SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-134

IN THE MATTER OF

EMANUEL H. NEEDLE

AN ATTORNEY AT LAW

Decision

Argued: October 16, 2003

Decided: January 29, 2004

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Frederick J. Dennehy appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by special master Edward F. Seavers, Jr.

Respondent was admitted to the New Jersey bar in 1957. He has no disciplinary history.

The ethics complaint alleged violations of RPC 1.5(a) [inadvertently charged as RPC 5.5(a)] (excessive fee), RPC 1.8 (a) (conflict of interest/prohibited business transaction with a client), RPC 1.15 (knowing misappropriation of trust funds), RPC 1.15 (negligent

misappropriation of trust funds), RPC 1.15(a) (commingling of personal and trust funds), RPC 1.15(b) (failure to promptly notify a third person of the receipt of funds in which the third person has an interest and failure to promptly deliver funds that the third person is entitled to receive), RPC 1.15(d) [inadvertently charged as RPC 5.5(a)] (failure to comply with the provisions of R.1:21-6), RPC 8.1(a) (false statement to disciplinary authorities), RPC 8.1(b) (failure to cooperate with disciplinary authorities), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice).

This matter is the result of an Office of Attorney Ethics ("OAE") random compliance audit of respondent's attorney records. The audit began on February 7, 1995 and continued on February 21 and 24, 1995, but could not be completed due to the volume, difficulty in retrieving and unavailability of records. Thereafter, the auditor had numerous telephone and written contacts with respondent to obtain necessary records. She also returned to respondent's office on July 30 and 31, 1996. The auditor testified that, sometime after October 1997, she had concluded that respondent was being deliberately uncooperative. Although respondent always promised to send the records, he sent incomplete records or none at all. He never provided any schedule of client balances, one of the most important documents for an audit.

Eventually, the OAE filed a petition with the Court seeking respondent's temporary suspension because, among other things, he had failed to fully comply with the OAE's requests for information. The petition resulted in an October 1998 consent order.

However, even after respondent consented to provide the OAE with all of the requested records, he failed to do so. During the ethics hearing, a significant amount of time was spent discussing what documents respondent had not yet given to the OAE. Respondent produced

documents in a piece-meal fashion during the forty-six hearing days, which spanned almost seven months, but never produced all of the requested records. Respondent contended he could not locate some of the documents because of their age. However, he should have retained almost all of them, pursuant to R. 1:21-6(b).

I. The T. Rowe Price Account (Counts One and Two)

In May 1981, respondent opened a T. Rowe Price Prime Reserve mutual fund account, (the "TRP account") in the name of "Emanuel Needle, Escrowee," using his law firm's employer identification number. The account was designated "Emanuel Needle Escrow Account." T. Rowe Price was, and is, located in Maryland.

After respondent deposited his clients' personal injury settlements in his Midlantic trust account, he sometimes retained part of the proceeds to pay medical providers or welfare liens, then transferred those funds to the TRP account. He did so by issuing Midlantic trust checks to TRP and depositing the checks in the TRP account. On the client ledger cards, respondent attributed the deposits to the original sources rather than showing that the funds had been transferred from his trust account.

There was a dispute as to whether respondent gave his TRP account records to the auditor during the first audit visit or whether he provided them only after she saw a reference to the account on a client ledger card and questioned him about it.

According to the auditor, respondent told her that the TRP account was another trust account that he used for investments made on behalf of clients. He initially told her that he did not have his clients' written authorization and was not sure whether he had their oral

authorization, but later admitted that he did not have his clients' authorization to invest their money. It was not until she discovered that funds escrowed for a medical provider had been deposited in the account that respondent admitted that the funds in the TRP account were not clients' investments.

Respondent testified that he told the auditor that he that he did not have his clients' written authorization to deposit their funds in the TRP account but that he had spoken to them about the fact that he had deposited their money in the account to obtain a higher interest rate. He only transferred funds to the account when he anticipated that it would take some time to resolve the third-party claim due to a dispute as to the legitimacy or amount of the claim. His clients benefited from the transfer because he remitted the interest to the clients, along with any funds not paid to the third party.

With respect to six clients whose funds were in the TRP account in December 1994, respondent could not recall why their monies had been deposited in the account. Some of the funds had been in the account since 1981.

Respondent also deposited the following non-client funds in the TRP account: (1) one brother's monthly social security checks; (2) another brother's personal funds; (3) funds that he received as the treasurer of a folk dance group; and (4) funds of Alpha, Beta, and Gamma (sometimes called Gemma), three limited partnerships that invested in real estate. Either respondent or his wife had an interest in each of the partnerships. Respondent testified that the partnerships were also his clients. As to why he had deposited partnership funds in the TRP account, he hypothesized that some of the funds may have been the result of a like-kind exchange and, to avoid a "taxable event," he decided to escrow the funds. Respondent then

stated that he used the like-kind exchange transaction as an example as to why he may have escrowed the limited partnerships' funds, but could not recall the actual reasons for the escrows.[1]

