SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-249
District Docket No. XIV-2011-0567E

IN THE MATTER OF	:	
DAVID ELDON FRETZ	:	Decision
AN ATTORNEY AT LAW	:	

Argued: November 20, 2014

Decided: March 13, 2015

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite proper notice.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-14(a)(4), based on respondent's three-year suspension in New York for a combination of ethics infractions, primary among them the misappropriation and conversion of more than $36,000 in client funds held in his attorney trust account.

The OAE recommends disbarment. Given that respondent's license to practice law in New Jersey has been revoked, we

determine that, if he ever applies for admission to the New Jersey bar, his readmission shall be withheld for one year and that he should not appear pro hac vice in New Jersey until further order of the Court.

Respondent was admitted to the New York bar in 1989 and to the New Jersey bar in 1992. He has no prior discipline. On September 24, 2007, however, his license to practice law in New Jersey was revoked for failure to pay the New Jersey Lawyers' Fund for Client Protection annual attorney assessment for seven years. His license remains revoked.

On January 6, 2010, the New York Grievance Committee for the Eighth Judicial District filed a petition containing six separate charges of ethics infractions. Respondent admitted many factual allegations in his answer to the petition.

On November 1, 2010, the parties executed a stipulation of facts that resolved the factual allegations of the petition. Respondent did not admit the ethics charges against him, however. Nevertheless, the hearing before the referee was limited to mitigation.

The facts, which are contained in the August 2, 2011 Referee's Report, are as follows:

THE FIRST CHARGE

On December 31, 2001, Thomas and Amy McCabe entered into two separate installment land purchase contracts, which totaled $65,000, with Dona and Kenneth Reiss. The contracts involved a parcel of land and house at 7803 Searles Road, in Friendship Township, Allegany County, New York. The contracts called for a $5,000 deposit ($2,500 for each contract), with the remaining $30,000 (for each contract) due in monthly installments over thirty years, with interest.

The McCabes moved into the Searles Road property and purchased homeowner's insurance from Erie Insurance Company ("Erie"). The policy listed them as the insureds and the Reisses as mortgagees. The policy required that any lawsuit by the insureds be brought within two years after a loss to the property and that, in the event a claim was made, the McCabes submit to an examination under oath.

On December 30, 2003, the Searles Road house burned to the ground. The McCabes reported the loss to Erie. In early 2004, Erie appraised the value of the damaged dwelling at $63,000, with a replacement cost of $210,077; the contents were valued at a replacement cost of $138,082; and the land was valued at $10,000.

Erie retained attorney R. Anthony Rupp to conduct examinations of the McCabes. On May 19, 2004, Rupp conducted a partial examination of Thomas McCabe, in the presence of Sunil Bakshi, the McCabes' attorney at that time. After Bakshi withdrew from the representation, the McCabes retained respondent.

In July 2004, Erie paid the Reisses (the mortgagees) the proceeds of the dwelling coverage, totaling $53,000.

On July 8, 2004, respondent sent Rupp a letter indicating that he was representing the McCabes and requesting that he schedule the McCabes' depositions.

From September through December 2004, Rupp sent respondent three letters about scheduling the depositions and called respondent at his office. Respondent did not reply to the letters. No one answered the telephone at his office. As a result, the McCabes' depositions were never taken.

Thomas McCabe, too, called respondent on various occasions about the matter. Respondent told McCabe that either Erie or its counsel was "stalling." In November 2004, respondent informed McCabe that the depositions would take place that month.

Although respondent had not yet filed suit against Erie, in the summer of 2005 he told Thomas McCabe that he had done so and that he was "waiting to hear from the Judge."

On December 30, 2005, the last day before the statute of limitations expired, respondent filed a complaint against Erie for breach of contract. The complaint sought damages of $164,000, plus interest and punitive damages.

On February 27, 2006, Rupp's office filed a motion to dismiss the complaint under New York's CPLR §3211(a), in lieu of filing an answer. The motion asserted that (1) respondent had failed to reply to Erie's attempts to schedule the McCabes' depositions; (2) the McCabes had failed to submit to depositions, as required by the homeowner's policy; and (3) the McCabes could not sue Erie, given their failure to comply with the terms of the policy. Respondent did not reply to the motion.

On April 26, 2006, Marco Cercone, an associate in Rupp's office, appeared at oral argument before Acting Supreme Court Justice Thomas P. Brown. Respondent failed to appear at oral argument or to communicate with the court. On May 11, 2006, Judge Brown signed an order dismissing the complaint. On May 17, 2006, Cercone mailed the order to respondent.

Respondent did not inform the McCabes that a motion to dismiss had been filed and that their complaint had been dismissed.

Also in May 2006, Thomas McCabe contacted his insurance agency, Seaway Insurance, and learned, for the first time, that their lawsuit against Erie was "closed." He immediately called respondent, who denied that the case was closed.

On September 22, 2006, at the McCabes' request, attorney John J. Fromen, Jr., attempted to contact respondent about the status of the matter. Fromen called respondent and sent him a letter requesting that respondent contact him. Respondent did not do so.

In January 2007, the McCabes sent respondent a certified letter, which he received, requesting him to contact them immediately about the status of their case. Respondent did not reply to that request for information.

