosecutor's office. That office forwarded a $87,644.61 check to respondent, which, on July 11, 1998, he deposited into his trust account's Kosonen sub-account at UJB. Kosonen never signed her name on a new client account form. At the ethics hearing, when she reviewed the form, she noted that her social security number on the bank form was incorrect.

During the course of the prosecutor's office's investigation, respondent admitted that he had signed Kosonen's name on that form. Kosonen stated that respondent never gave her or had her sign a power-of-attorney that would have permitted him to execute documents on her behalf.

Kosonen testified that, rather than return the funds to her, respondent suggested that she invest them for a two-year period, at a rate of nine percent interest. According to Kosonen, the following exchange occurred between her and respondent:

> [I]f and when I get your money back, I could invest it for 9 percent for you, is that all right? I said . . . what happens if I need the money before the two years, if I had a bill to pay or something? He said no problem, you could have it any time, but you wouldn't get it at 9 percent.
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> [5T127-9 to 16.] [3]

Kosonen testified that, although she gave respondent permission to invest her funds, she did not sign any document reflecting her authorization and she certainly did not authorize respondent to take a percentage of the investment. Respondent never told her how he planned to invest the money.

Kosonen did not know when exactly respondent obtained her money from the prosecutor's office. She sought its return, however, at the expiration of the agreed upon two-year period. She requested that respondent return her funds on numerous occasions between January and March 2002, to no avail. Each time, respondent either came up with excuses to cancel their scheduled appointments (his wife left him, he was sick, he was going to the hospital) or told her that her funds were not yet available. At one point, respondent told Kosonen that she would get her money back later that summer, after he obtained an expected, sizable recovery from a lawsuit that he was handling.

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[3] 5T refers to the transcript of the November 29, 2007 hearing before the special master.

Kosonen's friend and neighbor, John Pelligrino, also tried to contact respondent. At one point, respondent told Pelligrino that he had invested Kosonen's funds "in a lien." Respondent could not provide Pelligrino with documentation of the investment. According to Pelligrino, respondent stated that the lien "was not registered." Eventually, respondent advised Kosonen and Pelligrino to complain to the Clark police, which they did.

Respondent never provided Kosonen with an invoice for his services. Therefore, she was not aware that he had taken two fee checks from her funds, in the amounts of $17,000 and $8,000, leaving her sub-account with a balance of only $62,500.[4]

Kosonen had never asked for, signed or seen a personal guaranty that respondent had drafted, which provided, in relevant part:

> After partial payment of legal fees and expenses there remains the balance of $62,500.00. In order to assist Emily Kosonen to regain some of the costs and expenses she has agreed to allow Richard H.. [sic] Kress to utilize the funds for the purpose of making loans and other investments which in his sole discretion are good risks.
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> In order to assure Emily Kosonen of the loans and investments to be made, Richard H.

[4] Kosonen prevailed in a fee arbitration case against respondent, in which she was awarded the return of approximately $17,000.

> Kress personally guarantees the full repayment of all principal in the event of any default by any borrower. Emily Kosonen gives full authority to Richard H. Kress to make any and all such loans in his discretion as he sees fit.
>
> . . . . Richard H. Kress agrees that upon request a full accounting of the funds shall be made to Emily Kosonen from time to time.
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> Upon adequate notice from Emily Kosonen repayment of all funds plus interest will be turned over to her. In the event of a default by any borrower at that time Richard H. Kress agrees to make payment to Emily Kosonen of the principal balance then due within 45 days of notice of default by a borrower.
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> I acknowledge that I have advised Emily Kosonen to seek independent counsel before making this decision to lend any and all funds being held.
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> [Ex.P238.][5]

Respondent never provided Kosonen with any documentation relating to the "investments" of her funds and never advised her to seek independent legal advice about any such investments.

Respondent's client ledger showed two August 5, 1998 trust account disbursements to himself for $8,000 and $17,144.61 (designated as fees) from the Kosonen sub-account. He deposited

[5] Ex.P238 was not signed and had the date January 1999 typed in without a specific date.

the $8,000 fee check into the sub-account of his client Margaret Hutton.

Respondent's Summit Bank trust account monthly statement for February 1999 showed that, on February 4, 1999, he had written a $30,000 trust account check (no. 1793) against the Kosonen sub-account, payable to Summit Bank. That withdrawal left a $32,500 balance in the Kosonen sub-account.

To determine the purpose of the $30,000 withdrawal, the OAE subpoenaed Summit Bank records, which revealed that respondent had used the $30,000 to obtain four separate bank checks, dated February 4, 1999, payable to client Paul Maguire ($7,500), client Margaret Hutton ($15,000), client Agnes Manuzza ($5,000), and Smith Cadillac, a car dealership ($2,500).

Respondent justified his use of bank checks by stating that he had had prior problems with the bank and that, therefore, he had used trust account checks to purchase bank checks.

As to the purpose of the checks, respondent could not recall the reason for the check to Smith Cadillac. He conceded that it had nothing to do with the Kosonen funds. He admitted that he had purchased vehicles from Smith Cadillac and that, on occasion, he had given bank checks to that dealership. He denied having used Kosonen's funds to purchase a car, however.

During the course of Kulinich's investigation, he spoke to Ron Posyton, part-owner of the now defunct Smith Cadillac. According to Posyton, respondent had purchased a vehicle, but did not have the funds for the down payment when he picked up the car. Respondent agreed to provide the down payment in the near future. Because the company was going out of business, Posyton agreed to accept a partial payment of $2,500, or half of the down payment.

As to all four checks, respondent denied any knowledge that they had been issued against the Kosonen funds. He argued that the record does not clearly and convincingly establish such knowledge, but merely demonstrates that the checks were "issued at approximately the same time."

Kosonen did not know that respondent had used her funds for Manuzza, Hilton, Maguire, and Smith Cadillac and did not authorize the use of her monies for purposes other than investments.

Kulinich also discovered that respondent had loaned Walter and Patricia Garthwaite $32,000 from Kosonen's sub-account, for their purchase of real property. Respondent had prepared a March 26, 1999 mortgage note in that amount, between Kosonen and the Garthwaites. Kosonen never knew about the mortgage. She did not sign any documents relating to that transaction.

On March 26, 1999, respondent disbursed the following checks from the Kosonen sub-account, relating to the Gartwaite transaction: trust account check no. 1795 payable to Winifred & Maria Sasse (sellers) for $25,440.25; trust account check no. 1796 to Thomas B. Madding for $750; trust account check no. 1797 to Weichert Realtors for $1,710; trust account check no. 1798 to the Garthwaites for $2,390; trust account check no. 1799 for $1,235 to himself; and trust account check no. 1800 to Hunterdon County for $99.75. The disbursements totaled $31,625.

Although the Garthwaites repaid the loan, respondent did not deposit the funds back into the Kosonen sub-account. Kulinich could not trace the funds, but recalled that respondent had admitted lending them to other people, including Eugene Cates, Thomas Farrell,[6] and Steven Poggioli. Later, respondent denied lending funds to Poggioli.

Kulinich uncovered a May 14, 2002 personal check from Farrell to respondent for $78,000, which, Kulinich determined, respondent used to repay Kosonen by obtaining a $78,000

[6] As part of his investigation, Kulinich tried to locate Farrell by going to his house on two occasions, leaving messages with Farrell's mother, leaving a subpoena at Farrell's address, and attempting to locate Farrell at a number of used car lots, which either he owned or frequented, all to no avail.

treasurer's check. Respondent forwarded the check to Kosonen on May 20, 2002.

Kulinich prepared a chart summarizing the transactions from Kosonen's funds (annexed hereto).

Vincent Gagliardi, a sergeant with the Financial Crimes Unit of the Union County Prosecutor's Office, was one of the detectives assigned to investigate Kosonen's allegations against respondent, in 2002. His investigation revealed the following:

After respondent took his one-third fee for her legal matter, Kosonen was left with only $62,500. Gagliardi learned that, while Kosonen's money had been tied up with Middlesex County because of the wrongful seizure, she had lost a significant amount of interest and respondent had offered to invest her money at a rate of nine percent to try to recover her lost interest. Respondent did not provide Kosonen with any details relating to the investment. Their verbal agreement was that Kosonen would get her funds back after a two-year period. If she needed the money sooner, her interest rate would be lower.