In September 1982, respondent had deposited $35,000 in the TRP account for Barbara Levin. According to the auditor, respondent had told her that Levin was a "business associate," not a client. However, respondent contended that Levin was a client for whom he had negotiated a structured settlement in an automobile accident case. As to why, in December 1982, he had disbursed $32,000 to Gamma from the Levin funds, respondent stated that the original $35,000 deposited for Levin was actually his fee and the $32,000 was a personal investment in Gamma. As to why his fee from the Levin matter had been deposited in the TRP account, respondent claimed that he had no prior experience with structured settlements and "I just wasn't sure how you handle the fee and whether it has to be approved because it wasn't set forth in any specific release."[2] Respondent did not explain why he left $3,000 in the account. In 1998, when the remaining funds were finally disbursed, respondent issued a $3,000 check to himself for the remainder of the fee and an $11,414.25 check to his law firm for the interest earned while the fee was in the TRP account.

Respondent also deposited fees in other cases into the TRP account because, for various reasons, he was not certain of the correct fees. As of December 31, 1994, respondent had fees from six clients in the account, some of which had been in the account since 1984. Respondent

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[1] As of December 1995, there was approximately $118,000 in the TRP account for the three partnerships, making it highly unlikely that respondent could not recall why he had escrowed the funds.

[2] In Merendino v. FMC Corp., 181 N.J. Super. 503, 509-10 (Law Div. 1981), the court held that a contingent fee in a structured settlement should be based on the cost to the insurer.

stated that he had not had time to review the matters due to his busy law practice, did not want to be accused of taking money that did not belong to him, and did not need the money.

Respondent also deposited his return on an investment in the TRP account. In November 1994, he received $102,885 from his investment in McMillan Company, but believed that he was entitled to additional monies. He purportedly deposited the money in the TRP account to preclude an argument by McMillan Company that he had entered into an accord and satisfaction.

As of December 31, 1994, there was $935,881.88 in the TRP account. The auditor testified that, on February 29, 1995, she told respondent to transfer all clients' funds in the account to an approved New Jersey bank, pay all of the unpaid third-party claims, cease computing his legal fees in contingency cases on the gross amount of the recovery, and correct all of his recordkeeping deficiencies.

According to respondent, the auditor only told him to remove all non-client funds from the TRP account, that there were errors in his computations of contingent fees and that he should refund clients for any excess fees.

Respondent did not comply with the directions he admits receiving from the auditor. He removed the limited partnerships' funds from the TRP account in December 1995 and his brothers' funds in January 1996, but did not remove the funds from the McMillan Company or the folk dance group.[3] Nor did he refund excess fees to clients.

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[3] Respondent disbursed more money out of the TRP account for his brothers and the limited partnerships than they were entitled to receive. Respondent attributed the excess payments, which totaled approximately $750, to his having approximated the accrued interest, rather than waiting until he received the TRP statement at the end of the month. He asked his secretary to correct the errors. It was unclear exactly how that was accomplished. In any event, the complaint did not contain any charges relating to those excess interest disbursements and the OAE did not seek to add such charge during the hearing.

In September 1998, the OAE filed a petition with the Court seeking respondent's temporary suspension. On October 9, 1998, the OAE and respondent entered into a consent order, which provided that respondent was to (1) transfer the funds in the TRP account to a new trust account in an approved New Jersey bank within ten days; (2) pay all accumulated interest to each identifiable owner whose funds were in the TRP account, or in lieu thereof, to the Interest on Lawyers' Trust Accounts Fund ("IOLTA") within sixty days; (3) pay all third-party claimants within sixty days; and (4) provide the OAE with all records required to be maintained under R.1:21-6, including the identities of all persons for whom respondent held trust funds, the sources of the funds and the interest attributable to each person, within sixty days.

On October 19, 1998, respondent transferred $588,295.68, the account balance, from the TRP account to a new trust account at Valley National Bank. He thereafter disbursed those funds as explained below.

Counts One and Two of the complaint charged that respondent deposited trust funds in an unauthorized, out of state financial institution, used an improper designation for a trust account and commingled personal and trust funds.

II. The Contingent Fee Matters (Count Six)

The auditor testified that she had noted, in February 1995, that respondent "routinely" took excessive fees in contingent-fee personal injury cases by calculating his fee on the gross rather than the net recovery and by deducting "overhead" costs. She had also observed that

respondent correctly calculated his fees in cases involving minors, whose settlements had to be approved by the court.[4]

The auditor told respondent to cease the practice of computing his fee on the gross recovery and deducting overhead expenses, recalculate his fees for personal injury settlements for 1993 through February 1995, and return the excess fees to his clients. On May 26, 1995, the auditor sent to respondent a form spreadsheet for personal injury settlements, showing the original fees, corrected fees, amounts repaid to clients, business account check numbers for the repayments, and dates of the repayments. However, the spreadsheet was only completed for clients whose settlement funds had been deposited in the Midlantic trust account during 1993 and respondent only reimbursed those clients for the excessive fees.

The spreadsheet shows that respondent deposited settlement funds for forty-seven clients in the Midlantic trust account during 1993. He took an excessive fee in thirty-four cases and the correct fee in only ten cases.[5] In eight of the ten cases, there were no costs. In three cases, respondent had not yet taken his fee.