Meanwhile, in a separate action, the Reisses filed a petition, on February 7, 2006, seeking possession of the Searles Road property and a judgment in the amount of $11,415. The McCabes retained respondent to represent them in this matter as well. At the hearing, Judge Dawn A. Young granted respondent's oral adjournment request to April 11, 2006. On the adjourned date, shortly before the case was to be heard, respondent faxed

a new adjournment request to Judge Young, which was denied. The judge reserved decision on the petition.

Respondent took no further action on the McCabes' behalf and did not communicate with them, the court, and the Reisses about the proceeding.

On May 23, 2006, Judge Young awarded the Reisses possession of the property and a money judgment in the amount of $11,415, with interest.

In March 2007, the McCabes retained new counsel, Rodger P. Doyle, who filed a malpractice complaint against respondent in the Supreme Court, Erie County, alleging (1) negligence in his handling of the McCabes' fire insurance claim and the civil action against Erie; (2) breach of his agreement to defend the McCabes in the eviction action; and (3) intentional deceit and misrepresentation to the McCabes for telling them that their claims against Erie and related civil actions were proceeding properly. The complaint also requested treble damages, pursuant to New York law.

On April 28, 2007, respondent was personally served with the complaint. On May 23, 2007, because respondent failed to submit an answer, Doyle filed an order to show cause for respondent to disclose information about his legal malpractice

insurance. Respondent neither replied to the order to show cause nor appeared at a June 11, 2007 hearing. On the return date, the judge signed an order directing respondent to furnish the requested information within ten days. Respondent, through a relative, did so. On July 17, 2007, Travelers Indemnity Companies/St. Paul Fire and Marine Insurance Company ("Travelers") sent a letter to respondent and Doyle denying coverage for the McCabes' malpractice claim, on the basis that Travelers had never been notified of the claim, during the policy period or within sixty days after its expiration.

On October 11, 2007, Doyle filed a motion seeking a default judgment in the malpractice action, as a result of respondent's failure to answer the complaint. Respondent failed to appear at oral argument, on November 16, 2007. Therefore, on December 3, 2007, the court entered a default judgment in favor of the McCabes.

On December 20, 2007, a damages hearing was held. Respondent failed to attend. The court awarded the McCabes $226,000 in compensatory damages, which the court trebled, pursuant to New York law. The court entered a judgment against respondent for $678,000, plus interest. On January 4, 2008, the judgment, which had swelled to $700,180, was recorded in the Erie County Clerk's Office.

After the entry of the default judgment, attorney Joseph J. Manna took over the case for the McCabes. On January 28, 2008, Manna sent respondent a copy of the judgment and requested that respondent contact him about scheduling a judgment-debtor deposition. Respondent did not reply. Therefore, on February 4, 2008, respondent was served with a subpoena to compel his deposition, scheduled for February 18, 2008. Without notifying Manna beforehand, respondent failed to appear.

On March 13, 2008, Manna obtained an order to show cause as to why respondent should not be held in contempt for his failure to obey the subpoena for his deposition. Respondent did not reply to the order to show cause, did not appear on the March 28, 2008 return date, as directed, and did not otherwise communicate with Manna or the court about it. Therefore, the court entered a March 28, 2008 contempt order against respondent, followed by an April 8, 2008 final order for his (1) violation of the January 28, 2008 restraining notice; (2) failure to appear for the post-judgment deposition; and (3) failure to appear before the court on the return date of the order to show cause. Respondent was properly served with the contempt order. Ultimately, his wages were the subject of an execution.

Based on the above facts, the referee found that respondent

> i) By virtue of a finding of deceit pursuant to Judiciary Law §487, has engaged in illegal conduct that adversely reflects on his honesty, trustworthiness and fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(3) (former 22 NYCRR §1200.3[A][3]);
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> ii) Engaged in conduct involving dishonesty, deceit and misrepresentation, in violation of former Disciplinary Rule 1-102(A)(4)(former 22 NYCRR §1200.3[A][4]);
> iii) Engaged in conduct that is prejudicial to the administration of justice, in violation of former Disciplinary Rule 1-102(A)(5)(former 22 NYCRR §1200.3[A][5]);
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> iv) Engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7)(former 22 NYCRR §1200.3[A][7]);
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> . . . .
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> vii) Neglected legal matters entrusted to him, in violation of former Disciplinary Rule 6-101(A)(3) (former 22 NYCRR §1200.30[A][3]);
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> viii) Failed to seek the lawful objectives of his clients through reasonably available means permitted by law and the disciplinary rules, in violation of former Disciplinary Rule 7-101 (A)(1)(former 22 NYCRR §1200.32[A][1]);
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> ix) Failed to carry out contracts of employment entered into with his clients for professional services, in violation of former Disciplinary Rule 7-101 (A)(2) (former 22 NYCRR §1200.32[A][2]);
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> x) Prejudiced and damaged his clients during the course of the professional relationship,

in violation of former Disciplinary Rule 7-101(A)(3) (former 22 NYCRR §1200.32[A][3]); and

xi) Disregarded the rulings of a tribunal made in the course of a proceeding, in violation of former Disciplinary Rule 7-106(A) (former 22 NYCRR §1200.37[A]).