According to Gagliardi, after the two years expired, Kosonen made an appointment with respondent to retrieve her funds. A week later, respondent canceled the appointment. She made another appointment, which respondent again canceled,

purportedly because he was hospitalized. At a later meeting with Kosonen, respondent informed her that "he was going to win a big lawsuit in the summer, and then she would get the money."

On several occasions thereafter, Kosonen and her friend, John Pelligrino, tried to meet with respondent. They were unsuccessful. Each time, respondent came up with excuses for canceling their meetings.[7] Gagliardi believed that Kosonen was a very timid woman and that Pelligrino was acting on her behalf "like a voice for Emily Kosonen."

Gagliardi added that, eventually, when Kosonen asked respondent to provide her with information about her investment, respondent faxed her information about the Garthwaite loan.

According to Gagliardi, on March 28, 2002, respondent left a message on Pelligrino's answering machine, stating that Kosonen's funds would be available that week, that he had placed her money into several investments, and that there was nothing for Pelligrino "to get excited about." Kosonen knew nothing about the "several investments."

As part of his investigation, Gagliardi interviewed Garthwaite about the loan from Kosonen. Gagliardi observed that

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[7] Despite having submitted copies of pages from his appointment calendar showing several appointments with Kosonen, he admitted to Gagliardi that he met with her only once.

Garthwaite was very nervous because he thought he was "a suspect in the case.[8] Gagliardi's investigation uncovered a copy of a June 2, 2000 mortgage note, between Kosonen and Garthwaite, for $62,500. When Gagliardi questioned Garthwaite about it, he learned that Garthwaite had never seen the document before and that the signatures on the note were not his or his wife's. Garthwaite provided Gagliardi with other documents relating to the $32,000 loan. According to Garthwaite, respondent had told him that he had a power-of-attorney from Kosonen. During the course of his investigation, Gagliardi could find no evidence that a power-of-attorney existed.

Gagliardi had a difficult time contacting respondent about the investigation. When he finally did so, respondent told him that the Garthwaite loan was legitimate, that he, respondent, believed that Pelligrino was just trying to "shake him down" for money, and that, if he paid Pelligrino some money, Pelligrino could make the "whole thing with Kosonen go away."[9]

Respondent also told Gagliardi that Kosonen had signed a retainer agreement for $5,000, but could pay him only $2,000 at

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[8] Garthwaite's wife was the probation offer for Basil Luongo's son (Kosonen's nephew).

[9] Gagliardi noted that Pelligrino had an extensive criminal record for various things, including forgery, theft, robbery, and money laundering. Galgiardi maintained, however, that Pelligrino's record made no difference in the investigation.

the time. After he took his full fee and deposited the balance of her funds in his trust account, he recommended to Kosonen that she invest her money to earn a high interest rate. Respondent claimed that Kosonen had signed an agreement permitting him to invest the money on her behalf. Respondent never gave Gagliardi a copy of this alleged agreement.

Respondent informed Gagliardi that, during the time he had control of Kosonen's funds, he had lent $32,000 to the Garthwaites at twelve percent interest (which they repaid); $30,000 to Eugene Cates at nine percent interest; between $20,000 and $50,000 to Steven Poggioli at nine percent interest; between $20,000 and $40,000 to Tom Farrell at nine percent interest; and a bridge loan of $15,000 to Peggy Bochatin of Green Brook. He advised the borrowers and Kosonen not to report the loans on their income tax forms. Respondent did not provide Gagliardi with any documentation about these loans.

According to Gagliardi, when he showed respondent a copy of a $62,500 mortgage from Kosonen to the Garthwaites, respondent "appeared to be surprised," denied that he had ever seen it before, and claimed that his and the Garthwaites' signatures were forgeries. However, respondent's fax number and law office letterhead appeared at the top of the document. Moreover, the fax was sequential to the other $32,000 mortgage that respondent

had faxed to Kosonen on the same date and time. Respondent speculated that Pelligrino must have scanned the document with a computer and altered it.

Like the OAE, Gagliardi had difficulty obtaining documents from respondent. Therefore, on the day of his interview with respondent, Gagliardi served him with a grand jury subpoena. Respondent did not comply with the subpoena. Respondent told Gagliardi that, on April 29, 2002, he would meet with him and Gagliardi's partner, Detective Chris Gulbin, at his Clark office, at which time he would provide them with the requested records.

On that date, respondent was late meeting the detectives. He had not gathered any of the requested documents, claiming that his father-in-law had died days earlier. Because they did not have a search warrant, Gulbin and Gagliardi could not touch anything. They requested the Kosonen files and files related to the individuals to whom respondent had loaned money. According to Gagliardi, when he saw a file relating to Poggioli on respondent's desk and pointed it out to respondent, respondent claimed that it related to a different matter. Gagliardi testified as follows:

> [Respondent] turns to Detective Gulbin and myself, we're in the middle of his office, and he says -- he looks at Chris Gulbin and he goes, I'm fucked. And Chris Gublin and I

> look back. What? And he said . . . that he had received a letter from the Office of Attorney Ethics, and the letter requested he turn over any and all documents regarding his dealings with Emily Kosonen. He said, you know, he knew he did nothing wrong criminally, but he might have some problems ethically. . . . I remember he found a Summit Bank AccuTrack new client account form for Emily Kosonen dated July 11, 1998, and it showed an opening deposit of the $87,644.61. and on the bottom of the form, Kosonen's name is printed alongside her handwritten signature. I asked Mr. Kress if Emily Kosonen had signed that, and he said no. I asked Mr. Kress who signed it, and he said, I signed her name. I asked him why he would do that. He didn't reply.
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> [5T40-23 to 5T41-23.]

Respondent looked for the Kosonen file, while the detectives waited. Before they left, the detectives served respondent with another grand jury subpoena. Respondent confided to the detectives that he had been distraught and that "it would be easier if I just jumped off a bridge."

From the onset of Gagliardi's investigation, in 2002, it took respondent approximately a month and a half to repay Kosenen. Kosonen had first requested her money in February 2001; respondent repaid her on April 5, 2002.

Gagliardi served respondent with another subpoena, in May 2002, and also served one on respondent's former secretary, Maurer. Gagliardi's investigation led him to believe that respondent and Maurer were "hand-in-hand." He believed that "she

was like the old school, long time, secretary that worked for Mr. Kress, and he depended on her and, you know, she was a loyal employee." Gagliardi stated that Maurer was very cooperative during his investigation and was "a very nice woman."

At one point, Gagliardi, who thought that respondent was being sincere during the investigation, had a change of heart about respondent's candor. Specifically, respondent misrepresented to the OAE that he had given to the detectives the records sought by that office. Gagliardi was "stunned" when he learned that respondent had misinformed the OAE about the documents. Galiardi, too, found respondent uncooperative; he had requested the same information from respondent "over and over again." Gagliardi wanted documents that Kosonen had signed, not the unsigned versions that respondent had provided to him. Respondent never gave him the requested documents.

Over the course of one month, the detectives served three subpoenas on respondent. Later, respondent hired an attorney and mailed a $78,000 check to Kosonen. Although Kosonen and Pelligrino thought that the amount of the check would have been higher, they were satisfied with that sum.

After that payment, Gagliardi continued with his investigation, pursuant to standard procedure. He learned from subpoenaed bank records that respondent had repaid Kosonen with

funds obtained from Thomas Farrell. Respondent told Gagliardi that he had lent Farrell between $20,000 and $40,000, at nine percent interest. Gagliardi's efforts to locate Farrell were fruitless.

Gagliardi's interview of Maurer revealed that she knew only about the loan to the Garthwaites and that it was not office procedure to give original signed documents to clients, contrary to respondent's claim that Kosonen had all of her original documents.

