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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-096
District Docket Nos. XIV-03-530E
and VII-05-900E

IN THE MATTER OF
KEVIN J. CARLIN,
AN ATTORNEY AT LAW

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Decision

Argued: May 18, 2006

Decided: June 27, 2006

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

Carl D. Poplar appeared on behalf of respondent.

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

This matter came before us on a recommendation for a reprimand filed by the District VII Ethics Committee (DEC).

Respondent was admitted to the New Jersey bar in 1985. At the relevant times, he maintained a law office in Hamilton Township.

In 2003, respondent was reprimanded for gross neglect, lack of diligence, failure to communicate with his client, failure to promptly deliver funds to a third party, failure to obey an obligation under the rules of a tribunal, false or misleading communication about the attorney, use of improper letterhead, conduct prejudicial to the administration of justice (failure to obey two court orders requiring him to turn over funds), and recordkeeping violations. In re Carlin, 176 N.J. 266 (2003).

This disciplinary matter arises out of respondent's service as trustee of a trust that was established for the purpose of funding the college education of sisters Nicole and Jessica Miller. The complaint alleges that respondent violated RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate with the trust beneficiaries and failure to explain the matter to allow them to make informed decisions), RPC 1.5, presumably (a) (unreasonable fee) and (b) (failure to communicate fee in writing), RPC 1.7(a)(2) (conflict of interest), RPC 1.15(b) (failure to promptly distribute funds to the beneficiaries), RPC 1.15(d) (recordkeeping violations), and RPC 8.4(c) (conduct

involving dishonesty, fraud, deceit, or misrepresentation). As to the last charge, the complaint alleges that respondent (1) performed self-serving legal research and then charged the trust for his legal fees, notwithstanding his agreement to serve without compensation, (2) charged the trust \$1500 for accounting services that were "bartered" by the accountant for the equivalent in legal services from respondent, and (3) charged the trust for administrative fees that were never incurred.

Sometime in 1994 or 1995, respondent represented William J. Miller in a domestic violence and divorce matter involving his wife, Jean. Jean's sister, Lynn Daniello, was appointed guardian ad litem for the Miller daughters during the proceeding.

In January 1996, as part of the divorce settlement, William entered into a trust for the benefit of Jessica and Nicole, who were fifteen and fourteen at the time. The purpose of the trust was to pay for Jessica's and Nicole's "college or post high school education expenses." The trust, which was funded with \$70,000, was to terminate when Nicole turned twenty-one, on December 17, 2002. Each parent appointed one trustee. Jean chose Lynn Daniello and William chose respondent.

The trustees were to serve without compensation and were given the right to resign and to designate a successor. Moreover, upon written request, the trustees were required to "account to the Grantor and Beneficiaries as to all principal and income receipts and disbursements and all changes of investment." Apparently, the trustees were permitted to engage experts, although the provision granting this power is illegible.

The trust was opened with the purchase of some certificates of deposit (CDs), which rolled over either semi-annually or annually. Lynn Daniello initially maintained the records and managed the trust on a day-to-day basis. Respondent's role was limited to providing his signature, when required.

The dealings that Lynn and respondent had with each other were "contentious." Their communications stopped just before Jessica went to college.

In August 1998, one month before Jessica began her freshman year at Rider University, Lynn resigned as co-trustee. According to respondent, William and Nicole had told him that Lynn had resigned due to "a very bad falling out" with her sister, Jean.

Based on his knowledge of partnership law, respondent questioned whether the trust could continue, upon the resignation of the co-trustee. Respondent and an attorney looked at the terms of the agreement and recognized that some research on the issue was required. Respondent then discussed the matter with another attorney. Because that attorney's retainer was \$4000, respondent decided that he could perform the research for less than that amount. As a trustee, he believed that was the best thing to do. Accordingly, he and the first attorney undertook the task and concluded that respondent could continue as sole trustee.

Respondent did not confer with either Jessica or Nicole about conducting the research. They were unaware of that undertaking, which took a day and a half to complete. Respondent did not create a record of those services.

Later, respondent used this research to resist Lynn's attempts to appoint a successor. According to respondent, when Lynn resigned, in August 1998, she did not want to appoint a successor. In October 1998, however, Lynn sent respondent a letter threatening to sue him, after he had declined her attempt to name a successor trustee. Respondent took the position that, because Lynn had resigned, she lacked authority to appoint a

successor. According to respondent, he advised Lynn that she had already cost the trust attorney fees and that, if she sued, he would request that she pay the attorney fees incurred in that matter.

After Lynn resigned and turned over the books to respondent, he kept the CDs intact until Jessica started college, in September 1998, at which time he took a portion of her funds and placed them into a savings account so that funds would be available for disbursement. When tuition was due, respondent transferred the funds from the savings account into his trust account and wrote a check. He did the same with Jessica's monthly allowance and other expenses.

Respondent did most of the accounting work himself. He used his trust account as a clearing house so that he could keep track of the funds that were transferred out of the holdings. Later, he used his business account "so that there was a record."

Jessica testified that she first met respondent at his office, just before she went to college. She confirmed that the trust paid for her tuition, room and board, and books at Rider University, where she enrolled in September 1998. In addition,

she received a \$100 monthly allowance. During that time, she and respondent spoke on the telephone about once a month.

Upon enrollment, Jessica mailed her tuition bills to respondent for payment and sent in her book receipts for reimbursement. According to Jessica, respondent was not always prompt in complying with her requests for payments. For example, he did not always pay her college bills on time, which resulted in the assessment of late fees. Sometimes, Jessica had to meet respondent at his house, the bank, or his office to personally pick up her monthly spending allowance. Sometimes, respondent or his wife would bring the check to her at Rider.

Respondent's testimony generally mirrored Jessica's. He claimed, however, that bills were paid late as a result of her delays. If Jessica or Nicole suggested it, he would send the check overnight mail. The relationship was cordial, "and it worked."