Respondent admitted that he was aware that he had to calculate his fee on the net settlement amount. He blamed his secretary for the incorrect calculations. Respondent also admitted that he sometimes deducted for disbursements that should have been included in his attorney overhead, but claimed that he did not know that such deductions were improper until

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[4] Respondent's contingent fee agreements were preprinted forms containing the court-approved contingent-fee rates with blank spaces to be filled in with the relevant information. However, none of the relevant information was filled in, except for the clients' signatures.

[5] Respondent did not take any fee from Juan Rodriguez's $32,500 settlement. However, respondent's records indicate that he did not represent Rodriguez, who was a co-plaintiff of Armando Garcia, respondent's client.

told by the auditor. Respondent stated that, prior to 1992 or 1993, he had not deducted for such items, but that an attorney who worked for him told him that it was appropriate to recoup those expenses.

Respondent did not believe he was required to complete the spreadsheet for the Summit trust account or repay those clients because the "re" section of the auditor's letter enclosing the spreadsheet had only mentioned the Midlantic trust account. He did not believe that he had to complete a spreadsheet for 1994 and the first two months of 1995 because he ceased depositing settlement funds in the Midlantic account after he opened the Summit trust account in January 1994.[6]

The auditor compiled a "sampling" of excessive fees taken from clients whose funds had been deposited in the Summit trust account: (1) Mary Curry, $145.92;[7] (2) Lisa Henderson, $493.68; and (3) Ethel Ocowah, $102.97. However, there was no evidence of the incidence of excessive fees from settlements deposited in that account.

There was also an issue of whether respondent took an excessive fee from Armando Garcia's settlement because he divided the total settlement amount into two components and took a one-third fee on each of the components. In 1993, respondent took a $96,828.12 fee from the $290,484.36 gross recovery. In March 1995, he prepared an amended settlement statement, calculated his fee on the net recovery and remitted $732.42 to Garcia. The auditor testified that,

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[6] Between 1995 and 1998, Midlantic Bank became PNC Bank and Summit Bank became Fleet Bank. However, the names Midlantic and Summit are used regardless of the date of the transaction.

[7] The Curry matter is also an example of respondent retaining a medical escrow for an extended period of time. In June 1994, he escrowed $3,070 to pay two medical providers, telling his client that they had liens against her settlement proceeds and that he had been following up with Medicare to see if Medicare would pay the doctors' bills. As of the ethics hearing, those funds remained in the Summit account. Respondent did not recall what actions he had taken to resolve the escrow issue.

pursuant to R. 1:21-7(c) in effect in 1993, respondent was only entitled to take one-third on the first $250,000 and twenty-five percent of the next $250,000. Therefore, respondent should have remitted an additional $3,973.02 to Garcia.

Respondent argued that he was entitled to one-third of the total recovery because "it was really two recoveries, one was a recovery for the Compensation insurance company and the other was the balance recovery for the client."

Count Six of the complaint charged that respondent took excessive contingent fees, failed to cooperate with the OAE and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

III. The Monies Owed to Third Parties (Count Four)

As set forth above, respondent transferred monies owed to third parties from the Midlantic trust account to the TRP account. He testified that the monies remained in the TRP account for extended periods of time because he was negotiating with the third party or was waiting for the statute of limitations to bar the claim. He did not have a specific policy as to how long he would attempt to negotiate with a third party before he simply kept the funds in the TRP account and waited for the statute of limitations period to run. Even after the statutory time had run, he continued to hold the funds.

The auditor testified that she had found no evidence that respondent had been negotiating with the third parties. When respondent closed the TRP account, he remitted funds to third parties in seventeen client matters. There was extensive testimony about the following six cases.

A. The Bottone Matter

In 1976, Tina Bottone's parents retained respondent's firm to represent her in a personal injury claim against the Hillside Board of Education. Bottone was a minor at the time.

In 1983, Bottone, who was then an adult, and her husband began receiving welfare benefits from the Ocean County Board of Social Services ("OCBSS") and signed an agreement to repay OCBSS. Thereafter, Robert Abramowitz, an associate with respondent's firm, acknowledged that he had received Bottone's agreement to repay from OCBSS and requested the amount of the welfare lien. OCBSS replied that its lien was $3,869 but that, if Bottone reapplied for welfare and received additional benefits, the lien amount would increase and cautioned Abramowitz not to disburse any settlement funds without prior authorization from OCBSS.

Bottone's case was settled on June 26, 1985, the scheduled trial date. According to Abramowitz's notes, the case settled for $15,000 while he was "in court" with Bottone and her mother. In Abramowitz's hand-written settlement statement, he showed the attorney fee as one-third of the net recovery and indicated that $3,869 was to be "held in escrow," in "an interest bearing acct [sic] on behalf of client until welfare contacts us."

After depositing the $15,000 settlement check in the Midlantic trust account on July 23, 1985, respondent issued a $5,900.66 check to Bottone and transferred the remaining $9,099.34 to the TRP account. Respondent testified that he did not take his fee at that time because Abramowitz had left the firm and he was not sure of the correct fee amount. However, respondent's letter enclosing Bottone's check stated that the check was net of deductions for fees of $4,884.83 and expenses of $345.51 and that $3,869 would be held in an interest-bearing account for Bottone.