During Gagliardi's subsequent interview of respondent, respondent claimed that the loans to Steven Poggioli and Peggy Bochatin had not come from Kosonen's funds and that the Farrell and Cates files had probably been destroyed in a flood. Maurer confirmed that many files had been destroyed in a December 2002 flood in respondent's office. However, Gagliardi never saw any signs of a flood in respondent's office. He recalled that respondent had taken him and Gulbin into his boiler room to show them where the damage had occurred, but they had not seen any water damage, only clutter. Gagliardi did not reveal the final outcome of his investigation.

By letter of May 28, 2002 to Assistant Union County Prosecutor Ann Frawley, respondent claimed that he had provided Gagliardi with many documents relating to the Kosonen matter.

That was untrue. Although respondent had turned over a large stack of papers to Gagliardi, Gagliardi stressed that respondent had not provided the documents sought by the prosecutor's office for its investigation.

For his part, respondent claimed that Kosonen had signed a "retainer agreement" for her representation on drug possession charges. Kosonen vehemently denied having signed any retainer agreements. According to Kosonen, the charges against her were "no billed" because Kosonen's brother admitted that she had nothing to do with the drug transactions. Respondent claimed that, after the charges were dismissed, Kosonen signed another retainer agreement, giving her the option of paying respondent on an hourly basis or on a contingent fee basis, presumably for respondent to represent her in the forfeiture proceeding. According to respondent, the process became more difficult and more protracted than either of them had anticipated. Respondent was certain that Kosonen had signed the retainer agreements, but claimed that she "conveniently" did not have copies of them in her file.

According to respondent, Kosonen had become upset that it was taking him so long to recoup her funds, that she had lost interest on those funds, and that several months had passed before she had tried to pick up her check. Respondent claimed

that he, therefore, discussed lending her funds to the Gartwaites, an arms-length transaction and that Kosonen had then executed the $32,000 mortgage for the transaction.

Respondent alleged that, at one point, he had become concerned about lending Kosonen's funds. He, therefore, prepared, signed, and gave her a personal guaranty, with the advice that she retain an attorney to review the guaranty; Kosonen, however, had refused to do so.

For his role in investing Kosonen's funds, respondent received three percent of the interest generated from the loans; Kosonen received nine percent. Respondent stated that he knew the individuals to whom he was lending money and was "fairly confident" that the funds were safe. He contended that the loans had been made with Kosonen's knowledge and consent.

According to respondent, problems did not arise until March 2002, when Pelligrino had become involved. Respondent informed Pelligrino that Kosonen could have her funds back whenever she wanted them, but that he needed time to get them back. When Kosonen and Pelligrino had become dissatisfied with the wait, he had told them to go to the Clark police. However, the Clark police realized immediately that they could not handle the matter because of a conflict of interest; respondent had been the prosecutor in that township for twelve years. Respondent

also accused Pelligrino of creating a second Garthwaite mortgage for $62,500.

The complaint charged, in counts one and three, that respondent knowingly misappropriated Kosonen's funds, failed to safeguard funds, thereby violating the principles of In re Wilson, 81 N.J. 451 (1979), engaged in a conflict of interest and in a prohibited business transaction with a client, and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

THE MARGARET HUTTON MATTER (COUNT TWO)

In July 1998, prior to obtaining the release of Kosonen's funds, respondent represented Margaret Hutton in the sale of her business, the Driftwood Inn, to Angela Arizabal.[10] The sale price was $175,000.

On May 22, 1998, Arizabal gave respondent a $15,000 deposit by way of a personal check made out to respondent's trust account. On June 9, 1998, respondent deposited the check into Hutton's sub-account no. 00120.

[10] Respondent could not recall this transaction and contended that the OAE had all of his records relating to it.

The closing took place on July 31, 1998. Respondent did not disburse the $15,000 deposit in Hutton's sub-account.[11]

Six days later, on August 6, 1998, respondent withdrew $5,000 from the Hutton sub-account and deposited it in his business account. This payment was not listed as a legal fee on the HUD-1 settlement statement. On the same day, respondent issued to his wife, Cheryl, a $2,000 business account check.

On August 21, 1998, respondent deposited $2,000 into his business account from the Hutton sub-account (trust account check no. 1710). On September 5, 1998, by trust account check no. 1714, respondent issued another $2,000 check to himself from the Hutton sub-account. On October 10, 1998, again, he issued to himself a $2,000 trust account check from the Hutton sub-account (check no. 2322). On October 27, 1998, he issued to himself a $500 business account check containing the notation "draw" in the memo portion. He also wrote to himself trust account check no. 1750 for $1,500, dated November 20, 1998, issued from the Hutton sub-account. Respondent deposited the check into his business account. On that same day, he issued a business account

[11] Respondent held only the $15,000 deposit in escrow. Hutton received a $5,852 check from the buyer's attorney. Other than some payments to the New Jersey Division of Taxation, the record does not reveal to whom the remainder of the sale proceeds, if any, were distributed.

check to himself for the same amount. Also on November 20, 1998, he deposited $3,290 into his business account from four client sub-accounts (including the $1,500 from Hutton).

On January 14, 1999, respondent issued a $925 check (no. 1781) the Summit Bank, drawn against the Hutton sub-account. Respondent's Summit Bank statement for November 1998 showed a balance of $925 in Hutton's sub-account. Therefore, check no. 1781 depleted all of Hutton's $15,000 deposit funds. Respondent replaced them with a $15,000 bank check, dated February 4, 1999. The $15,000 check was part of the $30,000 that respondent had taken from the Kosonen sub-account on February 4, 1999.

Respondent was unable to explain his withdrawal against Hutton's $15,000. He stated that he had a very good rapport with Hutton and that, if he had asked, she probably would have lent him "the entire money anyway." He added that, if he were going to be dishonest or take advantage of Hutton, he would have charged her a fee greater than $1,000.[12]

Hutton testified that she had retained respondent for, among other matters, the 1998 sale of The Driftwood Inn bar to

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[12] Respondent may have taken more of a fee than he was entitled to receive. Hutton testified that she had paid him $500 for the closing, the HUD-1 listed only $250 paid to respondent for document preparation, and respondent claimed that he charged her $1,000. Respondent was not charged with any rule violations in this regard.

Angela Arizabal. Hutton did not receive a writing setting forth the basis or rate of the fee. Although she inquired about the fee on several occasions, respondent told her that he had not yet figured out its amount.

By check dated September 20, 1999, Hutton paid respondent $500 for closing fees. Respondent did not provide Hutton with an invoice for services or indicate what additional amounts she might owe him after the closing.

Hutton testified that she did not authorize respondent to make any disbursements from her funds, other than what was owed for the sale of the business (taxes, transfer fees), totaling more than $8,000, and a $575 rental payment for a Florida property.

When respondent sent Hutton the $15,000 bank check dated February 4, 1999, she immediately deposited it. Until then, she did not know the net amount that she would be receiving from the sale. She did not learn that respondent had written checks against her funds until she spoke to Kulinich. Hutton informed Kulinich that she only received a few hundred dollars at the closing. Afterwards, she asked respondent for the balance of her funds, but he informed her that the money had to be held in escrow.

Hutton could not determine whether she had received all the funds from the transaction because she was unsuccessful in her attempts to get her documents from respondent. Once she did get her file, there was nothing much in it. Hutton did not know that, by October 27, 1998, most of the funds that respondent had been holding for her had been transferred to his business account. Respondent never asked her if he could borrow her funds.

For his part, respondent professed no knowledge of why Hutton had delayed seeking her funds. He acknowledged that her funds were used for purposes unrelated to her transaction, but was unable to offer an adequate explanation therefor. As detailed below, he blamed his secretary, Elizabeth Mauer, for "converting [client funds] to herself."

The complaint charged that respondent knowingly misappropriated the $15,000 belonging to Hutton (In re Wilson, 81 N.J. 451 (1979)) and failed to safeguard her funds.

THE JOSEPH MAROTOLLI MATTER (COUNT FOUR)

Respondent represented Joseph Marotolli in the sale of The Cheeques bar to James Cecire. The sale price was $600,000. At some point prior to the December 1998 closing, Cecire gave respondent a $50,000 down payment. As of December 31, 1998,

respondent held in trust $164,952.89 in connection with the sale.