Jessica testified about her attempts to obtain an accounting from respondent. On September 14, 1999, she wrote to respondent and requested reimbursement for a book purchase in the amount of \$401.29. In the same letter, she requested an accounting for the "third time." She had requested an accounting from respondent in late 1998, so that she would know

"where [she] was at and [she] could plan out whether [she would be] living on campus or whatnot with the monies that [she] had." After "a couple of requests," which presumably included her September 1999 letter, Jessica received "some sort of accounting" from respondent. However, before she finally received the accounting, respondent either ignored her requests or said that he was working on it.

The accounting that respondent sent to Jessica was set out in a letter dated October 27, 1999, which included a \$429 check for her "book expenses." Because the accounting appeared accurate to her at the time, she did not ask for another one.

Page two of respondent's October 27, 1999 letter reflected a \$1000 payment for attorney's fees. Jessica was not aware that legal services had been performed and did not know who had provided them. The letter did not contain that information, and respondent never asked her if she wanted legal services performed. Moreover, she never received a fee agreement from him for services performed on behalf of the trust.

Although Jessica did not ask respondent about the attorney's fees when she received the accounting, she did ask him later. He told her that the fees were incurred as a result of her aunt's resignation as co-trustee. She did not understand

what that meant, but she did not talk to respondent or her aunt about it.

On October 28, 1999, respondent sent an accounting to Nicole. In his letter, respondent stated, among other things, that "\$1,000.00 from your account was applied to a total attorney's fee bill of \$2,000.00 for legal services necessitated by the resignation of the Co-Trustee." Similar language was contained in the letter to Jessica.

Nicole, who was not yet in college in 1999, did not remember having received respondent's October 28, 1999 letter. In October 1999, Nicole was unaware that respondent had provided and billed the trust for legal services. She received no information about the hourly rate or the nature of the services. As of the date of the DEC hearing, Nicole still did not know what legal services respondent had provided to the trust or why they were necessary.

Respondent testified that he wrote the October 1999 letters to each beneficiary and provided them with an accounting, in response to Jessica's September request. Respondent estimated that it took him five hours per beneficiary to complete the accountings.

Less than a year later, on August 24, 2000, respondent provided to Nicole and her parents a "first draft of an accounting of the principal, income, disbursements and the net schedule and summary of the Nicole and Jessica Miller Trust account," which was prepared by accountant Andrew Kennedy. Respondent had received "an Internet sort of solicitation" from Kennedy and, in response, had contacted him to see if he could "construct a trust accounting that didn't look like my accounting from the year prior that ran on sort of like a narrative form." Based on the trust provision that permitted the engagement of experts, respondent believed that, as trustee, he had the authority to retain Kennedy without the beneficiaries' approval. Kennedy charged \$500 for his services.

During Kennedy's review of the records, he saw that respondent had not taken any fee for respondent's services to the trust. Kennedy advised respondent that he was permitted to take certain expenses and that a reasonable amount would be \$100 per year per trust, which would represent "usual administrative costs," such as mail, banking charges, secretarial services. Respondent elected to charge \$50 per beneficiary.

Kennedy's 2000 accounting reflected, per beneficiary, a January 5, 1999 disbursement for \$1000 to respondent for "legal

fees" and an August 31, 2000 disbursement of \$250 to Kennedy for "accounting fee." The accounting did not reflect a charge for administrative expenses.

Jessica did not testify about the August 2000 letter and accounting, presumably because it was not sent to her. However, Nicole recalled having received the letter and accounting, which she merely skimmed. Nicole also had a conversation with her parents about the letter, but she remembered only that Kennedy's name had come up. She did not know what he had done for the trust.

Nicole testified that she enrolled in a Florida junior college in 2000 at age nineteen.¹ Nicole sent bills to respondent for payment. Other than "a couple" of late tuition payments, there were no problems with payments. She did not remember if she was charged late fees. Moreover, the late payments did not affect her ability to take the courses for which she had registered. According to Nicole, respondent always had sufficient time to pay the bills promptly.

¹ It appears from the record that Nicole may have begun college in January 2001. In late December 2000, respondent paid a junior college tuition bill for "Spring 2001."

Nicole communicated with respondent by telephone when tuition was due, which was about every four months. She did not have any trouble contacting him. Respondent always made an effort to answer her questions. Most of the checks that respondent issued to Nicole were drawn on his business account.

According to respondent, before Nicole went to college, he did not communicate with her "very much." When she went to college, they communicated about every month or so, usually by telephone. Both girls had his cell phone number. They called him after business hours.

Respondent described himself as "like an uncle" to them. For example, on one occasion, Nicole asked for money when she was in Ridgewood, visiting a boyfriend. Initially, respondent declined her request because he did not believe it was education-related. However, when Nicole told him that she needed the money to get back to Florida, respondent drove sixty miles to take the money to her.

On another occasion, Nicole wanted \$5000 for a new car, but respondent authorized only \$3000. He eventually convinced her that, because insurance rates were lower in Florida, she could buy a trustworthy car for \$3000 and have money leftover for insurance.

Jessica testified that, in her final year of college, respondent assisted her and Nicole in the preparation of a loan agreement between the sisters with respect to trust monies. Jessica had exhausted her funds, and Nicole agreed to lend her some money so that she could finish school. Jessica and Nicole met respondent at his office, at which time he prepared a loan agreement between the two. Prior to the execution of the agreement, respondent did not inform the sisters that they could have separate counsel.² Jessica has repaid the loan.

Nicole recalled that respondent prepared the agreement at Jessica's request. She and her sister met him somewhere, reviewed the terms, and signed it. Before they met with him to sign the papers, Jessica and Nicole already had agreed to the transaction. Nicole stated that the meeting was not at a law office and that the agreement already had been drafted when she arrived.