[OAEbEx.E¶48.][1,2]

THE SECOND CHARGE

From January through April 2006, respondent handled four real estate transactions in which the clients paid him for title insurance premiums and recording fees. In the Eva, Marguccio, and two Sabuda matters, respondent failed to turn over the funds to either Real Title Agency Services, Inc., or Monroe Title Insurance Corporation. Respondent also failed to send to the clerk's office funds that he had collected for recordation fees. As a result of respondent's inaction, title insurance policies were not issued. Respondent also failed to record the documents related to the Eva matter. Respondent took no further action on

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[1] Paragraphs v and vi were withdrawn.

[2] "OAEb" refers to the OAE's brief in support of its motion for reciprocal discipline.

behalf of these four clients, such as finalizing the outstanding title insurance and recording issues.

In the months following the closings, title company representatives and client Sabuda contacted respondent about his obligation to pay the title insurance premiums, so that title insurance could be issued. Respondent did not comply with their requests.

In October 2007, respondent retained an attorney, Vincent E. Doyle, regarding the ethics investigation into the within matters. Doyle, in turn, retained a real estate attorney to complete the post-closing tasks in the four real estate transactions, after which title insurance policies were issued.

In all four transactions respondent received from the lender sufficient funds to pay the post-closing title and recording obligations ($3,215 in all).

Respondent's trust account was closed on April 19, 2007, with a zero balance. He had not maintained the $3,215 in escrow funds inviolate in the trust account, pending payment of the title insurance premiums and recording fees. Rather, he had used the funds for purposes unrelated to the client matters.

The funds that respondent's attorney ultimately used to pay the title company and recording obligations were respondent's personal funds.

Based on the foregoing, the referee found that respondent:

> i) Engaged in conduct involving dishonesty, in violation of former Disciplinary Rule 1-102(A)(4) (former 22 NYCRR §1200.3[A][4]);
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> ii) Engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7) (former 22 NYCRR §1200.3[A][7]);
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> . . . .
>
> iv) Neglected legal matters entrusted to him, in violation of former Disciplinary Rule 6-101(A)(3) (former 22 NYCRR §1200.30[A][3]);
>
> v) Failed to seek the lawful objectives of his clients through reasonably available means permitted by law and the disciplinary rules, in violation of former Disciplinary Rule 7-101(A)(1) (former 22 NYCRR §1200.32[A][1]);
>
> vi) Failed to carry out contracts of employment entered into with his clients for professional services, in violation of former Disciplinary Rule 7-101(A)(2)(former 22 NYCRR §1200.32[A] [2]);
>
> vii) Prejudiced and damaged his clients during the course of the professional relationship, in violation of former Disciplinary Rule 7-101(A)(3) (former 22 NYCRR §1200.32[A][3]);
>
> viii) Misappropriated funds in his possession received incident to his practice of law belonging to other persons, in

violation of former Disciplinary Rule 9-102(A) (former 22 NYCRR §1200.46[A]);

ix) Failed to maintain and preserve in an attorney trust account funds in his possession received incident to his practice of law belonging to other persons, in violation of former Disciplinary Rule 9-10203)(1) (former 22 NYCRR §1200.46[B][1]); and

x) Failed to promptly pay or deliver to the client or third person as requested by the client or third person, the funds in his possession which the client or third person is entitled to receive,
in violation of former Disciplinary Rule 9-102(C)(4) (former 22 NYCRR §1200.46[C][4]).

[OAEbEx.E¶59.][3]

THE THIRD CHARGE

In May 2006, Katherine E. Scarborough retained respondent to represent her in the purchase of property located at 104 Heather Road, Cheektowaga, New York. Respondent attended the June 22, 2006 closing. In October 2006, the title company sent respondent the abstract of title for the property, which he failed to put in a safe place or to forward to Scarborough.

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[3] Paragraph iii was withdrawn.

Following the closing, Scarborough called respondent to obtain the abstract, but respondent failed to reply to her messages. When Scarborough personally visited respondent's office to obtain the abstract, she found that he had closed his office, without leaving a forwarding address.

In July 2008, Scarborough sought to sell the Heather Road property, for which she needed the original abstract. Respondent admitted having lost the abstract. His ethics counsel then arranged to have the abstract re-certified.

The referee found that respondent:

> i) Engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7) (former 22 NYCRR §1200.3[A][7]);
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> . . . .
>
> iii) Neglected a legal matter entrusted to him, in violation of former Disciplinary Rule 6-101(A)(3) (former 22 NYCRR §1200.30[A][3]);
>
> iv) Failed to carry out a contract of employment entered into with his client for professional services, in violation of former Disciplinary Rule 7-101 (A)(2) (former 22 NYCRR §1200.32[A][2]);
>
> v) Prejudiced or damaged his client during the course of the professional relationship, in violation of former Disciplinary Rule 7-101(A)(3) (former 22 NYCRR §1200.32[A][3]);
>
> vi) Failed to promptly notify the client of the receipt of property in which the client

had an interest, in violation of former Disciplinary Rule 9-102(C)(1)(former 22 NYCRR §1200.46[C] [1]);

vii) Failed to place the property of a client in a safe deposit box or other place of safekeeping as soon as practicable upon receipt, in violation of former Disciplinary Rule 9-102(C)(2)(former 22 NYCRR §1200.46[C][2]);

viii) Failed to maintain complete records of the property of a client coming into his possession and failed to render appropriate accounts to the client regarding this property, in violation of former Disciplinary Rule 9-102(C)(3)(former 22 NYCRR §1200.46[C][3]); and

ix) Failed to deliver to the client as requested by the client property in Respondent's possession which the client is entitled to receive, in violation of former Disciplinary Rule 9-102(C)(4) (former 22 NYCRR §1200.46[C] [4]).