According to respondent, he did not pay the welfare lien because he had believed that Bottone was a minor at the time she had received welfare benefits and there was case law that held that welfare agencies could not seek repayment of welfare grants to the minor's parents from the minor's personal injury recovery.[8]

In September 1987, OCBSS sent a letter to Abramowitz, requesting information about Bottone's case. Because there was no reply, OCBSS sent an identical letter to respondent in October 1987, then several more letters to him between April 1988 and January 1990.

It was not until May 1990 that respondent told Larry Perlberg, counsel to OCBSS, that the case had already been settled. At that time, Perlberg sent to respondent, among other things, OCBSS's ledger showing the benefits paid to Bottone and Bottone's 1983 agreement to repay OCBSS. Perlberg requested that respondent send him a copy of the settlement statement.

Despite several telephone calls and letters from Perlberg, respondent did not send the settlement statement or pay the lien. However, in February 1991, he transferred $3,869 from the TRP account to the Midlantic account and withdrew $4,884.83 for his fee and $345.51 for expenses, leaving $4,269.59 in the TRP account for Bottone.[9]

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[8] Respondent alluded to two 1991 newspaper articles in his file for Bottone. However, those articles post-dated his decision to escrow the lien monies. Furthermore, the articles concerned an Appellate Division decision that Essex County could require a parent of a child with a personal injury trust fund to apply to the county surrogate for release of the money to the welfare office as a condition of welfare. The Supreme Court reversed that decision in 1992 but respondent did not have the Supreme Court opinion. In any event, Bottone was not a minor when she received welfare benefits.

[9] There was a dispute as to whether respondent was entitled to a one-third fee because Bottone was a minor when the contingent fee agreement was signed and the agreement and the court rule limited respondent's fee to twenty-five percent. Respondent contended that he was entitled to a one-third fee because the case had been assigned out to a trial. He did not know whether a trial had actually commenced because Abramowitz had handled the case. Abramowitz had also computed the fee on the settlement statement, but did not testify at the ethics hearing. Bottone recalled being in the courthouse for the trial but did not know whether a trial had commenced. Based on the foregoing, there is no clear and

Respondent then offered $1,925 to OCBSS as a compromise amount.[10]

Despite two subpoenas from OCBSS, respondent never provided Bottone's settlement statement.

In February 1994, respondent returned the $3,869 to the TRP account. Pursuant to the consent order in the ethics proceeding, respondent sent a $3,869 check to OCBSS in 1998. He also sent a $3,559.82 check to Bottone for the interest earned on the $3,869, after Bottone signed an agreement to indemnify his firm for any claim by OCBSS. Respondent disbursed the remaining $3,493.11 to his firm for the interest earned on the fee while it was in the TRP account. He explained that he did not give the $3,493.11 to Bottone because he believed it would be a violation of the fee-sharing rule.

In October 2000, Perlberg notified respondent (1) that the $3,869 payment was not sufficient to satisfy OCBSS's lien because Bottone had received additional welfare payments prior to July 1985, when respondent had disbursed the settlement proceeds to her; (2) respondent was personally liable for the $1,925 shortfall; and (3) if respondent did not satisfy the lien, OCBSS would pursue Bottone for the money. Perlberg testified that OCBSS had determined to delay its collection action against Bottone pending the resolution of the ethics matter because the

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convincing evidence that respondent took an excessive fee in the Bottone matter.

[10] In his letter to OCBSS, respondent stated that (1) OCBSS might not be entitled to repayment because Bottone was a minor when she was injured; (2) OCBSS was only entitled to be repaid from December 1984 because that is when Bottone signed the agreement to repay; and (3) there were "special circumstances" because Bottone suffered "serious permanent injuries and it is also anticipated that she will incur future medical bills (plastic surgery)." Respondent had never spoken with Bottone and there was no evidence that Bottone had suffered any serious injury or required plastic surgery. Furthermore, OCBSS had already sent Bottone's 1983 agreement to repay to respondent.

auditor had told him that Bottone might be entitled to additional monies from respondent due to the fact that respondent had taken an excessive fee.

Bottone testified that, when her case settled, it was her understanding that OCBSS would be paid immediately from the escrow. She learned that payment had not been made approximately thirteen years after the settlement, when she received a letter from OCBSS. Bottone called respondent several times but was never able to speak with him. According to Bottone, her only communications with respondent were his 1995 letter forwarding the settlement check and his 1998 letter forwarding the interest check.

B. The Afriyie Matter

In July 1985, Vida Afriyie retained respondent to represent her in connection with injuries she sustained while a passenger on a New Jersey Transit bus.[11] By letter dated December 15, 1987, to USF&G Insurance Company, respondent confirmed that USF&G had agreed to settle Afriyie's claim against the driver of the vehicle that hit the bus for $10,000. Respondent represented to USF&G that he would satisfy any medical liens from the settlement proceeds.