Before the closing, on November 11, 1998, respondent issued to Greenwood Meadows a $7,500 trust account check (no. 1733), drawn against the Marotolli/Cheeques sub-account (00184). Greenwood Meadows was a housing development in which one of respondent's clients, Lisa Carracino, had purchased property. Marotolli had never heard of Greenwood Meadows and had not authorized respondent to borrow or use his funds for any purposes other than his own.

According to Marottoli, respondent's billing procedures were "very unusual." Marottoli did not know the amount of respondent's fee, did not receive a writing setting forth its basis or rate, and did not receive an itemized bill from respondent.

During the OAE investigation, respondent informed Kulinich that he did not have any files for the Greenwood Meadows matter and did not recall having a client named Lisa Carracino. As to the Marottoli matter, respondent told Kulinich that he had turned over all of his files to the client.

According to Kulinich, respondent also used funds from the Marotolli/Cheeques sub-account to pay a personal injury settlement to two other clients, Goran Josifoski and Josifoski's

mother. Respondent had represented the Josifoskis in connection with a 1995 car accident. Respondent settled their case for $10,000. The release was dated January 13, 1996. Respondent deposited the March 19, 1997 settlement check into his trust account on April 4, 1997. He took a $3,333.33 fee on May 16, 1997, paid the Josifoskis' medical expenses on November 30, 1998 and, on November 30, 1998, issued a $5,666.67 check to Goran Josifoski from the Marotolli/Cheeques sub-acocunt. Marottoli did not know Goran Josifoski and did not authorize respondent to pay Goran Josifoski from his funds.

Kulinich determined that, as of May 1998, the Josifoskis' sub-account did not have sufficient funds to cover the Josifoski check.

After the Marotolli/Cecire closing, respondent provided Marotolli with an accounting of the closing funds, merely by giving him a check register. The register did not list the check to Josifoski. According to Marotolli, several other checks had been issued from his sub-account, for which he did not know the purpose.

As to the Josifoski matter, respondent told Kulinich that it was an old file that was no longer in his possession. Kulinich was able to recreate the Josifoski file by obtaining

records from the bank and from the insurance company involved in the personal injury matter.

During Kulinich's investigation, Josifoski told him that he had trouble getting his settlement check from respondent and that he did not get it until "a year or two" after the settlement. Respondent countered that Josifoski should have picked up his settlement check sooner. Respondent claimed that the check was available for pick-up and that the funds were in his trust account.

Respondent testified that he had a close relationship with Marotolli and that, if he had asked Marotolli for "$100,000 . . . Marotolli wouldn't even have asked me what I need it for." Marotolli agreed that, if respondent had asked him to borrow the funds, he would have said "yes." Respondent contended that there was no reason for him to take money from Marotolli's account. He denied that he had been experiencing financial difficulties at that time. In essence, he denied any knowledge that Marotolli's funds had been utilized for purposes other than those of Marotolli's matter. He accused his secretary, Maurer, of foul play, that is, misusing client funds for her own benefit.

The complaint charged that respondent knowingly misappropriated Marotolli's funds,[13] failed to safeguard funds, failed to promptly deliver funds to a client, and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

THE AGNES MANUZZA MATTER (COUNT FIVE)

Respondent represented Agnes Manuzza in the sale of her Linden, New Jersey, property. On January 12, 1999, respondent deposited the $17,000 down payment into the Manuzza trust sub-account.

On January 15, 1999, respondent replaced a portion of the Marotolli funds with $7,000 taken from the Agnes Manuzza sub-account (00193). Manuzza did not know that respondent had used the monies from her sub-account and never authorized him to do so.

As mentioned previously, respondent replenished the Manuzza funds, on February 4, 1999, with a $5,000 check issued against the Kosonen funds and a $2,000 cash deposit made on January 20, 1999.

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[13] Because the closing had not yet occurred when respondent improperly disbursed funds from the Marotolli sub-account, the deposit funds were really escrow funds, not client funds, held for Marotolli's and Cecire's benefit.

Here, too, respondent contended that he did not know that the Manuzza funds had been used for unauthorized purposes and again blamed Maurer for the systematic conversion of client funds.

The complaint charged respondent with the knowing misappropriation of client trust and escrow funds, violating the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollandonner, 102 N.J. 21 (1986), failure to safeguard funds, and conduct involving dishonesty, fraud, deceit or misrepresentation.

The OAE offered the testimony of Elizabeth Maurer, respondent's former secretary. Maurer had worked for respondent for almost twenty years, from 1984 until the summer of 2003, when respondent stopped paying her salary. Currently, she is the secretary of a Superior Court Judge, in Union County. During the course of Maurer's employment with respondent, he was involved in five separate law partnerships and twice worked as a solo practitioner. During their twenty-year relationship, respondent never accused her of taking any client funds.

Over the years, Maurer did some of respondent's bookkeeping. At respondent's request, she wrote business account checks and many times signed them on his behalf because he was "hardly ever there." She first checked with the bank to

determine whether there were sufficient funds in respondent's account. On occasion, when she would alert respondent of deficiencies in his account, respondent would instruct her to write the checks anyway. Maurer balanced the trust account checkbook for a while, but not the business account checkbook.

Maurer remarked that, typically, respondent did not utilize fee agreements. In the nineties and early 2000, Maurer did some client billing. She noted that respondent had no billing system and did not send monthly bills to his clients. Respondent had standard fees for different types of cases. Maurer prepared client bills by going through each file and giving respondent a list of the work performed in the matter. Respondent then reviewed the list and marked down the amount of time spent for each service. He did not maintain regular hourly time records, he generated them "after the fact."

Among other things, Maurer prepared settlement distribution statements. Once respondent approved the statements, she prepared the associated checks. Respondent always signed the trust account checks, with one exception – at respondent's insistence, Maurer signed a check while he was in Florida.

Respondent maintained a Quicken computer program for his accounts that both Maurer and respondent used. Respondent did not have an accountant for his business.

Initially, Maurer reconciled respondent's trust and business accounts. She later declined to do it because respondent "had checks that were not marked down." Because the accounts were disorganized, she felt uncomfortable performing the reconciliations. According to Maurer, "[m]any, many, many times," respondent's business account was overdrawn. Checks bounced, often her own paychecks. During the two years before she left respondent's employ, respondent would pay her one week, but not the next, because there was no money in the business account.

Both Maurer and respondent maintained separate receipt books and both provided clients with written receipts, when they paid for services, depending on who received the payment. Frequently, clients would pay respondent directly. At times, respondent would give the clients receipts on the back of a business card. When clients told Maurer that they had already paid respondent, often she had no record of the payment.

Maurer described respondent's filing system as disorganized -- some files were kept alphabetically in filing cabinets, while other files were kept loose around the office, on the floor, on desks, on tables, "everywhere."

According to Maurer, respondent hardly ever paid the office bills. They were evicted for nonpayment of rent, the phones were

disconnected many times, the electricity was shut off, and she was always receiving telephone calls from people to whom he owed money. Respondent would not pay her salary, but would buy new suits and special-order shoes. He always drove new, expensive cars, including Cadillacs and a Jaguar. She did not know whether he purchased or leased the cars. She recalled that GMAC called him "over and over," because his payments were overdue. He filed for bankruptcy several times and his mortgage was the subject of foreclosure actions on several occasions. According to Maurer, respondent, nevertheless, took vacations to Bermuda, the Caribbean, Spain, China, Viet Nam, and, frequently, Florida. During his vacations, Maurer was left to deal with respondent's financial issues.

Respondent denied that his trips were all vacations. He claimed that his frequent trips to Florida were to visit his parents and that some of the other trips were to visit his daughter, while she studied abroad in China and Spain.

While respondent was in China, he was evicted from his office, but had lined up another office. Maurer packed up the office, rented a moving van, and got the new landlord to let her move in before the payment of a security deposit.

As to the flood in respondent's office, Maurer testified that it did not affect respondent's computer. He did not ask her

to make an inventory of the files that had been destroyed. He threw the files out before marking down which files had been affected.