[OAEbEx.E¶68.][4]

THE FOURTH CHARGE

In July 2005, Francis J. Fonti, Jr., retained respondent to dissolve a New York corporation, Vintage Lodi, Inc., for which he paid him $500. Respondent took no action to complete the matter.

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[4] Paragraph ii was withdrawn.

For two years, from July 2005 through June 2007, Fonti made numerous telephone calls to respondent about the matter, reaching him only twice. In January 2006, respondent falsely informed Fonti that the matter was proceeding apace. In February 2007, he told Fonti that he had not completed the dissolution and would promptly refund his $500. Due to respondent's inaction, Fonti paid an extra $1,300 in additional New York State taxes and accountant's fees.

Respondent returned the $500 fee to Fonti in August 2008, more than three years after his retention.

The referee found that respondent:

> i) Engaged in conduct involving dishonesty, deceit and misrepresentation, in violation of former Disciplinary Rule 1-102(A)(4)(former 22 NYCRR §1200.3[A][4]);
>
> ii) Engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7)(former 22 NYCRR §1200.3[A][7]);
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> . . . .
>
> iv) Failed to refund promptly a legal fee paid in advance that has not been earned, in violation of former Disciplinary Rule 2-110(A)(3)(former 22 NYCRR §1200.15[A][3]);
> v) Neglected a legal matter entrusted to him, in violation of former Disciplinary Rule 6-101(A)(3) (former 22 NYCRR §1200.30[A][3]);

vi) Failed to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules, in violation of former Disciplinary Rule 7-101 (A)(1)(former 22 NYCRR §1200.32[A][1]);

vii) Failed to carry out a contract of employment entered into with his client for professional services, in violation of former Disciplinary Rule 7-101(A)(2)(former 22 NYCRR §1200.32[A][2]); and

viii) Prejudiced or damaged his client during the course of the professional relationship, in violation of former Disciplinary Rule 7-101 (A)(3) (former 22 NYCRR §1200.32[A][3]).

[OAEbEx.E¶75.][5]

THE FIFTH CHARGE

From August 2005 through April 2007, respondent used his trust account primarily for real estate transactions, representing both lenders and purchasers.

On August 17 and 31, 2005, respondent issued two checks from the trust account, for $8,505.20 and $300, respectively, made payable to "cash."

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[5] Paragraph iii was withdrawn.

On three occasions, from August 9, 2005 to August 9, 2006, respondent wrote checks out of the trust account for the payment of personal and office expenses, including office rent. None of the payments related to client matters.

From September 15, 2005 through September 6, 2006, respondent wrote eighteen trust account checks, made payable to himself, primarily in even-numbered amounts. Those checks were not associated with any particular client transactions and were not for the payment of legal fees. The checks totaled $33,499.

On July 14 and August 3, 2006, respondent withdrew cash from the trust account in the amount of $1,000 and $1,500, respectively. Those withdrawals were not associated with any particular client transactions and were not for the payment of legal fees.

The eighteen checks and two cash withdrawals were drawn on client funds on deposit in the trust account. Respondent used the funds for purposes unrelated to those client matters.

From May 30, 2006 to April 12, 2007, respondent's trust account had a negative balance on seven occasions.

On September 11, 2006, the trust account had a negative balance of -$929.68. On September 21, 2006, the balance dipped to -$4,654. Specifically, there were insufficient funds in the

trust account on those dates to satisfy obligations regarding the sale of a property at 1083 Tonawanda Street, Buffalo (the Tonawanda Street transaction).

On September 12, 2006, respondent deposited $12,000 of his own funds into the trust account. On September 22, 2006, he deposited an additional $6,000 of his own funds. The $18,000 infusion enabled him to pay the water bill and property taxes on the Tonawanda Street transaction, which totaled $16,746.

At the hearing before the referee, respondent's counsel, Joel L. Daniels, asked respondent about those deposits. Respondent explained that he believed that the deposits represented an advance to the client.

As a result of respondent's failure to maintain in trust the client funds associated with the Tonawanda Street transaction, he had to use personal funds to satisfy the remaining obligations for that client matter.

Moreover, from November 29, 2005 to January 31, 2007, respondent deposited a total of $22,683 of personal funds into the trust account, on about seventeen occasions: $18,000, as described above, plus $4,683 in earned legal fees, earned title agent fees, and personal funds. The $4,683 was deposited when

funds for various clients were "on deposit in the trust account."

In March 2007, respondent issued three checks from his trust account, all payable to Monroe Title Insurance Corp., in the amounts of $1,081, $1,657, and $473. The checks were returned for insufficient funds, because the balance in the trust account was $.01. The checks, which totaled $3,211, represented title insurance premiums for various real estate transactions.

Additionally, from August 2005 until the trust account was closed, in April 2007, respondent did not keep complete or accurate records of every transaction in the trust account, contemporaneously with the transactions. He also failed to maintain records identifying the date, source, and description of deposits into, and withdrawals from, the trust account.