In February 1988, respondent deposited the $10,000 settlement check in his Midlantic trust account and issued two checks to his firm, for $3,559 and $35.[12] He remitted $4,856 to Afriyie, leaving $1,550 in the account to pay Afriyie's doctors. The $1,550 was transferred to

[11] Between 1982 and 1985, respondent had represented Vida Afriyie and her daughter in related personal injury claims, settling both claims for $18,500.

[12] The client ledger card shows that respondent's expenses in the matter were $195. Therefore, his fee should have been $3,268.33. There was no explanation for the $35 disbursement.

the TRP account in September 1988. Respondent testified that he transferred the funds because he had believed that Blue Shield might be obligated to pay the bills of Drs. Weinstein and Bhandari.[13]

However, according to the auditor, respondent had told her that the $1,550 had been transferred to the TRP account because the settlement funds were insufficient to pay all of the medical providers and he was negotiating with the two doctors.

In July 1989, respondent received a $1,000 settlement check from New Jersey Transit, from which he took a $333 fee and remitted $667 to Afriyie. In his letter to Afriyie forwarding the check, respondent stated that he was "following up on efforts to collect additional monies for payment of the medical bills." There was no evidence of any effort by respondent to get Blue Shield to pay the doctors.

As to why the $1,550 remained in escrow for more than ten years, respondent testified "I was trying to resolve it with Blue Cross/Blue Shield. Now, I realize that seems like a long period of time but when you're dealing with Blue Cross/Blue Shield you don't measure in months. You measure in years."

The $1,500 had grown to $2,620.15 while in the TRP account. In December 1998, respondent disbursed $1,070.15 to Afriyie, $275 to Dr. Bhandari and $1,275 to Dr. Weinstein. Respondent's letter to Afriyie enclosing the $1,070.15 check was returned by the post office because Afriyie no longer lived at the address.

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[13] Respondent had sent letters to both doctors in March 1988 requesting that they complete and sign Blue Shield physician information forms. Dr. Weinstein completed and signed the form in June 1988, but there was no signed form from Dr. Bhandari. According to respondent's arbitration case statement, Afriyie's medical specials totaled $1,827.98 (Overlook Hospital, $152.98; Dr. Weinstein, $1,275; Summit Radiological Assoc., $45; Dr. Bhandari, $275; and Emergency Medical Assoc., $80). There was no evidence as to the payment of the other medical bills.

C. The Joyner Matter

Sometime prior to August 1989, Harold Joyner retained respondent to represent him in a personal injury claim. On October 12, 1989, respondent issued a letter of protection to one of Joyner's medical providers, the Center for Treatment of Pain and Traumatic Injury ("CTPTI"). In January 1990, CTPTI sent copies of its bills to respondent. According to the cover letter, the balance was $1,335, after deductions for "deductible & co-pay."

Respondent deposited the $26,712 settlement funds in the Midlantic trust account in January 1993, then disbursed $15,912.50 to Joyner, $362 to a Dr. Lemazow and $9,102.50 to his firm ($8,904 in fees and $198.50 for disbursements).[14] The remaining $1,335 was transferred to the TRP account in February 1995.

The auditor testified that respondent initially told her that there were not sufficient funds to pay all of the medical providers and that he escrowed $1,335 while he negotiated a reduction of their bills. Respondent denied having made that statement to the auditor. He stated that he retained the funds because CTPTI's bill could not have been correct if they had received co-payments.

In 1997, CTPTI filed a complaint against Joyner for its unpaid bill. Respondent filed an answer on behalf of Joyner, as well as a reply to CTPTI's motion for summary judgment, alleging a statute of limitations defense.

David Watner, Esq., CTPTI's counsel, testified that he rejected respondent's initial $500 settlement offer, but later agreed to settle the case for $650, after respondent told him that he had

[14] Respondent calculated his fee on the gross recovery.

remitted all of the settlement proceeds to his client because he was unaware that CTPTI was owed any additional monies. Respondent never paid the money.

Respondent denied having told Watner that he had remitted all of the settlement funds to his client. He claimed that he did not send the $650 check to Watner because Watner never sent him a release.

As of November 1998, the $1,335 had grown to $1,669.23. Respondent disbursed $500 to Watner, $974.23 to Joyner, and $195 to his law firm.[15]

By letter dated December 5, 1998, Watner returned the $500 check, stating that the settlement figure was $650 and requesting that respondent forward a check for that amount. Respondent did not recall having received Watner's letter. Watner obtained a judgment against Joyner.

Respondent's check to Joyner was not negotiated.

D. The McMillan Matter

In May 1991, respondent settled James McMillan's personal injury claim for $10,800.[16] He escrowed $1,225 for four medical providers: CTPTI ($787), Dr. Lemazow ($72), Dr. Gangemi ($172), and Dr. Giampapa ($224). Respondent told McMillan that he was negotiating

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[15] Respondent contended that the $195 was for his representation of Joyner in the suit filed by CTPTI. He also claimed that, when Joyner brought in the complaint to him, he had obtained Joyner's oral authority to use the interest earned on the $1,335 for his costs and fees in the litigation. When the special master noted that the documents indicated that Joyner had mailed the complaint to respondent, respondent stated that he did not have a specific recollection that Joyner had delivered the complaint, but that, if Joyner had mailed it to him, he would have spoken to Joyner on the telephone about his fee for the CTPTI suit.