In Maurer's opinion respondent was not very honest. She testified that he often lied to people. For example, when clients would request copies of their papers, respondent would misrepresent to them that he had dictated them and given them to Maurer to type; he would promise to pay people from large settlements but would not fulfill his promise; and he would promise to repay money that he owed, but would not do so.

As to the Josifoski matter, Maurer testified that she had not prepared its checks. She did not know why the funds had been paid from the Cheeques sub-account and did not know why Josifoski had been paid a year and a half after his case had been settled. Maurer did not know that respondent's clients Poggioli and Farrell had received loans from the Kosonen funds.

Maurer recalled that, in the mid-nineties, respondent owned cigar stores in Clark and Westfield. As a result, he was frequently out of the office. Often, she did not know where he was.

On his behalf, respondent offered several witnesses. Thomas Farrell testified that he had known respondent for approximately fifteen years and had met him when felony charges had been

lodged against Farrell's father. Respondent also represented Farrell in a criminal matter relating to a handgun. Their relationship was predominantly business-oriented.

Farrell asserted that he had paid Maurer to do work for him "on the side." However, he accused her of failing to properly credit payments he had made to respondent and testified that he had observed her signing respondent's name on checks that she had written.

Farrell admitted that he had never met Kosonen, but had spoken to her over the phone. He claimed that twice she had agreed to lend him money. Maurer had prepared the notes. Farrell had only unsigned versions of the notes, stating, "That's what I always do."[14] Farrell claimed that he did not have funds available to repay Kosonen when the loan became due and that he had to sell an investment to pay for it.

Farrell explained that he could not be found by the prosecutor's office or the OAE because, for a period of time, he was "unsettled" - he lived in California, Florida, New Jersey, and spent some time in Las Vegas. The only person who knew his whereabouts was his brother. He had been out of contact with

[14] The documents were not provided to the OAE prior to the hearing, but were offered as evidence during the sixth hearing date, December 5, 2007; the first hearing date was August 8, 2007.

respondent for years. Farrell had not known that Gagliardi had been to his mother's house looking for him, nor did he receive any communications from the OAE.

According to Farrell, he did not know that he had documents in his possession relating to his transaction with Kosonen until the Saturday before the ethics hearing. He presented them to respondent at the hearing.

Farrell claimed that, when respondent became sick, in the summer of 2003, Farrell noticed that Maurer would go to the office only once a week. He would go to respondent's office every day and sit in a parking lot until he spotted her. When he got into respondent's office, he observed piles of mail, which Maurer would just flip through. Afterwards, they would walk out together. He never observed her doing any legal work. He claimed that Maurer avoided him. If she saw him, she would drive away because, he concluded, she did not want him observing her getting paid for not performing any work, that is, a paid vacation.

Cheryl Kress, respondent's wife and a business teacher employed by the Kenilworth School District, testified at the ethics hearing. She stated that she never performed bookkeeping services or accounting for respondent, nor did she do any

banking for him. She worked for her husband when Maurer went on vacation.

Cheryl testified that respondent became annoyed with Maurer in the later years because she would not follow through with "things," would not do the correspondence, or would be late with the filing. When respondent expressed his desire to fire Maurer, Cheryl talked him out of it because it was difficult to find a good legal secretary.

Robert Kastner has known respondent for approximately forty years. He was acquainted with respondent's father and thought of respondent as "not a son, but a younger person that I can relate to when I'm with my family . . . and I admired [him]." Kastner is a retired business education teacher.

Based on his observations of Maurer, Kastner advised respondent to fire her. He thought that respondent gave Maurer too much control of the office and that she was not a conscientious employee.

Steven Poggioli knew respondent for over twenty years. They first met when respondent was the Clark prosecutor and Poggioli had been arrested on a shoplifting charge. Respondent represented him in some criminal matters. He worked on respondent's house as payment for respondent's representation.

Previously, Poggioli had been convicted of narcotics offenses and, at some point, entered a guilty plea to Medicare fraud.

Poggioli accused Maurer of giving him false information about his criminal matters and asserted that she did not follow through with work that respondent had assigned to her. He also accused Maurer of taking cash payments from him, not giving him a receipt, and improperly disposing of the cash.

Poggioli claimed that the woman with whom he lived filed, on his behalf, a claim against respondent with the New Jersey Lawyers' Fund for Client Protection ("CPF") for $170,000. He denied that he personally filed that claim.[15]

Donny Turner, a client, retained respondent in 2003 to file a bankruptcy petition. He accused Maurer of taking his fee and photocopying the cash ($1,000) as his receipt.

Turner admitted that he filed an ethics grievance against respondent, but stated that he later withdrew it. The grievance accused respondent, not Maurer, of taking his money. Maurer, however, claimed that the money was forwarded to the bankruptcy trustee.

Timothy Dey was an attorney who had an office in the same building as respondent. Because he was also a college professor,

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[15] The CPF report does not list this claim.

he was not always in his office. Dey recalled that, in 2003, after respondent had surgery, he saw Maurer at respondent's office "no less than three, no more than five or six" times, but did not speak to her much and did not know what she was doing there. She was in and out of respondent's office "in a flash".

During the summer of 2003, Timothy's wife, Barbara Dey, was at her husband's office daily. After respondent's hospitalization, Barbara saw Maurer at respondent's office for about one week. Afterwards, she never saw her again. Barbara did not know what Maurer was doing there, but "saw her with the checkbook writing out a check on a couple of times".

For his part, respondent stated that he had known Maurer since high school. For the first few years of her employment, "he could not have been more satisfied" with her work. Everything was done properly and on time. They had a good relationship. After he moved his office, he began seeing a decline in her work performance. In addition, she did not treat his female clients very nicely; they complained that Maurer was rude to them.

Respondent claimed that, in the early to mid-1990s, Maurer became quite adept with the Quicken bookkeeping system. She was the only one who prepared the checks because, initially, he was

not computer-proficient. He claimed that she did the account reconciliations and bookkeeping "at all times."

Respondent blamed his inability to locate files sought by both the OAE and the prosecutor's office on their destruction caused by the flood in his office. Therefore, he was able to compile for the investigation only those documents maintained on his word processor. When the OAE requested all of respondent's trust and business records from January 1, 1997 through "the current month," Maurer compiled that information.

Respondent recalled that Farrell must have gotten the first Kosonen loan; he did not know whether there were two $30,000 checks written on the Kosonen sub-account, and accused Maurer of making errors on the account. According to respondent, Maurer did all of the banking. He claimed that he was not aware that funds had been taken from his trust account and placed into his business account from 1996 to 1998.

In "1997, 1998," respondent had opened two cigar stores, one of which was to be managed by his brother. His brother quit, however, leaving him to manage the cigar stores and his law practice. Because of his absence from his practice, Maurer had complete control of the office, his bookkeeping, all of his records and all of his accounts. At the time, he had no reason to distrust her. In the late 1990s, however, his clients began

complaining; when he asked them for payments, they claimed that they had already made cash payments to Maurer. Respondent began to suspect that Maurer was not depositing the payments into his business account. Therefore, around 1999, he advised his clients to make cash payments to him directly, rather than to Maurer.

Respondent testified that, in the following years, it became apparent to him that Maurer was not attending to her duties, was lying to clients about his whereabouts, and was lying about the status of work done on their files.

Respondent accused Maurer of other acts of dishonesty, such as collecting unemployment while taking two paychecks for herself, in July and September 2003, and forging his signature on them; significantly understating the amount of her wages for tax purposes; and making improper transfers from his trust account, without his knowledge or consent, because in the late 1990s she needed additional funds, while her children were in college. He added that Maurer had gone through great lengths to disguise her theft of his clients' funds and that he had done all that he could to protect his clients, but had fallen "victim to the foils of a dishonest employee." Other than his accusations, respondent offered no proof that Maurer had converted clients' funds for her own use.