According to Nicole, respondent said nothing to her or Jessica about whether the loan was a good idea or not or the pluses or minuses of "doing this." Respondent never said that a loan could not be made between the sisters in the absence of a

² The complaint did not charge respondent with a conflict of interest for having prepared this agreement.

document. She did not know why a document was required, and respondent suggested the document without explanation. Although Nicole read the document, she did not question its terms.

For his part, respondent explained that, during Jessica's last semester at college, she had run out of money; her parents had none to give her. The sisters conferred and contacted him about their plan. He discussed the matter with them and "drafted sort of a bare bones sort of agreement." He then reviewed the agreement with an attorney at the firm where he worked at the time, and they worked together to draft "an appropriate agreement."

Respondent did not charge the trust for the preparation of the agreement. He stated that he was acting as a trustee, not as a lawyer. He believed a document was necessary for the protection of the trust and the beneficiaries.

On December 17, 2002, Nicole turned twenty-one. At that time, she did not know how much money remained in the trust. She believed, however, that it was between \$20,000 and \$25,000, as she had attended college for only two years, and the car had cost \$3000. Nicole had not kept a running account of what had been spent.

A few weeks after her birthday, Nicole asked respondent for the balance of the funds. He told her that he would send her a check for \$21,000, which was the account balance. About two months later, on March 6, 2003, respondent sent Nicole a check in that amount. However, Nicole did not believe that this accurately represented the balance.

In July 2003, respondent sent Nicole another check for \$3000. She did not remember whether the second check had been sent in response to her request for the rest of the money. Although Nicole had asked for an accounting, she received none with either disbursement.

After Nicole received the \$3000 check, she still believed that she had not received all of the funds. On July 30, 2003, she filed a grievance against respondent, at Lynn's suggestion.

Although Jessica and Nicole discussed the filing of a grievance, Jessica did not sign it. Indeed, after her graduation, in 2002, Jessica had no further contact with respondent.

Respondent claimed that Nicole had, at one time, tried to "dupe" him into giving her money to which she was not entitled by, he believed, "double register[ing]" or failing to report to him that she had received a scholarship "or something along

those lines." He said that he "caught her on it and called her on it in writing." Accordingly, when Nicole sent him the letter stating that she was twenty-one and that she wanted the money due her, he became suspicious because, at that age, she should have been a sophomore in college. He, therefore, asked her to supply him with a copy of her driver's license.

Respondent claimed that he did not receive a copy of Nicole's license "for some while." Moreover, at the time, he was just starting his own practice, and he "didn't have enough time as the trustee on this trust to give them the final accounting." He, thus, sent her \$21,000 and, later, \$3000. He received her grievance while he was in the process of preparing his own accounting. He did not make the final \$1210 payment because he "froze everything and did nothing new for fear that I might be making a miss step [sic]."

After the grievance was filed, respondent hired Anthony Scalcione to complete the accounting. Scalcione was not a CPA, although he had a background in accounting. Scalcione was an electrician who later obtained an electrical engineering degree and an MBA. As of the date of respondent's testimony, Scalcione was studying for a Ph.D. in business.

According to respondent, Scalcione did accounting work "for at least a couple of businesses." Respondent stated that he would have required Scalcione's accounting services even in the absence of a grievance.

When respondent hired Scalcione, he told Scalcione about the grievance and explained that he required the accounting "to hopefully avoid an ethics complaint." Respondent also assured Scalcione that he would be paid, although the amount of the compensation was not predetermined. Although respondent maintained that Scalcione had spent a lot of time preparing the accounting and ultimately charged \$1500, Scalcione did not provide respondent with documentation to support that bill.

Respondent testified that he had obtained the approval of Office of Attorney Ethics (OAE) investigator Christopher Spedding and OAE Deputy Ethics Counsel Janice Richter to release \$1500 to Scalcione. However, when respondent informed Scalcione that the money was available for payment, Scalcione requested that respondent perform future legal services for him, instead of paying him \$1500. Respondent agreed to the arrangement because he was "short of money at [the] time." Later, respondent performed "[l]ots" of legal services for Scalcione. He represented Scalcione's daughter in a municipal court matter,

and he assisted Scalcione in some litigation with his daughter's boyfriend and a lawn service. Respondent did not bill Scalcione for these services. Instead, he charged the trust \$1500 for Scalcione's services.

On this topic, Jessica testified that, when she received a November 3, 2003 letter from respondent with the final accounting, she questioned a few line items, which included "a lot of Federal Express charges, obviously for overnighting monies that had been late," a charge for Andrew Kennedy and Anthony Scalcione, a \$100 administrative expense, and mileage. Jessica did not believe that she should have been required to pay the overnight charges, because respondent was late in complying with her prompt requests for payments.

The accounting was not accompanied by any documentation, and Jessica did not request any. She did not ask respondent to identify Scalcione, although she believed that she was told that the charge for Scalcione represented accounting fees.

Respondent never asked Jessica if he could take an administrative fee and never sought her consent to hire an accountant to examine the trust's records.

Nicole testified that, shortly after she received the accounting, she and Jessica met with respondent to review it.

Nicole did not understand the accounting and could not figure out how much money was left in her account; respondent explained the accounting to her as best he could.

Nicole recalled asking respondent about the administrative expenses, but did not remember if she had asked him about the \$2000 "K.J.C." fees. She did not know the purpose of those fees and did not consent to the expenditure. She also did not know who Anthony Scalcione was, what he did, how he was paid, or whether he was paid at all.

Nicole did not recall if she had talked to respondent thereafter, even though she was dissatisfied with the accounting. As of the date of the DEC hearing, Nicole still believed that she had not received all of the money she was due.