From September 15, 2005 until the trust account was closed, on April 19, 2007, there was a shortage of funds needed to satisfy all of the client obligations for which funds were held. Respondent stipulated that he failed to maintain and preserve the funds in his trust account designated for the payment of those premiums and that he used the funds for purposes unrelated to the client matters involved.

During respondent's testimony before the New York ethics authorities, a brief discussion took place about the trust account misappropriations. Respondent's attorney broached the subject as follows:

> Q. There are a number of checks drawn to you from the trust account that are included in the Petition and in the Stipulation?
>
> A. Yes.
>
> Q. A number of them are in even numbers such as $2,800, $500, $2,200 and so forth?
>
> A. Yes.
>
> Q. The purpose of those withdrawals was what?
>
> A. To the best of my knowledge these were fees that were due to me out of my account.
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> Q. You did not maintain any memorandum in your —
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> MS. CALLANAN [PRESENTER]: May I interrupt, unless you want to be impeached at length, you already admitted in the petition these checks were not for the payment of legal fees. I object for the same reasons you just mentioned, Judge, going through all these things, they have been admitted, fully admitted, the trust account issue —
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> HEARING OFFICER: In the Answer, not even in the Stipulation.
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> MS. CALLANAN: And the Stipulation addresses everything else. I prefer not to impeach Mr.

Fretz on every single paragraph in the Petition. We already have an admission.

[OAEbEx.D,194-12 to 195-16.]

The referee found that respondent:
i) Engaged in conduct in violation of former Disciplinary Rule 1-102(A)(4) (former 22 NYCRR § 1200.3 [A][4]);

ii) Engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7)(former 22 NYCRR § 1200.3[A][7]);

iii) Misappropriated funds in his possession received incident to his practice of law which belonged to other persons, in violation of former Disciplinary Rule 9-102(A)(former 22 NYCRR §1200.46[A]);

iv) Commingled his own funds with funds in his possession received incident to his practice of law which belonged to other persons, in violation of former Disciplinary Rule 9-102(A) (former 22 NYCRR §1200.46[A]);

v) Did not maintain in his trust account funds in his possession which belonged to other persons incident to his practice of law, in violation of former Disciplinary Rule 9-102(B)(1)(former 22 NYCRR §1200.46[B][1]);

vi) Did not maintain complete records of all funds coming into his possession and render appropriate accounts to the client or third persons regarding them, in violation of former Disciplinary Rule 9-102(C)(3) (former 22 NYCRR §1200.46[C][3]);

vii) Did not make or maintain records of all deposits into and withdrawals from his trust account, and failed to specifically identify

the date, source, and description of each item deposited, the names of all persons for whom funds were held, or the date, payee, description, and purpose of each withdrawal from his trust account, in violation of former Disciplinary Rules 9-102(D)(1)&(2) (former 22 NYCRR §1200.46[D][1]&[2]);

viii) Did not make accurate entries at or near the times they occurred of all financial transactions in his book of account or other similar record, in violation of former Disciplinary Rule 9-102(D)(9) (former 22 NYCRR § 1200.46[D][9]); and

ix) Made withdrawals from his trust account which were not in the form of checks made payable to named payees and which were in the form of cash, in violation of former Disciplinary Rule 9-102(E)(former 22 NYCRR §1200.46[E]).

[OAEbEx.E¶96.]

THE SIXTH CHARGE

On March 10, 2009, during the New York ethics investigation, respondent and his ethics counsel parted ways. Thereafter, the ethics investigator sent respondent five written requests for information about these matters. Respondent admitted having received the letters. He did not reply to the letters or otherwise communicate with the investigator about them.

The referee found that, by his inaction, respondent:

> i) Engaged in conduct which is prejudicial to the administration of justice, in violation of former Disciplinary Rule 1-102(A)(5)(former 22 NYCRR §1200.3[A][5]) and Rule of Professional Conduct 8.4(d) (22 NYCRR §1200.58[d]); and
>
> ii) Engaged in conduct which adversely reflects on his fitness as a lawyer, in violation of former Disciplinary Rule 1-102(A)(7)(former 22 NYCRR §1200.3[A][7]) and Rule of Professional Conduct 8.4(h)(22 NYCRR §1200.58[h]).
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> [OAEbEx.E¶102.]

Respondent offered, in mitigation, the testimony of a nurse practitioner, Jeanne Salada-Conroy, who treated him for depression, in 2008 and 2009, well after the events in these matters. The referee found that respondent had "presented absolutely *no* evidence, either from his own testimony or that of Ms. Salada-Conroy or any other source, that his misconduct regarding misuse of client funds and his trust account was caused by or related in *any* way to symptoms of depression."

The referee also found that, from 2003 to early 2006, respondent conducted his law practice, working every day, answering phone calls, supervising his paralegal, and representing clients in as many as fifty to eighty real estate and mortgage transactions at a time. The referee noted that, in 2006, respondent "effectively abandoned his law practice" and

changed careers. In October 2006, he became a financial advisor. He passed the investment broker license examinations and the New York State insurance examination and has kept his licenses current with continuing education courses, all without issue. Thus, the referee concluded, respondent's alleged mental health problems did not prevent him from operating a law office and changing careers.