Respondent offered his Commerce Bank business account statement from July 2003, with attached checks, to support his contention that Maurer had written checks to herself in July 2003.[16] He claimed that he was not in the office in July 2003; he was in Boston at the time, because of illness. He pointed to two checks made out to Maurer that, he maintained, he did not sign; one was presented for payment on July 22, 2003, the other on September 4, 2003. He noted that one check might have been a blank check that he had signed for Maurer's use, while he was out of the office, and added that he had difficulty distinguishing between his signature and Maurer's, whenever she signed his name. According to respondent, the checks established that Maurer was going to his office to take paychecks while she was collecting unemployment. Respondent also accused Maurer of taking money from his clients and depositing the funds into his business account to cover up her thefts of cash from his clients, who did not receive receipts. Respondent realized that he never had enough funds in his business account, but noted that no client funds were missing.

Respondent admitted knowing that he was the only person authorized to sign trust account checks and admitted telling the

[16] Respondent contended that he located the documents only the night before the hearing date.

OAE that he had signed all of his trust account checks. He stated that, when he made that statement, he thought it was true.

Respondent claimed that he did not need to use his trust account funds for his own personal finances because, during the years in question, he had several ongoing businesses.

As to the failure to cooperate charge, respondent contended that

> [a]t no time did I ever not provide documentation to the Office of Attorney Ethics that I was provided to or requested to provide to them within a reasonable amount of time. Anything that was in my possession, and there are a few times where I did make a mistake and thought I didn't have something that I did, was voluntarily turned over to them as soon as possible.
> . . . .
> I always cooperated.
>
> [7T101-21 to 7T102-13.][17]

During cross-examination, respondent conceded that he never provided the OAE with his Fleet Bank records, despite the OAE's many requests for them. Respondent also conceded that he failed to provide the OAE with a time line of the dissipation of Kosonen's funds. He claimed that he was unable to do the time line without his records. The OAE pointed out, however, that

[17] 7T refers to the transcript of the December 6, 2007 hearing before the special master.

respondent's records were maintained on the Quicken system. At the hearing, with the use of the exhibits, respondent was able to construct the following time line:

On July 13, 1998, respondent received Kosonen's funds ($87,644.61) from the Middlesex County Prosecutor's office. He took his fees, leaving a balance of $62,500 in Kosonen's sub-account until January 15, 1999. On February 4, 1999, the balance in the sub-account was reduced to $32,500, as the result of a check drawn on the sub-account for $30,000. The funds were used to obtain four bank checks payable to Manuzza, Hutton, Maguire, and Smith Cadillac. Respondent could not explain the purpose of those checks. The mortgage note for the Garthwaites for $32,000 was dated March 26, 1999. The March 31, 1999 statement for the Kosonen sub-account showed other disbursements of $1,235, $750, and $2,390. The April 1999 statement showed additional checks written on the sub-account, leaving a $974.75 balance in the Kosonen sub-account. Respondent added that, without having the Kosonen file, he could not construct an accurate time line of what happened to the Kosonen funds.

Respondent's explanation of the path of the $30,000 taken from the Kosonen sub-account was confusing and not supported by subpoenaed bank records. Respondent testified that the February

4, 1999 check[18] went to Farrell, but could not explain how two $30,000 checks could have come out of the Kosonen sub-account.[19] After respondent withdrew $30,000 for the bank checks, $32,500 remained in the Kosonen sub-account, not the $2,500 amount that would have remained had two $30,000 checks been written against the sub-account. Respondent eventually concluded that the other $30,000, presumably to Farrell, must have come out of another account. He first stated that, when the Garthwaites repaid the Kosonen loan, the funds were deposited into their sub-account, instead of Kosonen's, but later speculated that, when he received the funds back from the Garthwaites, he obtained a bank check, which he gave to Farrell. He added that the record of the transactions was in the Kosonen file, which he no longer had.

As to the Cates loan, respondent remarked that he never had a file for Cates because he never represented him; he only loaned him money. He kept that promissory note with all the other promissory notes in folders in the Kosonen file, all of which, he asserted, had been destroyed in the flood.

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[18] This was, presumably, the check that Kulinich had traced to the purchase of the four bank checks.

[19] As noted previously, the record establishes that respondent used $30,000 to purchase the four bank checks to Maguire, Hutton, Manuzza and Smith Cadillac. Respondent presented no evidence to support his contention that he had given a second $30,000 check for a loan to Farrell.

According to respondent, he received bank checks from the borrowers and then turned them over to others; therefore, he claimed, the funds did not necessarily go through his accounts. The prior lender would get a bank check payable to the next lender, if respondent so requested.

During cross-examination, respondent made a number of admissions and an assertion: he had been the subject of a foreclosure proceeding in July 1998, but claimed that it was "disputed" with the mortgage company; the New Jersey Division of Taxation's $40,000 tax lien against him was an error on the Division's part; in March 1998, he had a $28,000 judgment against him by another creditor, Pablo Guillen, and a $15,000 judgment against him by Goldstein Ballen, a law firm; in May 2001, there was a $59,000 judgment against him as a result of "another Federal action;" he leased a new Cadillac Seville in 2001; in 2002, there were a number of sheriff's sales scheduled on his house, which, he claimed, was the subject of litigation with the mortgage company; in September 2002, he purchased a new "$55,000 Silver Mercedes 320W"; approximately a month and a half later, he filed for chapter 7 bankruptcy.

According to the OAE, respondent submitted altered documents to cast suspicion of wrongdoing on Maurer. For instance, respondent offered his Commerce Bank business account

statement for July 2003, with attached copies of checks, to support his claim that Maurer wrote checks to herself in July 2003, while he was not in the office. He claimed that she, not he, had stolen trust monies. However, the OAE noted that the two checks payable to Maurer (nos. 49 and 51), unlike the other checks, were undated. The OAE then subpoenaed Commerce Bank records to determine whether they matched respondent's and discovered that checks nos. 49 and 51 were dated April 4, 2003 and April 18, 2003, respectively. The checks were presented for payment months later, a circumstance that, the OAE contended, supported Maurer's testimony that she did not present payroll checks when there was no money in the business account to cover the checks. The OAE's position was that respondent had removed the dates from his bank records to support his defense that Maurer was improperly taking checks and had presented the altered documents at the ethics hearing.

The OAE noted that the sequence of distributions from the Kosonen sub-account (set forth in detail, above) belied Farrell's testimony that he received a loan from Kosonen in January 1999. Instead, respondent's testimony and representations made prior to the hearing support the conclusion that the Garthwaite loan was the first loan made from the Kosonen funds.

The OAE highlighted respondent's financial problems during the relevant time period: the foreclosure of his residence in 1998; a 1998 $28,000 judgment; and a 1999 $40,000 tax lien. Yet, despite these financial problems, respondent purchased a $55,000 Mercedes and filed for chapter 7 bankruptcy about one month later; he was evicted from his office for non-payment of rent, his office telephones and electricity were turned off for non-payment, and Maurer's payroll checks bounced.

The OAE also underscored Maurer's obvious honesty and competency: she had been respondent's legal secretary for twenty years; she had corrected errors in the trust account when they had occurred; she had signed only one trust account check, when respondent had insisted that she do so; she had signed business account checks, but with respondent's approval; she would make copies of respondent's files, before giving them to clients; the misappropriated funds had not been used for her benefit, but had been deposited into respondent's business account to replace funds "stolen" by respondent, or used to pay his debts; Cheryl admitted that Maurer was a good legal secretary, whom respondent should not fire; and Maurer's payroll checks, written in April and May 2003, were not cashed until August and September 2003.

The OAE pointed out the inconsistencies in respondent's case. He accused the OAE of losing his copy of the Kosonen file,

but later stated that it was lost in his office's flood; he accused the OAE of having his cash receipts journal, but he later found it in his office; during the OAE audit, he admitted that he signed all of his trust account checks, but later accused Maurer of signing many of the checks; and he stated that Farrell had received the first loan from Kosonen's funds, but later testified that the Garthwaites had received the first loan.