Nicole could not remember when she first asked respondent for an accounting. Although her grievance states that she and Jessica had asked for it in October 1998, that was an error because Nicole had not yet gone to college. Nicole did not believe that she requested an accounting until the trust was supposed to end. She could not recall whether respondent had given her any information about the trust prior to 2003.

Jessica and Nicole viewed respondent's role differently. Upon examination by the DEC panel chair, Jessica stated that she

thought of, and referred to, respondent as her attorney. She did not believe that respondent had charged her for the preparation of the loan agreement. She did not know whether respondent had charged the trust.

Nicole, in turn, referred to respondent by his first name and described him as an acquaintance. She did not consider him to be her lawyer, but thought of him as a trustee.

As to respondent's recordkeeping violations, OAE investigator Christopher Spedding testified that the OAE had scheduled a demand audit because respondent's reply to the grievance had been inadequate. The audit took place on October 23, 2003. Spedding reviewed respondent's trust account and found no overdrafts or shortages. There was no three-way reconciliation, however. Respondent did not have a ledger card for the Miller trust.

Spedding requested from respondent a three-way reconciliation with ledger cards and bank statements as of September 2003. He also requested some bank statements that he did not see during the audit. Follow-up requests were made on October 31, November 21 and 24, and December 10, 2003. Respondent did not provide the documentation. On January 5, 2004, Spedding scheduled a demand audit for January 21, 2004.

The audit was postponed to January 30, and then February 4, 2004.

At the second audit, on February 4, 2004, respondent produced more records on the Miller trust, including individual checks and deposits. The next day, Spedding wrote to respondent and requested five items related to the trust. On February 23, 2004, Spedding gave respondent forty-five days to produce quarterly reconciliations, client ledger sheets, and journals. Respondent did not comply with that request.

On May 5, 2004, the OAE faxed to respondent a copy of Spedding's February 23, 2004 letter, in a further attempt to obtain the reconciliations. That effort was unavailing. As of the date of the DEC hearing, respondent had not complied with the OAE's requests for the reconciliations.

The OAE handled the recordkeeping violations and the Miller grievance separately. The recordkeeping violations were limited to respondent's failure to produce a three-way reconciliation, despite the OAE's multiple requests.

The parties stipulated that \$1210 should have remained in the trust account.

Attorney Robert Vort testified on respondent's behalf. He has known respondent since 1992, when they shared offices within

a suite. That arrangement lasted until 1998. Since then, Vort and respondent have continued to communicate by phone throughout the week and on weekends.

According to Vort, respondent has an excellent reputation for honesty and truthfulness, as well as law-abiding conduct within the legal and judicial community. If Vort ever needed a lawyer, he would "feel free" to retain respondent. He personally described respondent as "honest as the day is long."

Respondent agreed that, as trustee, he owed a fiduciary duty to the Miller children. He asserted, however, that his personal life was in chaos when he acted as trustee. His wife had rheumatoid arthritis, and his son was diagnosed with autism. The latter problem required forty hours of therapy per week, which was not covered by insurance, and which cost \$60,000 in 1996. Thereafter, the therapy cost \$10,000 to \$12,000 per year, in addition to the private schooling the child received.

In 1998, when the trust was created, respondent's family had to move from Scotch Plains to Robbinsville to be closer to the son's school, in Princeton, given his wife's medical condition. Respondent maintained his practice in Hackensack. He described the toll that the family's health problems had taken on him and on the marriage:

My office was in Hackensack through early 2001. And eventually the marital stresses were very difficult. Most days I would work all day, come home, help put Kevin to bed. And on weekends Henrietta would take this aggressive drug, methotrexate. And she would be out for the weekend and I would be basically full-time mom and dad all the time.

We're now separated and I have Kevin half the time. And I've told people this is a break for me even though economically it's not. But it's a break for me just to have him half the time.

[T186-11 to 23.]³

With respect to the recordkeeping violations, respondent explained that, in the spring of 2004, at Spedding's and Richter's request, he had taken the Miller v. Miller file to a meeting with them. The discussions at that meeting were limited to the Miller divorce and the Miller trust. There was no mention of respondent's attorney trust account balance.

Respondent reviewed his trust accounts with Spedding in respondent's office. He showed him and Richter the handwritten records that he kept. He claimed that, until the day of the DEC hearing, he had no idea that he was not in compliance with the recordkeeping rules. According to respondent, he had told

³ "T" refers to the transcript of the January 5, 2006 hearing.

Spedding that he did not understand the three-way reconciliation process and had requested information on it. Spedding had sent him some materials, but he still did not understand the process. At that point, he had given the information to a CPA who, a couple of weeks later, had said that he would be able to prepare what was required. To the best of respondent's knowledge, his trust account balances are currently reconciled with his ledger sheets.

The DEC concluded that respondent had violated RPC 1.15(b), RPC 1.15(d), and RPC 8.4(c). As a preliminary matter, the DEC observed that respondent was a trustee, and, as such, owed Jessica and Nicole a fiduciary duty. Respondent acknowledged this obligation. Nevertheless, his position before the DEC was that, because he owed the sisters no duty as an attorney, the Rules of Professional Conduct did not apply to his conduct.

After a lengthy recitation of the law underlying attorney-client relationships, the DEC concluded that respondent's "general performance as the trustee - in communicating with the beneficiaries, in providing accountings, in distributing funds - was done in the context of an attorney-client relationship with the beneficiaries." Nevertheless, according to the DEC, RPC 1.15(b), RPC 1.15(d), and RPC 8.4(c) "are implicated regardless

of whether an attorney-client relationship exists." The DEC continued:

[T]he circumstances show that [respondent] played a role as a lawyer on at least two relevant occasions. First, when he provided legal work to the Trust in 1998 or 1999, he had an attorney-client relationship with the Trust (or with himself as trustee). Second, when [respondent] drafted and advised Jessica and Nicole about the loan agreement in October 2001, he had an attorney-client relationship with one or both of them. RPC 1.5 (Fees) and RPC 1.7(a)(2) (Conflict of Interest) are implicated in both of these circumstances.