In a decision dated August 2, 2011, the Supreme Court of New York, Appellate Division, Fourth Judicial Department, suspended respondent for three years. The court agreed with the referee's findings of fact and concluded that respondent had violated the following disciplinary rules: DR 1-102 (a)(3) (engaging in illegal conduct that adversely reflects on his honesty, trustworthiness and fitness as a lawyer);[6] DR 1-102 (a)(4) (engaging in conduct involving dishonesty, deceit or misrepresentation); DR 1-102 (a)(5) (engaging in conduct that is prejudicial to the administration of justice); DR 1-102 (a)(7)

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[6] The referee found that the "illegal conduct" was based on New York Judiciary Law § 487, which states, "[a]n attorney or counselor who is . . . guilty of any deceit . . . with the intent to deceive the court or any party . . . is guilty of a misdemeanor."

(engaging in conduct that adversely reflects on his fitness as a lawyer); DR 2-110 (a)(3) (failing to refund promptly any part of a fee paid in advance that has not been earned); DR 6-101 (a)(3) (neglecting a legal matter entrusted to him); DR 7-101 (a)(1) (intentionally failing to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules); DR 7-101 (a)(2) (intentionally failing to carry out a contract of employment entered into with a client for professional services); DR 7-101 (a)(3) (intentionally prejudicing or damaging a client during the course of the professional relationship); DR 7-106 (a) (disregarding a ruling of a tribunal made in the course of a proceeding); DR 9-102 (a) (misappropriating client funds and commingling client and personal funds); DR 9-102 (b)(1) (failing to maintain client funds in a special account separate from his business or personal accounts); DR 9-102 (c)(1) (failing to notify promptly a client of the receipt of property in which the client had an interest); DR 9-102 (c)(2) (failing to place the property of a client in a safe deposit box or other place of safekeeping as soon as practicable upon receipt); DR 9-102 (c)(3) (failing to maintain complete records of the property of a client coming into his possession and to render appropriate accounts to the

client regarding that property); DR 9-102 (c)(4) (failing to deliver promptly to a client as requested by the client the property in his possession that the client is entitled to receive); DR 9-102 (d)(1) (failing to maintain required records of bank accounts); DR 9-102 (d)(2)(failing to maintain a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed); DR 9-102 (d)(9) (failing to make accurate, contemporaneous entries of all financial transactions in his records of receipts and disbursements, special accounts, ledger books and in any other books of account kept by him in the regular course of his practice); and DR 9-102 (e) (making withdrawals from a special account payable to cash and not to a named payee).

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14. Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which the finding rests for purposes

of disciplinary proceedings. Therefore, we adopt the findings of the Supreme Court of New York, Appellate Division, Fourth Judicial Department, regarding respondent's conduct while he was an attorney licensed to practice law in New Jersey.

As previously mentioned, respondent's license to practice law in New Jersey was revoked, on September 24, 2007, for failure to pay the annual attorney assessment for seven years.

Pursuant to R. 1:28-2(c), "any attorney who . . . has been declared ineligible for seven or more consecutive years shall have his or her license to practice in the State administratively revoked by Order of the Supreme Court." The implications of the revocation are specifically detailed in R. 1:28-2, which states:

> On entry of a license revocation Order . . ., the attorney's membership in the Bar of this State shall cease. Any subsequent application for membership shall be in accordance with the provisions of Rule 1:24 [Bar Examinations; Qualifications for Admission to Examination]. An Order of revocation shall not, however, preclude the exercise of jurisdiction by the disciplinary system in respect of any misconduct that occurred prior to Order's effective date.

Here, respondent committed ethics violations both before and after the revocation of his license in New Jersey. All of those violations occurred in New York. None took place in New

Jersey. Accordingly, we have jurisdiction only with respect to the conduct that occurred prior to September 24, 2007, the date when respondent's law license was revoked. We do not have jurisdiction over respondent's conduct that took place after his revocation of his New Jersey license, because the ethics improprieties were committed in New York, not in this jurisdiction.[7] Respondent, thus, is subject to reciprocal discipline for all of the conduct for which he was disciplined in New York, except for the entire Sixth Charge (DR 1-102(A)(5) and DR 1-102(A)(7)) and the conduct in the First Charge, related to the contempt order (DR 7-106(A)).

We find that respondent violated the equivalent of the following New Jersey Rules of Professional Conduct: 1.1(a) (DR 6-101(A)(3)); 1.15(a) (DR 9-102(A)); 1.15(b) (DR 9-102(C)(4) and DR 9-102(C)(1)); 1.15(d) and R. 1:21-6 (recordkeeping) (DR 9-102(B)(1), 9-102(C)(3), 9-102(D)(1) and (2), 9-102(D)(9), and 9-

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[7] RPC 8.5(a) (Disciplinary Authority) provides that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."

102(E)); 1.16(d) (DR 2-110(A)(3); 8.4(b) (DR 1-102(A)(3)); 8.4(c) (DR 1-102(A)(4)); and 8.4(d) (DR 1-102(A)(5)). New York DR 1-102(a)(7), 7-101(A)(1), 7-101(A)(2), 7-101(A)(3), and 9-102(C)(2) have no New Jersey equivalents.