The OAE took the position that respondent's witnesses were either not credible or had no relevant knowledge of the facts. For example, Poggioli was a convicted drug offender, had pled guilty to Medicare fraud, and his testimony was not consistent with a CPF claim that he had filed against respondent; Turner's testimony was not consistent with an earlier ethics grievance that he had filed against respondent; and Farrell also had run-ins with the law.

The OAE noted that respondent did not blame his long-time secretary for his trust account problems until the eleventh hour. He did not accuse her during the Union County Prosecutor's Office investigation, or during the OAE's five-year investigation, or in his answer to the March 24, 2006 ethics complaint. He could not show that Maurer had used any of the trust funds. Moreover, his records traced the misappropriated

funds into his business account, from which he withdrew funds for his and his wife's use.

Citing In re Iulo, 119 N.J. 498 (1989), the OAE contended that respondent had engaged in "lapping," that is, the use of one client's funds to cover another client's needs.

Respondent, in turn, maintained that the paramount issue in this matter was credibility, particularly his and Maurer's, but also that of the other OAE witnesses. He argued that the ethics proceedings against him had been precipitated by a convicted felon, Pelligrino, who had served a nine-year prison sentence for fraud and money laundering and who, therefore, was not a trustworthy witness. He also questioned the veracity of Kosonen's testimony.

The special master found that respondent treated his trust account as his private bank, "consisting of debts rather than as funds required to be held by him in trust." The special master determined that, in "a variety of instances, [respondent] 'kited' or 'lapped,' intermingled and disbursed such funds contrary to the purposes for which they were deposited with him."

As to the Kosonen matter, the special master found that, even though Kosonen admitted that she orally authorized respondent to invest her funds, she had no knowledge of the

nature of the investments that respondent made with her money. The special master found that, although Kosonen was vague about some of her recollections, her testimony was credible nonetheless. He found her testimony consistent with the statement that she had given to Detective Gagliardi in April 2002. The special master specifically found that respondent's testimony to the contrary was "unbelievable." He noted that respondent offered no credible evidence to explain the myriad of disbursements he made from the $87,664.61 that he deposited into his trust account on Kosonen's behalf.

The special master found that, in turn, the OAE's analysis of respondent's deposits and withdrawals from his trust accounts (Exhibit P321) was accurate. He also found that, based on the Garthwaites' testimony, the mortgage was forged and not recorded.

The special master found that respondent had not apprised Kosonen of "any of his machinations" and that his use of $2,500 of the funds to pay his personal obligation to Smith Cadillac was particularly egregious. The special master concluded that disbarment was required for respondent's conduct in the Kosonen matter alone.

As to the Margaret Hutton matter, the special master noted respondent's inability to provide any satisfactory explanation

for the improper disbursement of Hutton's funds. The special master remarked that respondent's use of the Kosonen funds to repay the missing Hutton funds did not excuse his misuse of the Hutton funds.

Here, too, the special master concluded that, under In re Wilson, 81 N.J. 451 (1979), respondent must be disbarred.

In the Marotolli matter, the special master found that, without Marotolli's knowledge or consent, respondent had written two checks against the Marotolli sub-account: one to Greenwood Meadows for $7,500 and the other to Goran Josifoski for $5,666.67. The special master summarized respondent's defense to those disbursements: "I knew [Marotolli] wouldn't mind, and in any event I was sick, and anyhow my secretary must have done it." The special master did not find any of respondent's defenses credible or convincing. He, therefore, found clear and convincing evidence of knowing misappropriation in this matter as well.

With respect to the Manuzza matter, the special master summarily determined that the allegations of the complaint were accurate and supported by clear and convincing evidence. The special master concluded that respondent treated Manuzza funds as "cavalierly" as he did the funds in the preceding counts,

that he disbursed the funds to unauthorized persons by "lapping" and that, under Wilson, he had to be disbarred.

The special master found that respondent's reasons for failing to cooperate with the OAE's investigation amounted to nothing more than excuses. The special master concluded from the evidence that, had respondent cooperated, his cooperation would have "quickly revealed his inexcusable violations of critical ethical requirements." Moreover, he found, respondent's delay in cooperating was a tactic to give him more time to avoid the inevitable determination that he must be disbarred. The special master stated that "[w]ere this his only ethical failing (presumably his failure to cooperate), I consider that a suspension of one year from the practice of law would be required."

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

Respondent's counsel argued before us that Maurer was untrustworthy and it was she who had stolen money from respondent's trust account and from his business account, while he was hospitalized in Boston. There was no competent evidence submitted to support this contention, however. Moreover, the OAE

submitted proof that the two business account checks to which counsel specifically referred were Maurer's payroll checks that she waited to negotiate until respondent had sufficient funds to cover them.

Counsel argued further that the OAE should have investigated respondent's accounts in greater detail, once it came to light that Maurer had made an error in respondent's accounts. However, Maurer readily admitted making that error when she wrote down an incorrect sub-account number. Once she realized her mistake, she immediately informed respondent and took the steps necessary to correct the error. Respondent did not dispute her testimony on this point.

Respondent's counsel also argued that, once Kosonen made a decision to loan funds or to allow respondent to invest her funds, they "no longer had the character of client trust funds. They were in the trust account, but they were no longer client trust funds." Counsel cites no precedent for this proposition. Kosonen's clear understanding was that respondent was going to invest her funds for a two-year period at a nine percent rate of return. Respondent had a duty to safeguard those funds notwithstanding their character. The record clearly and convincingly demonstrates that he failed to do so. He did not invest those funds but, instead, used them as his own personal

line of credit. Clearly, Kosonen never authorized respondent's personal use of those funds.

To bolster our conclusion, we find that respondent received the funds in July 1998. Although respondent promised to invest the funds, they remained intact in his trust account until February 4, 1999, when he took $30,000 to purchase the four bank checks to reimburse the Maguire, Manuzza and Hutton sub-accounts, and to pay Smith Cadillac. Respondent did not invest the funds as he had promised and he was unable to return the funds to Kosonen at the conclusion of the two-year investment period. Under the circumstances of this case, we find that respondent's failure to make bona fide investments on Kosonen's behalf and his use of the funds for his benefit constituted knowing misappropriation of her funds.

Counsel also disputed that respondent failed to cooperate with the OAE. Counsel claimed that respondent was unable to provide documentation that no longer existed. She noted that there had been a flood in respondent's office two years before the OAE requested information from him, that his computer crashed and he was unable to print out documentation, and that he was seriously ill with pancreatitis in 2002 and 2003. However, all of these purported events occurred long after the

Union County Prosecutor's Office attempted to obtain the very same documents from respondent.

Counsel's position was that the record supports only that respondent negligently misappropriated client funds, that he failed to supervise Maurer, and that his attorney records were deficient, for which he deserves no more than a short-term suspension. For the reasons expressed below, we disagree with respondent's counsel's position.

We find that the only issue for determination is whether respondent has a credible defense to the misappropriation charges, that is, that his secretary, not he, converted his clients' funds. For the following reasons, we conclude that the record clearly and convincingly supports a finding that respondent's testimony was incredible and fabricated.

First and foremost, we give great weight to the special master's finding that respondent's testimony was not worthy of belief. The special master was able to assess, first-hand, each witness's demeanor. It is well-settled that the trier of fact has the opportunity to observe the witnesses and, therefore, has a better perspective from which to evaluate their veracity (citation omitted). In the Matter of Randolph Kraft, DRB 04-436 (September 14, 2005) (slip op. at 84-85).

Next, and equally significant, is that the witnesses who challenged Maurer's testimony and good character were respondent's long-time associates, most of whom were convicted felons: Farrell, who incredibly claimed that he sat in a parking lot every day and, in essence, stalked Maurer for no stated purpose (recall that, during this time, respondent did not suspect Maurer of any wrongdoing), Poggioli, and Turner, both of whom claimed that Maurer had taken their money without properly accounting for it. Nothing in the record substantiates their testimony. Moreover, even if that were the case, respondent failed to establish a nexus between those allegedly missing funds and the funds that were taken from his clients' accounts.