[16] Respondent calculated his fee, $3,600, on the gross recovery.

with the medical providers to reduce their bills and that, to the extent he was successful, he would remit the savings to McMillan.

In 1992, after Dr. Giampapa filed suit against McMillan, respondent settled the case for $150. He transferred the remaining $1,105 to the TRP account in January 1994.

In May 1995, Watner filed a complaint on behalf of CTPTI against McMillan for its unpaid fee. In October 1995, Watner and respondent agreed to settle the case for $325. According to Watner, respondent told him "there was little money received from the personal injury settlement and not enough to pay this bill in full." By letter dated October 27, 1995, respondent confirmed the settlement and requested that Watner forward to him a release and a stipulation of dismissal. He then transferred $500 from the TRP account to his Summit trust account.[17]

By letter dated November 8, 1996, Watner inquired when he would receive the $325 payment and indicated that it was his second request for payment. Respondent did not recall having received the letter.

As of November 1998, there was $802.97 in the TRP account for McMillan. Respondent issued a $325 check to Watner and a $477.97 check to McMillan. Respondent testified that he had forgotten that he had transferred $500 to his Summit trust account to pay Watner and those funds remained in the Summit account as of the ethics hearing.

The checks to Watner and McMillan were never negotiated. Watner did not cash the check because it was for less than the judgment he had obtained against McMillan. Respondent testified that he did not know that Watner had obtained a judgment against McMillan "but I

[17] Respondent could not issue a check for less than $500 from the TRP account.

would now have an exposure and all the more reason not to distribute that money to deal with the problem."

E. The Woods Matter

Sometime prior to June 1977, Alfreda Woods retained respondent to represent her in connection with a personal injury claim. In June 1977, the Essex County Welfare Board ("ECWB") notified respondent's firm that Woods had received welfare benefits; had signed an agreement to repay, which it enclosed; and requested that it be kept informed about the personal injury claim. Between April 1980 and February 1987, ECWB sent twelve letters to respondent's firm requesting information about the status of the case, but did not receive a reply. However, on ECWB's May 20, 1986 letter, respondent had replied, on March 14, 1988, "Matter pending – please mark ahead 2 Months." [sic]

In fact, Woods' case had settled sometime prior to December 1982 because respondent had transferred $8,152.68 to the TRP account on that date.[18] Respondent testified that he had escrowed the funds because there was a dispute about ECWB's lien, but did not explain the nature of the dispute.

As of November 1998, the $8,152.68 had grown to $25,568.40. Respondent issued a $17,415.72 check to Woods and an $8,152.68 check to ECWB. He sent Woods' check to two addresses but it could not be delivered to her. ECWB did not receive its check because it had been sent to an old address.

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[18] Respondent never produced the Midlantic client ledger card for Woods or any other documents from Woods' file.

Edward English, an Essex County administrative analyst, testified that ECWB's file did not indicate any dispute about the lien. In fact, respondent never notified ECWB that Woods' case had been settled. He learned about the settlement from the OAE auditor.

Because ECWB had not received the check, English wrote to respondent on March 23, 2000, stating that Woods had received $49,045 in welfare benefits and that respondent should remit any funds he was holding, with the accumulated interest, to ECWB. Respondent did not reply to the letter. In his reply to a subsequent letter from counsel for Essex County, respondent requested ECWB's calculations of benefits, including dates and amounts, and copies of documents in support of the lien claim. Apparently, counsel for Essex County did not reply to respondent's letter.

In January 2002, respondent filed an interpleader action regarding Woods' funds. He did not take any action in the remaining cases where clients or third parties had not cashed the checks.

F. The Moody Matter

On December 23, 1986, respondent deposited a $5,000 settlement check for Valerie Moody in the Midlantic trust account. After deducting $1,967.67 for his fee and $242.60 for expenses, respondent escrowed the remaining $2,789.73 for ECWB's welfare lien.[19] On November 6, 1987, he transferred the funds to the TRP account. Periodically, he made interest payments to Moody from the Midlantic trust account because he could not issue checks for less

[19] Respondent calculated his fee on the gross recovery. Furthermore, the client ledger card indicates that his expenses were $102.60, not $242.60.

than $500 from the TRP account. According to respondent, the interest payments totaled $1,292.31.

Respondent testified that he did not pay ECWB because Moody had denied having signed an agreement to repay the welfare grants. There is a June 1989 letter signed by Moody that supports that testimony. However, ECWB had notified respondent, in August 1985, that it had a claim on any recovery and had attached a copy of Moody's repayment agreement to its notification.

Moody testified that she was not told of ECWB's lien until she went to respondent's office to pick up her settlement check. Respondent then told her that he would hold the funds for a period of time because "Essex County is, you know, it's so big, and they'll forget," but that he would periodically remit to her the interest earned on the funds. Thereafter, when she contacted respondent about her settlement funds, "he would just say, well – he still getting the thing [sic] from the Essex County Welfare, and he would let the secretary figure out the interest." At times, Moody had difficulty contacting respondent about her interest checks and "would have to get very upset with him in order to get an interest check." She did not recall the dates or the amounts of the checks.