Specifically, respondent grossly neglected the McCabe fire-insurance claim, failed to pay title insurance and record documents in the real estate transactions that are the subject of the second charge, and failed to dissolve the corporation in the Fonti matter (RPC 1.1(a)); negligently misappropriated client funds, commingled personal and trust funds, failed to deliver property to a client or third party, lost the Scarborough abstract, and displayed deficient recordkeeping in various client matters (RPC 1.15(a), (b), and (d)); failed to promptly return Fonti's fee (RPC 1.16(d)); engaged in illegal conduct that reflects adversely on his honesty, by exhibiting deceit in the McCabe matter (RPC 8.4(b));[8] engaged in a pattern of misrepresentations for the untrue statements made to the McCabes

[8] A New Jersey lawyer found guilty of a criminal misdemeanor in North Carolina violated New Jersey RPC 8.4(b), even though that violation was not a criminal offense in New Jersey. In the Matter of Efthemois D. Velahos, DRB 14-055 (slip op. at 9) (September 4, 2014).

and Fonti about the status of their cases (RPC 8.4(c)); and engaged in conduct prejudicial to the administration of justice, for failing to appear for motions in the McCabe matter (RPC 8.4(d)).

In determining the quantum of discipline, we are guided by R. 1:20-14(a)(4), which states:

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:
>
> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
>
> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the Respondent;
>
> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (D) the procedure followed in the foreign matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

For the reasons detailed below, we find that subsection (E) applies in this case.

Respondent was suspended for three years in New York. The New York court stated:

> In determining an appropriate sanction, we have considered respondent's previously unblemished record during his 22 years of practicing law and his expression of remorse. Respondent, however, has committed serious misconduct that caused harm to his clients. In particular, we have considered that respondent's neglect of the fire insurance matter and his deceit in trying to conceal that neglect deprived the homeowners of an opportunity to retain new counsel who could have acted in a timely manner to preserve their claim for damages.
>
> [OAEbEx.F,4.]

As an initial matter, we must analyze the misappropriation charge. Respondent was found guilty in New York of conversion of client funds and misappropriation, for which he received a three-year suspension. Based on New York's findings of conversion and misappropriation, the OAE urged respondent's disbarment, under In re Wilson, 81 N.J. 451 (1979). Specifically, the OAE pointed to respondent's writing numerous trust account checks to himself ($33,499), making two cash withdrawals from a teller window ($2,500), and issuing two trust account checks written to cash ($8,805), often to pay for personal and office expenses. The OAE noted that respondent's numerous deposits of personal funds into the trust account to

cover shortages was further evidence that his misappropriations were knowing, "[o]therwise, there would be no need to cover client obligations with personal funds."

It is true that a New York finding of "conversion" and "misappropriation" seems to suggest a finding of knowing misappropriation. But that is not always so. In In re White, 192 N.J. 443 (2007), an attorney was suspended for six months in New Jersey on a motion for reciprocal discipline, after he was disbarred in New York for conversion of trust funds. In White, we stated as follows:

> [I]n New York, conversion and knowing misappropriation appear to be two different things. See, e.g., In re Duke, 184 N.J. 371 (2002) (attorney disbarred in New York for "converting" trust funds, commingling trust and personal funds, improperly drawing an escrow check to cash, failing to maintain required bookkeeping records, and failing to timely cooperate with the grievance committee; on motion for reciprocal discipline, however, the attorney received a reprimand in New Jersey).
>
> . . . .
>
> Moreover, when New York disciplinary authorities charge an attorney with knowing misappropriation of client or escrow funds, the petition generally alleges, and the Court finds, failure to safeguard funds (DR 9-102(A)) and conduct involving dishonesty, fraud, deceit, or misrepresentation (DR 1-102(A)(4)). See, e.g., In re Stevens, 741 N.Y.S.2d 536, 539 (N.Y. App. Div. 2002), and In re Lubell, 599 N.Y.S.2d 557, 558 (N.Y.

> App. Div. 1993) (both decisions observing that intentional conversion of client funds violates DR 1-102(A)(4)).
>
> [In the Matter of James White a/k/a James E. White, DRB 06-344 (slip op. at 19-20) (June 21, 2007).]

Here, the second and fifth charges of the petition addressed respondent's use of client funds that should have been held in the trust account for real estate matters. In the second and fifth charges, failure to safeguard funds (DR 9-102(A)) and conduct involving dishonesty, fraud, deceit, or misrepresentation (DR 1-102(A)(4)) were charged. It appears from those charges that the New York authorities intended to charge respondent with knowing misappropriation.

Having said that, nothing in the record shows, to a clear and convincing degree, that respondent's misuse of his trust account was intentional. As the Court stated in In re Konopka, 126 N.J. 225 (1991),

> [w]e insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. . . . If all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [Id. at 234.]

In his answer, respondent admitted all of the factual allegations of counts two and five of the New York petition. Those two counts charged him with the misappropriation of client funds. Although respondent admitted that there were shortages in his trust account, he did not admit the rule violations. Otherwise stated, he admitted a trust account shortage, but did not admit that the shortages were the result of knowing misappropriation.