[HPR8.]⁴

The DEC rejected respondent's argument that the grievance "should be more appropriately characterized as a civil claim." The DEC noted that "a fiduciary has an affirmative duty to disclose all material facts to his principal and a failure to disclose can constitute fraud." Similarly, RPC 8.4(c) "broadly forbids a lawyer in any aspect of his or her life to 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'" Thus, the DEC reasoned, "[a] lawyer who is guilty of a fraudulent failure to disclose in performing his fiduciary duties as a trustee squarely implicates RPC 8.4(c)."

⁴ HPR refers to the hearing panel report.

The DEC found no violation of RPC 1.3 and RPC 1.4(b) because "the general management of the Trust did not involve an attorney-client relationship between [respondent] and the beneficiaries;" moreover, both beneficiaries testified that they were regularly in contact with respondent, who also was available to them. The DEC noted that, although the evidence established that respondent sometimes made payments late, it was not clear whether that was due to his conduct or the beneficiaries'.

With respect to respondent's delay in providing the final accounting, the DEC found that, because his "performance of general Trust activities were [sic] not in the context of an attorney-client relationship, his delays in fully distributing the Trust funds to Nicole Miller following her 21st birthday did not constitute a lack of promptness and diligence in violation of RPC 1.3."

The DEC concluded that respondent violated RPC 1.15(b) when, after Nicole's twenty-first birthday, he delayed payment of the funds remaining in the trust. According to the DEC, there was no excuse for respondent's failure to pay the remaining \$1210 on the ground that he "froze" the account upon the filing of the grievance.

As to the charges arising out of respondent's disbursements for attorney's fees, accounting fees, and administrative fees, the DEC concluded that he violated RPC 8.4(c) when he failed to disclose to the beneficiaries that he had paid himself fees for legal work. The DEC found that the true purpose of respondent's research was to support his resistance to Lynn's attempt to appoint a successor trustee, and that the "legal question he researched was therefore an issue of his own making."

The DEC found that respondent's ill motive was compounded by his failure to "disclose promptly or fully the nature of the charges," inasmuch as a year had gone by before he had disclosed the \$2000 fee. In addition, the DEC questioned whether the fee was reasonable, insofar as respondent did not prepare a written bill, time sheets, or produce any work product.

On the other hand, the DEC found that respondent did not engage in a conflict of interest in conducting the research. According to the DEC, "[t]hat [respondent] wore both the hat of the Trustee and the hat of a lawyer for the Trust does not by itself prove a conflict of interest. The evidence offered at the hearing did not clearly establish a conflict."

Similarly, the DEC concluded that respondent did not violate RPC 1.5(b), because a new client was not involved.

Respondent was the trustee-client and the lawyer, and, therefore, there could not have been any misunderstanding as to the fees and services. Moreover, the DEC found that respondent did not have to obtain the beneficiaries' consent to conduct the research, because, as trustee, he had the power to hire and compensate attorneys.

In light of its finding that respondent violated RPC 8.4(c) and that "the legal work done by [respondent] was not truly necessary to serve the interests of the Trust and beneficiaries," the DEC determined that he should reimburse the Trust for the \$2000 fees taken.

With respect to the loan agreement between Jessica and Nicole, the DEC found that respondent did not engage in a conflict of interest because "the evidence did not clearly establish that [he] was in fact representing both Jessica and Nicole in the loan agreement (especially in light of Nicole's testimony that she never considered him her attorney)." In addition, the DEC concluded that respondent did not violate RPC 1.5(b) because he did not charge a fee for his services.

With respect to the \$600 in administrative fees to the Trust, the DEC found that, while the amount was modest and the practice may be "common," the charge simply "cannot be squared

with his agreement to serve as trustee 'without compensation.'" Moreover, the fees were not taken until the final accounting in 2003. According to the DEC, respondent's failure to disclose the fees until the accounting that was prepared as the result of the grievance "clearly shows an intent to hide these charges from the beneficiaries." The DEC concluded that respondent violated RPC 8.4(c). It recommended that the money be returned to the trust and distributed to the beneficiaries.

With regard to Kennedy's services, the DEC found that the terms of the trust agreement permitted respondent, as trustee, to hire an accountant without the beneficiaries' approval. Accordingly, the DEC found that respondent did not improperly retain and pay Kennedy to prepare the 2000 accounting. The DEC was not concerned by the absence of a bill, a check representing payment, and documentation showing payment. The DEC observed that, while these factors may have constituted recordkeeping violations, they were not violations of RPC 8.4(c).

The DEC described respondent's "barter" arrangement with Scalcione as "a glaring example of [respondent]'s cavalier approach to his responsibilities as a trustee." In this regard, the DEC first remarked that it was questionable whether respondent had hired Scalcione for the benefit of the trust or

for the purpose of replying to the grievance. Second, Scalcione's fee seemed disproportionately high, given that (a) Kennedy had done an accounting for \$500, (b) there had been few distributions, (c) Scalcione needed only to update the Kennedy accounting, and (d) Scalcione was not an accountant. According to the DEC, respondent lacked the statutory authority to hire Scalcione, and, moreover, Scalcione's qualifications were "doubtful."

The DEC concluded that respondent violated RPC 8.4(c) when he entered into the transaction with Scalcione and failed to "accurately disclose it." Accordingly, it recommended that respondent reimburse the \$1500 fee to the trust.

—Finally, the DEC concluded that respondent violated RPC 1.15(d) for two reasons. First, he failed to reconcile his books on at least a monthly basis and to retain records of the reconciliations, in violation of R. 1:21-6(c)(1)(H). Second, he failed to maintain records showing payments to individuals not within his regular employ, that is, Kennedy and Scalcione, in violation of R. 1:21-6(c)(1)(F).