In 1997, respondent released the settlement funds to Moody, after she signed an agreement to indemnify him for any claim by ECWB. In June 1997, respondent transferred $4,589.78 from the TRP account to his Summit trust account, leaving $93.76 in the TRP account. He did not recall why he left funds in the TRP account. Respondent then remitted $2,789.73, the original escrow amount, to Moody.

However, the $2,789.73 had earned $306.98 in interest while in the Midlantic trust account in 1986 and 1987 and $1,893.81 in interest while in the TRP account through May 1997. Furthermore, the $93.76 that was left in the TRP account in 1997 had grown to $108.03 when the TRP account was closed in 1998. Respondent disbursed the $306.98 and $108.03 to his law firm in 1998. He did not recall how or when he had disbursed the additional $601.50 ($1,893.81-$1,292.31) although he was certain that there were no funds remaining for Moody in any of his trust accounts.

Respondent contended that his firm was entitled to all of the additional interest because Moody had agreed, by countersigning his June 9, 1997 letter, that, in the event of "any interest balance remaining due as a result of final calculations and adjustments, we are authorized to apply same to additional fees and expenses incurred in this matter since establishment of the escrow account."

Moody denied having signed the letter, but admitted having signed the indemnification agreement referenced in the letter. She contended that she would not have signed an agreement permitting respondent to keep any of the interest.

ECWB closed its collection file on Moody in February 1991, apparently because it had determined that it could not obtain repayment.

Count Four of the complaint charged that respondent failed to promptly deliver funds that a third person is entitled to receive, provided false information to disciplinary authorities, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct prejudicial to the administration of justice.

IV. **The Glicken Loans (Count Five)**

It is undisputed that respondent loaned money to clients. According to respondent, in the early 1970s, Harry Glicken, the husband of his cousin, Molly Glicken, wanted to invest money in loans to respondent's clients. Respondent testified that Harry Glicken died a few years after the loan arrangements had begun. He then spoke to Molly Glicken, who agreed to "a couple of loans." Thereafter, according to respondent, he funded the "Glicken" loans. However, he continued to represent to his clients that the funds came from Molly Glicken because he wanted to "keep it on a businesslike basis" and discourage clients from seeking loans from him. In his form letters to clients setting forth the terms of the loans, respondent stated that the letter "will serve to confirm that you have requested me to assist you in your efforts to obtain a loan...I am pleased to inform you that I am able to arrange for this loan through Mrs. Molly Glicken."

Respondent contended that he only loaned money to clients who could not obtain funds from other sources and who demonstrated "a real need" for the funds. However, respondent's testimony and documents do not support that contention. Some of the reasons for the loans included "this or that," "to start a business," "certain living expenses," "certain debts that have accrued for personal living expenses," and "personal and travel expenses."

The auditor testified that respondent never mentioned Harry Glicken to her. He told her that Molly Glicken was an elderly relative, who had given him money many years before, and that he did not keep track of her funds because she had given him permission to use the money to "loan it out and do business." Respondent also told her that he continued to use Glicken's name after he began funding the loans because his clients were more likely to repay if the money was owed to an investor.

According to the auditor, there was no evidence that Molly Glicken had ever given money to respondent, had ever received funds from him or that she even existed. When she asked respondent how she could contact Glicken, he told her that he had not spoken to Glicken in a long time and that he did not know her address or telephone number in Florida. When she tried to get respondent to explain some of the Glicken transactions to her, "the result was unsatisfactory."

Respondent admitted that he used Glicken's name on the loan documents, issued trust checks to Glicken when the loans were repaid, endorsed Glicken's name on the checks, redeposited the checks in his trust account and used the funds for loans to other clients. There was extensive testimony about the following five cases.

A. The Wilkerson Matter

In February 1983, respondent settled a personal injury claim on behalf of Raymon Wilkerson. Liberty Mutual Insurance Co. agreed to pay $35,000 immediately and $375 per month, commencing February 1984, for the remainder of Wilkerson's life.[20] If Wilkerson died before receiving $90,000 from the monthly annuity payments, his beneficiary would receive them until $90,000 had been paid.

Respondent's ledger card for Wilkerson begins on July 31, 1984, showing a $2.10 disbursement for photocopies, even though Wilkerson's case had been settled in 1983. Although

[20] Respondent testified that the lump sum payment was made directly to Wilkerson, that he had received a separate fee check and had deposited it in his business account. However, the settlement agreement states that the $35,000 check was to be made payable to Wilkerson and respondent's firm because it included attorney's fees and disbursements, as well as Wilkerson's settlement proceeds. There was no evidence of how much Wilkerson received from the $35,000.

respondent had identified the ledger card as pertaining to Wilkerson's personal injury claim, he later stated that was incorrect and that he began the ledger card when he started loaning monies to Wilkerson.