At the hearing that ensued, there was no testimony about the misappropriation charges. There was no focus at all on respondent's use of the trust account. In fact, misappropriation, conversion, and dishonesty were issues that were never raised with respondent at the hearing. The only indication of respondent's intent appears to be his utterance, at the hearing before the referee, that he thought he was removing earned fees from the trust account and that his $18,000 infusion of personal funds was an advance of his own funds to a good client, for the payment of taxes. That testimony suggests negligent, not knowing, misappropriation.

As stated above, for respondent's trust account actions, the referee found him guilty of dishonesty, conversion, misappropriation, and commingling. In its written decision, the

New York Court upheld the referee's findings of fact and, in the paragraph meting out a three-year suspension, made no mention of respondent's chronic use of client funds for his own purposes. Rather, it based the suspension on respondent's neglect of the McCabe's fire-insurance claim and his deceit in concealing that neglect, mitigated by his twenty-two year legal career and expression of remorse. Respondent was not disbarred. In I/M/O Vogel, 724 N.Y.S.2d. 166 (2001), the court held that intentional conversion in New York is inherently met with disbarment, while careless (neglect) conversion may lead to a lesser penalty.

In short, although R. 1:20-14(a)(5) provides that another jurisdiction's final adjudication of an attorney's guilt "shall establish conclusively the facts [emphasis added] on which it rests for purposes of a disciplinary proceeding in this state," the facts of a knowing misappropriation were not clearly and convincingly established in New York.

Nevertheless, respondent committed serious ethics offenses. Not only did he engage in various instances of negligent misappropriation, but he also displayed a troubling pattern of deceit and misrepresentation.

Misconduct for multiple violations similar to that of respondent has resulted in six-month to one-year suspensions.

In In re Namias, 164 N.J. 310 (2000), the attorney was suspended for one year after the Court found that he had engaged in gross neglect, a pattern of neglect, lack of diligence, commingling, negligent misappropriation, failure to promptly deliver funds that a client or third party is entitled to receive, recordkeeping violations, failure to return client file, conduct involving deceit for lying to the client, and failure to cooperate with disciplinary authorities. The matter proceeded by default, whereby the complaint alleged that the attorney maintained multiple trust accounts, which were "out-of-trust" and exhibited negative balances. Further, in three real estate transactions, he failed to pay closing obligations, including sewer/water adjustments, taxes, title insurance, recording, realty transfer fees, creditors, and survey fees. Additionally, the attorney exhibited gross neglect on a personal injury matter, when he failed to answer interrogatories and failed to oppose the motion to dismiss, which, ultimately, caused the complaint to be dismissed. The attorney failed to inform the client of the dismissal, but instead told the client that he was "taking care of it." See also In re Pollan, 143 N.J.

305 (1996) (six-month suspension where the attorney failed to maintain proper records for an estate trust and engaged in misconduct in six other matters, including gross negligence, pattern of neglect, misrepresentation, failure to communicate with his clients, failure to deliver a client's file and failure to cooperate with disciplinary authorities); In re Marlowe, 152 N.J. 20 (1997) (one-year suspension where the attorney failed to maintain adequate trust funds, failed to put the assets of two separate estates into separate estate accounts, exhibited gross neglect and lack of diligence, failed to abide by his client's wishes, failed to communicate with his client, and failed to cooperate with disciplinary authorities); In re Malfitano, 121 N.J. 194 (1990) (one-year suspension where the attorney failed to return a fee to a client, misrepresented facts to a client, failed to communicate with clients, failed to cooperate with disciplinary authorities, and exhibited gross neglect and lack of diligence).

Here, similar to Namias,[9] a period of suspension is appropriate. In assessing the length of the suspension, we

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[9] In Namias, we found, in aggravation, that the attorney was on notice of his recordkeeping deficiencies and failed to correct them. He also defaulted in the matter.

considered the number of the violations, the patterns of both neglect and misrepresentation, and his virtual abandonment of Scarborough. Further, as the OAE pointed out, respondent's misconduct spanned a five-year period, from 2004 to 2009, and he failed to notify the OAE of his New York suspension, as required by R. 1:20-14(a)(1). Based on the foregoing, we determine that a one-year suspension is the appropriate level of discipline for respondent's transgressions, aggravated by the above factors.

We are aware that respondent cannot be actually suspended because his law license in New Jersey has been revoked. Accordingly, we determine that, should he seek readmission to the New Jersey bar, the readmission shall be withheld for one year. We also determine that he should be prohibited from appearing pro hac vice in New Jersey until further order of the Court.

Members Gallipoli and Yamner voted for disbarment. Vice-Chair Baugh did not participate.

Finally, we determine that respondent should be responsible for the payment of basic administrative costs and actually-incurred disciplinary expenses, as provided in R. 1:20-17 and as required by every Court order imposing discipline. Such payment

is to be made following the entry of the Court's order of discipline, rather than following readmission.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David Fretz
Docket No. DRB 14-249

Argued: November 20, 2014

Decided: March 13, 2015

Disposition: Readmission withheld for one year

Members	Disbar	Readmission withheld for one year	Reprimand	Disqualified	Did not participate
Frost		X			
Baugh					X
Clark		X			
Gallipoli	X				
Hoberman		X			
Rivera		X			
Singer		X			
Yamner	X				
Zmirich					
Total:	2	5			1

Ellen A. Brodsky
Chief Counsel