With respect to the appropriate form of discipline, the DEC stated:

Under all the circumstances, the Panel recommends that [respondent] receive a REPRIMAND, and that as additional conditions, [respondent] be required (1) to reimburse to the Trust the amounts listed below; (2) to distribute the balance of the Trust to the beneficiaries within two weeks of the final disposition of the Complaint; and (3) to submit to quarterly accountings of his trust and business accounts to the OAE for a period of two years.

As to fees, the Panel recommends that as a condition to a Reprimand, [respondent] reimburse the Trust the following:

\$2,000.00 in legal fees
charged by [respondent]
\$ 600.00 in administrative
fees charged by [respondent]
\$1,500.00 in fees for Anthony
Scalcione's services

This \$4,100 should be added to the \$1,210 remaining in the Trust, for a total balance of \$5,310 to be distributed between the two beneficiaries in accordance with their respective shares. These recommended reimbursements are to resolve fee disputes and are not a fine for any violations of the Rules of Professional Conduct.

[HPR16.]

Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. The DEC correctly concluded that respondent violated RPC 1.15(b), RPC 1.15(d), and RPC 8.4(c). The DEC also correctly concluded that

respondent did not violate RPC 1.5(b) and RPC 1.7(a)(2) with respect to the loan agreement. Although the complaint did not charge these rules based upon respondent's preparation of the loan agreement, the DEC heard testimony on the subject. However, we are unable to agree with the DEC's finding that respondent did not violate RPC 1.3 and RPC 1.4.

That respondent's conduct as trustee was controlled by the Rules of Professional Conduct is unquestionable. As the DEC observed, respondent was a lawyer who also happened to be a trustee. "An attorney serving as a trustee is held to the same high standards as an attorney who is representing a client." In re Dreier, DRB 93-404 (March 21, 1994) (slip op. at 13). Indeed, "[c]onduct by an attorney which engenders disrespect for the law calls for disciplinary action even in the total absence of an attorney/client relationship." In re Carlsen, 17 N.J. 338 (1955) (citing In re Howell, 10 N.J. 139 (1952)). Thus, attorneys must conform their conduct to the high standards of the profession even if their activities are not related to the practice of law. In re Genser, 15 N.J. 600, 606 (1954). Accord In re Alsobrook, DRB 05-237 (December 21, 2005) (slip op. at 22 n.7). Accordingly, attorneys who act as fiduciaries are within

the reach of any applicable RPC. Here, respondent violated several of those rules.

Respondent violated RPC 1.15(b) when he failed to terminate the trust on December 17, 2002, and failed to distribute all funds due. RPC 1.15(b) provides that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." In In re Dreier, supra, 138 N.J. 45 (1994), DRB 93-404 (March 21, 1994) (slip op. at 8), the Supreme Court concluded that an attorney/trustee violated RPC 1.15(b) when he failed to release certain trust funds after the trust had terminated. Respondent, too, violated that rule by not providing Nicole with any money from the trust until almost three months after it had terminated, by delaying the next payment another four months, and by failing altogether to pay the remaining \$1210 due her.

We find respondent's explanation for delaying payment upon Nicole's twenty-first birthday devoid of credibility. He claimed that he was not certain that Nicole had, in fact, turned twenty-one, when she wrote to him a few weeks after the event. Accordingly, he asked her for proof. Yet, the record contains an October 17, 2002 letter from respondent to Nicole, in which

he wrote: "Please supply me with a copy of your birth certificate and your drivers [sic] license at your earliest convenience. I look forward to winding-up the Trust affairs on or about December 17, 2002." Thus, in October 2002, respondent was well aware that Nicole's birthday was on December 17, 2002. In addition, he was well aware that the trust would terminate on that date.

The other evidence that detracts notably from respondent's credibility is his claim that, after Nicole attempted to terminate the trust, he requested a copy of her driver's license, because she had attempted to "dupe" him previously. The evidence offered in support of this claim, however, consisted of two letters between respondent and Jessica, not Nicole.

Unlike the DEC, we find that respondent ran afoul of RPC 1.3 and RPC 1.4(a) in the performance of his trustee responsibilities. Article VIII of the trust agreement required respondent to account to the beneficiaries upon written request. The DEC correctly found that it was not clear whether or when Jessica had made any request for an accounting prior to September 1999. However, respondent clearly violated RPC 1.3 when he failed to provide a final accounting until almost a year

after the trust had terminated and more than three months after a grievance had been filed against him. Moreover, he also violated RPC 1.4(a) insofar as he failed to provide Nicole with information pertaining to the amount of the balance that remained in the trust upon its termination.

We concur, however, with the DEC's finding that respondent did not violate RPC 1.5(b) or RPC 1.7(a)(2) when he performed legal research and collected a \$2000 fee for those services. N.J.S.A. 3B:14-23(1) grants a fiduciary, "in the exercise of good faith and reasonable discretion," the power to "employ and compensate attorneys for services rendered to the . . . trust." Indeed, trustees "'are entitled to the advice and help of counsel in the performance of their duties.'" Mears v. Addonizio, 336 N.J. Super. 474, 480 (App. Div. 2001) (quoting Gardner v. Baldi, 24 N.J. Super. 228, 232 (Ch. Div. 1952)). Thus, respondent had the authority to conduct legal research, so long as he did so in good faith and with reasonable discretion. By the same token, as the DEC correctly found, it was not a conflict of interest for respondent to conduct the legal research and, because he was the attorney and the trustee, there was no need for a fee agreement. We, therefore, dismiss the charged violations of RPC 1.5(b) or RPC 1.7(a)(2).