Respondent also provided the testimony of Robert Kastner, a man whom he had known for forty years and who stopped just short of stating that he thought of respondent as a son. Kastner claimed that he had recommended that respondent fire Maurer because she had too much control of his office and because of her less than conscientious performance. Kastner did not testify, however, that Maurer was dishonest or a thief. In fact, respondent's own wife, Cheryl, disagreed with Kastner's advice, reminding respondent that good secretaries are hard to find.

Respondent also offered the testimony of the Deys, who provided no relevant information about the missing funds or

Maurer's character, but merely that they saw Maurer in respondent's office only briefly in 2003, after respondent had taken ill. Respondent misrepresented Mrs. Dey's testimony in his proposed findings of facts, claiming that Mrs. Dey had observed Maurer "taking checks." In fact, her testimony was simply that she observed Maurer "writing" checks.

In addition to deferring to the special master's credibility findings, we make our own independent findings on credibility by considering, among other things:

1) respondent's past instances of dishonesty, as seen in his 1993 three-month suspension, when, as a prosecutor, he withheld critical information from a municipal court judge to accomplish the dismissal of a case; his one-year suspension for, among other things, making untruthful statements to his adversary and a bankruptcy trustee's attorneys and attempting to create a sham transaction to deceive a third party; and his 2006 six-month suspension for, among other things, permitting his bankruptcy client to pay his fee by charging a cruise on the client's credit card, knowing that the client could not pay the bill;

2) his attempt, at the ethics hearing, to submit a purported authorization for the use of Manuzza's trust funds, even though he had admitted, in his answer to the ethics

complaint, that he did not have Manuzza's authorization to use her funds;

3) the fact that nothing in the record casts any doubt on any aspect of Kosonen's testimony, lending substantial weight to the special master's specific finding that Kosonen was a credible witness;

4) the existence of the $62,500 forged mortgage between Kosonen and the Garthwaites; although respondent accused Pelligrino of altering the $32,000 mortgage, there was simply no logical reason for him to have done so; he did not need it to "shake down" respondent for money; the more logical inference is that respondent created the document to explain the missing funds from Kosonen's account - $30,000 for the bank checks and the $32,000 loan to the Garthwaites;

5) respondent's inconsistent testimony: initially, he stated that the first $30,000 taken from the Kosonen funds was a loan to Farrell; in fact, the first loan was to the Garthwaites; respondent later admitted using the $30,000 to obtain bank checks because, he claimed, in the past he had problems with the bank; prior to the hearing, he never accused Maurer of taking the $30,000 to get bank checks for her own purposes;

6) respondent's admissions to Gagliardi that he had done nothing wrong criminally, but that he knew that he had acted unethically;

7) respondent's lie to the OAE about having turned over records to the prosecutor's office and lie to the prosecutor about the documents that he had turned over to Gagliardi; up until that point, Gagliardi believed that respondent had been sincere during his investigation and had felt some "bias" in respondent's favor because he had known him for so long;

8) Gagliardi's finding of no evidence of water damage at respondent's office, as well as respondent's no claim of water damage during Gagliardi's initial investigation, in early 2002; at that time, the files were, presumably, still intact; yet, respondent did not turn them over;

9) respondent's accusation that Kosonen "conveniently" did not have a copy of her signed retainer agreement, when, as Maurer and other clients testified, respondent did not use retainer agreements;

10) respondent's motive to use his clients' funds: his lavish and expensive lifestyle and his serious financial problems, as reflected by the judgments and tax lien against him, foreclosure proceedings on his house, and ultimate filing for bankruptcy; although respondent initially denied that he was

suffering from financial difficulties, he later admitted his specific financial problems at the time that he was purportedly investing Kosonen's funds;

11) respondent's submission of altered bank documents to make it appear that Maurer was improperly writing checks to herself;

12) respondent's eleventh hour assertion that someone had opened up an account in his name; yet, he provided no evidence of that alleged impropriety;

13) respondent's giving unfettered access to Maurer of his books and records, in the face of alleged complaints by his clients that she was keeping their fee payments for herself; and

14) respondent's testimony that Farrell received loans in the amount of $20,000 to $40,000; Farrell gave respondent a $78,000 check, which respondent used to reimburse Kosnonen.

Respondent's brief to us contained additional misstatements that further support the conclusion that his testimony was not credible. They are, among others:

1) that the OAE lost information that he provided to that office (referring to Exhibit P199); this document is a transmittal letter to a district ethics committee, specifying the documents being forwarded to it by the OAE;

2) that Kosonen made frequent visits to his office, as documented by copies of pages from his appointment calendar; the calendar, however, did not show the number of appointments that respondent had cancelled; moreover, respondent admitted to Gagliardi that he had met with Kosonen only once; and

3) that Manuzza provided him with a general authorization to use trust funds, a contention that she denied.

We have also considered that, although respondent had initially informed Kosonen that she would receive her funds back at the expiration of a two-year period (earlier, if she needed the funds), it took her nearly four years to obtain her funds, after their release from the Prosecutor's Office. Like respondent's other clients, Kosonen had to pursue the return of those funds. Respondent, nevertheless, accused his clients of not "picking up" their funds earlier.

In sum, respondent's allegation that it was Maurer who was in need of funds and that it was she who had stolen his clients' funds is simply not supported by the record. To the contrary, it was respondent who needed the bank checks to replenish other clients' funds that he had misused and to make the down payment on his Cadillac. Simply put, respondent "robbed Peter to pay Paul," that is, he engaged in the lapping of client funds. His failure to provide retainer agreements, bills or itemized

statements to his clients made it easy for him to use their money for his own purposes.

Respondent hypothesized that, if the OAE had performed a full account analysis to determine whether his trust account was out of trust as a whole at any point, the analysis might have shown that no client funds were actually invaded. We find this argument unpersuasive. Notwithstanding respondent's best efforts to prevent the OAE from obtaining his records, based on its analysis of subpoenaed records and other documents the OAE's analysis supports the fact that respondent's clients had to wait to receive their funds; their funds were not available on time. For example, the OAE's investigation and analysis established that Hutton's sub-account was fully depleted in January 1999 and that respondent used Kosonen's funds to replenish funds missing from other client sub-accounts.

As indicated previously, respondent also argued before us that he is guilty only of recordkeeping violations, failure to properly supervise Maurer and, at most, negligent misappropriation. We reject respondent's arguments. We find that respondents' failure to keep proper records, failure to provide his clients with retainer agreements, and failure to supply them with their files prevented them from determining the true amounts to which they were entitled at the conclusion of their

cases and, therefore, facilitated respondent's misuse of their funds.

We find that all of the foregoing clearly and convincingly demonstrates that respondent knew that he was misusing his clients' funds.

One last point needs mention. Although Kosonen gave respondent permission to invest her funds for profit, she did not authorize him to use her funds to reimburse other clients (Maguire, Hutton, and Manuzza) or for his own benefit (the Smith Cadillac payment). While the loan to Garthwaite might arguably have been a legitimate use of Kosonen's funds, respondent's other disbursements from her account were accomplished without her knowledge or consent.

To summarize respondent's knowing misappropriation of clients funds: he used Kosonen's funds to replenish the sub-accounts of clients Paul Maguire, Margaret Hutton, and Agnes Manuzza and to pay Smith Cadillac for a down payment on his car. Hutton's funds were used to replenish respondent's overdrawn business account. Marotolli's funds were used for Linda Carracino's benefit for a payment to Greenwood Meadows and to fund the Josifoskis' personal injury settlement. Manuzzas' funds were used to replenish Marotolli's sub-account.

In short, the clear and convincing evidence in the record supports the conclusion that respondent was guilty of numerous instances of misrepresentation, fabrication of documents, failure to cooperate with the OAE investigation, and knowing misappropriation of client and escrow funds. Under In re Wilson, supra, 81 N.J. 451 (1979), In re Hollendonner, supra, 102 N.J. 21 (1985), and their progeny, he must be disbarred. We so recommend to the Court.

Members Boylan, Baugh, Clark, and Lolla did not participate.

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

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Richard H. Kress
Docket No. DRB 08-238

Argued: January 15, 2009

Decided: April 21, 2009

Disposition: Disbar

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

Julianne K. DeCore
Chief Counsel