We find also that respondent did not violate RPC 1.4(a) when he conducted the legal research. The complaint suggests that this violation resulted from respondent's failure to obtain authorization for the research from either Jessica and Nicole or their parents. However, N.J.S.A. 3B:14-23(1) does not require a trustee to obtain anyone's permission before employing a lawyer. The trustee need only exercise good faith and reasonable discretion.

Notwithstanding these principles, "a trustee has 'no right to subject the trust fund unnecessarily to charges for counsel and attorney's fees.'" Mears, supra, 336 at 480 (quoting Holcombe v. Executors of Holcombe, 13 N.J. Eq. 413, 415 (Ch. 1861)). Respondent claimed that he conducted the research because he questioned whether the trust could continue if a co-trustee resigned and did not appoint a successor. His questioning of the viability of the trust was not unreasonable because the instrument was vague as to whether a successor had to be appointed prior to or upon the resignation of one of the trustees. Moreover, it was not unreasonable for respondent to conclude that he could conduct the research at a less expensive rate. Although the complaint charged that the \$2000 flat fee

was unreasonable, the record contains no evidence in this regard.

We are also unable to agree with the DEC's conclusion that respondent violated RPC 8.4(c) by conducting the research to resist Lynn's attempt to appoint a successor and by failing to disclose the charges for a year. Respondent's questioning the impact of Lynn's resignation upon the trust was reasonable. According to respondent, when Lynn first resigned, in August 1998, she did not appoint a successor. Respondent then did some research to determine if the trust could continue with only one trustee. Two months after Lynn resigned, she attempted to appoint a successor. At that time, respondent confronted her with the results of his research. No testimony or other evidence refutes these facts. Therefore, we cannot conclude that respondent performed the research to keep Lynn from appointing a successor.

We find, however, that respondent sought to conceal that he had done the legal research, when he submitted the October 1999 accounting. In the accounting letter to each beneficiary, respondent stated that \$1000 from each account was applied to a total attorney's fee bill of \$2000 for "services necessitated by the resignation of the Co-Trustee." He did not identify the

provider of the services, although he later corrected that omission when, in August 2000, he identified himself as the provider. We conclude that, although respondent was permitted to provide legal services to the trust under the circumstances, he concealed his identity from the beneficiaries, in violation of RPC 8.4(c).

The complaint charges that respondent also violated RPC 8.4(c) when he made the barter arrangement with Scalcione but charged the trust \$1500 for Scalcione's services, took \$600 in administrative expenses, and failed to pay the \$1,210.10 balance to Nicole.

As a matter of law, all of the accounting fees were improper. The DEC justified the payment of Kennedy's \$500 fee on the ground that N.J.S.A. 3B:14-23(x) permits a fiduciary to retain an accountant to prepare an accounting. We cannot concur with the DEC's reasoning for several reasons.

N.J.S.A. 3B:14-23(x) did not take effect until March 24, 2003. Kennedy was retained in the summer of 2000. Prior to the statute's effective date, a trust could not be charged for the services of an accountant to prepare an account because an accounting was "the responsibility of the fiduciary." Mears,

supra, 336 N.J. Super. at 482 (quoting In re Trust of Brown, 213 N.J. Super. 489, 494 (Law Div. 1986)).

In addition, even after March 2003, the statute permits a fiduciary to retain and compensate an accountant to prepare an accounting only if the accounting is "not the usual, customary or routine service[] provided by the fiduciary in light of the nature and skill of the fiduciary." N.J.S.A. 3B:14-23(x). The 2000 accounting reflected only two disbursements on Nicole's behalf. The twenty-eight disbursements made on Jessica's behalf were nothing other than routine. Thus, the statutory provision permitting the employment of an accountant still could not justify Kennedy's retention.

Nevertheless, respondent's retention of Kennedy cannot be considered a violation of RPC 8.4(c). There was nothing deceitful or dishonest about it. However, the money should be repaid to the trust. As seen below, this reimbursement is one of the requirements that we determine to impose on respondent.

On the other hand, respondent did not act improperly when he took taking \$600 in "administrative expenses." Although he agreed to serve without compensation and deducted actual expenses that were incurred, such as overnight mail charges, it

was not unreasonable for him to charge a small administrative fee to the trust to cover his overhead.

Unquestionably, however, respondent violated RPC 8.4(c) when he hired Scalcione and charged the trust \$1500 for Scalcione's services. Not only was respondent not permitted to delegate his duty to prepare an accounting, but he had his own interests in mind when he did so.

Respondent testified that he hired Scalcione as a result of the grievance, although he claimed that he would have required Scalcione's services even if a grievance had not been filed. The impropriety here is that the trust paid \$1500 to benefit respondent. Scalcione prepared the accounting for respondent, not for the trust. Respondent was required to prepare the accounting himself, as part of his duties. Scalcione charged \$1500 for the accounting. Instead of monetary compensation, however, Scalcione opted for the receipt of legal services, which respondent eventually provided.

If respondent had provided the legal services to Scalcione in exchange for the accounting work, all would have been well. There would have been an even exchange between them. Respondent, however, paid himself \$1500 from the trust. At the trust's expense, respondent obtained reimbursement for the legal

services that he performed for Scalcione. Respondent's "barter" arrangement, which was no barter arrangement at all, was dishonest because the trust paid for services that respondent had agreed to perform in exchange for Scalcione's accounting. It was also deceitful because the final accounting reflected a \$1500 payment to Scalcione, rather than respondent, thereby leading anyone to believe that Scalcione's work was for the benefit of the trust when, in fact, it was for the benefit of respondent.

The final count of the complaint charged respondent with recordkeeping violations. Spedding testified that respondent never provided the OAE with three-way reconciliations. Respondent's professed ignorance as to what they are and as to whether they were done is unconvincing. The requirement is simple to understand and, with little effort, easy to satisfy. Thus, respondent violated RPC 1.15(d).

In summary, we conclude that respondent violated RPC 1.3, RPC 1.4(a), RPC 1.15(b), RPC 1.15(d), and RPC 8.4(c).

There remains the quantum of discipline to be imposed for respondent's violations. Reprimands are typically imposed upon attorneys who deceive their clients. In re Rosenthal, 177 N.J. 606 (2003) (in addition to other ethics violations, attorney

violated RPC 8.4(c) when he supplied client with a fictitious docket number for the purpose of substantiating his false claim that he had filed a complaint on the client's behalf; because matter was a default and attorney had an ethics history, a six-month suspension was imposed); In re Weintraub, 171 N.J. 78 (2002) (in addition to other acts of misconduct, attorney violated RPC 8.4(c) when he engaged in deceitful conduct for the purpose of manipulating his client into paying attorney's personal bills; six-month suspension imposed due to "prolonged nature of the misconduct"); In re Gasper, 149 N.J. 20 (1997) (attorney reprimanded for fabricating a court order for the purpose of misleading his client into believing that he had filed a lawsuit on the client's behalf); and In re Dreier, 94 N.J. 396 (1983) (attorney publicly reprimanded for supplying a false docket number to his client for the purpose of misleading the client into believing that he had filed a lawsuit on the client's behalf). Like the attorneys in these cases, respondent's final accounting mislead the beneficiaries into believing that Scalcione had performed services for the benefit of the trust and that the trust had paid Scalcione for those services.

Admonitions or reprimands are the general measure of discipline for violations of RPC 1.15(b) and RPC 1.15(d). See, e.g., In re Ortelere, Docket No. 03-377 (DRB February 11, 2004) (attorney admonished for failure to promptly deliver balance of settlement proceeds to client after her medical bills were paid); In re Lustig, Docket No. 02-053 (DRB April 19, 2002) (admonition imposed upon attorney who, for three-and-a-half years, held in his trust account \$4800 earmarked for the payment of a client's outstanding hospital bill); and In re Dorian, 176 N.J. 124 (2003) (reprimand imposed upon attorney who failed to use escrowed funds to satisfy medical liens and failed to cooperate with disciplinary authorities).

As case law demonstrates, respondent's violation of RPC 8.4(c) alone requires a reprimand. Although respondent later corrected his deceit, he initially concealed from the beneficiaries that he was the attorney who performed the legal services on behalf of the trust. Respondent also misrepresented to the beneficiaries the propriety of having accountants prepare accountings and charging the trust for the work. More troubling, however, was respondent's taking \$1500 from the trust for himself, but claiming that the money was paid to Scalcione for his "accounting" services to the trust, when, in fact,

respondent had agreed to exchange Scalcione's services for his own. In this regard, his conduct was aimed at self-benefit. His arrangement with Scalcione permitted him to be paid by the trust, without the beneficiaries' knowledge, for the legal services that he had bartered with the electrician.

In fashioning the appropriate discipline for this respondent, we consider the nature of respondent's conduct, his motivation, as well as his disciplinary history. We note that that this is not the first time that he has exhibited gross neglect, lack of diligence, failure to communicate with a client, failure to promptly deliver funds, and failure to comply with the recordkeeping rules. As stated earlier, in 2003, respondent was reprimanded for these and other violations in three client matters. In re Carlin, supra, 176 N.J. 266.

The mitigating factors that respondent advanced should not serve to reduce the level of discipline ordinarily imposed for the same sort of conduct as that displayed by respondent. This is not the first time that he has offered in mitigation his family's health and his own personal problems. He did that in the 2003 case, causing us to determine that a reprimand should be imposed, rather than a suspension. The testimony there established that, although respondent had been treated by a

therapist referred by the Lawyers' Assistance Program, he stopped that treatment in December 2000, due to the provider's relocation. Because respondent's former therapist believed that respondent would benefit from continued therapy, he predicted that a suspension would be "counterproductive to respondent's treatment and harmful to his recovery." At the ethics hearing, which took place in April 2002, respondent testified that he would resume treatment with another professional whom he had recently contacted. Here, the testimony suggests quite strongly that, despite his promise, respondent did not continue with therapy after December 2000.

We note that additional mitigating factors in the previous matter included respondent's admission of wrongdoing, expression of remorse, and the absence of personal gain. These factors are not present here.

In light of the seriousness of respondent's infractions, his prior reprimand, and the absence of mitigating factors, we determine to impose a censure. In addition, we require him, within sixty days of the date of this decision, to (1) reimburse the trust in the amount of \$4000 for the accounting and attorney's fees, (2) distribute these funds to Jessica and Nicole, (3) release to Nicole the \$1210 that he should have

distributed to her on December 17, 2002, and (4) comply with the OAE's demand for three-way reconciliations.

Chair O'Shaughnessy and Member Wissinger voted to impose a reprimand. Members Baugh and Boylan did not participate.

We further require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
William J. O'Shaughnessy,
Chair

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

**SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD**

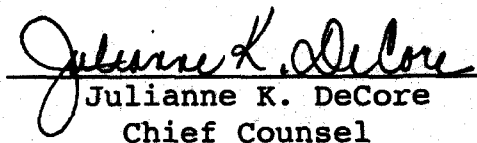
In the Matter of Kevin J. Carlin
Docket No. DRB 06-096

Argued: May 18, 2006

Decided: June 27, 2006

Disposition: Censure

| Members | Suspension | Censure | Reprimand | Disqualified | Did not participate |
|---------------|------------|---------|-----------|--------------|---------------------|
| O'Shaughnessy | | | X | | |
| Pashman | | X | | | |
| Baugh | | | | | X |
| Boylan | | | | | X |
| Frost | | X | | | |
| Lolla | | X | | | |
| Neuwirth | | X | | | |
| Stanton | | X | | | |
| Wissinger | | | X | | |
| Total: | | 5 | 2 | | 2 |


Julianne K. DeCore
Chief Counsel