According to the ledger card, between August 6 and 8, 1984, respondent made three deposits, totaling $15,000, to his Midlantic trust account for Wilkerson, from "H. Glicken." On August 13, 1984, he issued two checks to Wilkerson, for $2,500 and $12,500. Respondent stated that he loaned the $15,000 to Wilkerson because Wilkerson wanted to start a business and was unable to obtain a bank loan. Although the ledger card indicates that the funds came from H. Glicken, respondent did not recall if it was Harry Glicken's or his own money that funded the $15,000 loan.[21]

According to respondent, Wilkerson agreed to repay the loan with his $375 monthly annuity payments. There was no evidence of a loan agreement. Thereafter, according to respondent, Wilkerson requested additional loans because he needed money "for this or that." Between December 1985 and April 1989, respondent made seven additional loans, totaling $14,085, to Wilkerson. Respondent believed that he used his personal funds for most of the loans.[22]

Wilkerson died in December 1990. According to respondent, he transferred $5,080 to Wilkerson's estate in December 1990 and $1,500 in April 1993 to pay Wilkerson's funeral bills

[21] Respondent earlier testified that Harry Glicken had died within a few years of the commencement of the loans in the early 1970s. On respondent's analysis of the Wilkerson loans, he showed Molly Glicken as the obligee of the 1984 loan.

[22] On his analysis of the Wilkerson loans, respondent shows himself as the obligee of two of the loans and Molly Glicken as the obligee of the remaining loans. All of the loans had a sixteen percent interest rate. The ledger card shows that the monies for a $3,500 loan had been transferred from the funds of "C. Irons." Respondent testified that he had previously loaned money to Irons, another client, and the $3,500 was from a repayment of that loan.

because his family did not have any money. Respondent was unable to locate the Wilkerson estate client ledger card.

Respondent continued to receive the $375 monthly annuity payments after Wilkerson's death and will continue to receive them until January 2004. Using the Wilkerson ledger card, the auditor calculated that, as of February 1995, respondent had loaned $35,665 to Wilkerson or his estate and had received $46,875.

Respondent claimed that he loaned $44,885 to Wilkerson and to Annette Davis, Wilkerson's mother and the beneficiary of his annuity, and that the monthly annuity checks will not be sufficient to repay all of the loans. As proof of the additional disbursements, respondent produced his August 2000 letter to Davis, which Davis counter-signed. However, there are discrepancies among the dates and loan amounts shown in the letter, on the ledger card, and on respondent's analysis of the Wilkerson loans.

Respondent deposited the $375 loan repayments in his Midlantic trust account, attributing the funds to Wilkerson. Between August 1984 and December 1987, he periodically transferred the accumulated funds to the TRP account, again attributing the funds to Wilkerson, and indicating that they had been received from "Liberty."

Beginning in February 1989, respondent used the Wilkerson loan repayments that had accumulated in his Midlantic trust account to make loans to other clients.[23] Between February 1989 and October 1994, he made fourteen loans, totaling $19,325, to eleven clients from the Wilkerson loan repayments. When making each loan, respondent issued a Midlantic trust check

[23] In 1996, respondent transferred the Wilkerson funds from his Midlantic trust account to his Summit trust account. Thereafter, he deposited the $375 checks in the Summit account.

to his law firm, as trustee, deposited it in his Midlantic trust account, then issued a trust check to the client.

Respondent did not report to the IRS the interest earned on any of the loans. The funds that respondent had transferred to the TRP account remained there until November 1998, when he disbursed the principal, $14,590, to himself and the interest, $13,385.70, to his firm. Respondent testified that the interest was reported at that time. He did not explain why the interest was attributed to his law firm, not him.

As to the interest on the Wilkerson loan repayments allowed to accumulate in the Midlantic account and used to fund loans to other clients, there was no evidence whether respondent or his firm paid income tax on those funds. However, given respondent's position, as set forth below, that he did not have to recognize interest income until he withdrew it from his trust account, it is unlikely that he paid tax on that interest.

B. The Garcia Matter

Respondent began representing Armando Garcia sometime in 1989. Apparently, some settlement funds were deposited in the Superior Court sometime prior to July 1990, but Garcia's personal injury case was not completely settled until August 1993. Between July 1990 and February 1993, respondent made ten "Glicken" loans, totaling $13,430, to Garcia.[24]

There were loan documents for some of the loans. The documents included a letter from respondent to Garcia, countersigned by Garcia with an "X," setting forth the loan terms, an

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[24] Garcia spoke only Spanish. He was unable to read or write in Spanish or English and signed his name with an "X." Respondent testified that a relative, who would interpret for him, always accompanied Garcia.

assignment, and a promissory note. Garcia assigned the proceeds of his personal injury settlement to Molly Glicken and authorized respondent's firm to pay the loan principal plus twelve per cent interest from the settlement proceeds.

On July 27, 1993, the $322,984.36 settlement funds were deposited in the Midlantic trust account. Between August 11 and 13, 1993, respondent issued three checks to Molly Glicken, for $1,000, $9,413.84 and $4,634.16.[25] According to the Garcia client ledger, the $9,413.84 check was used to fund a loan to Maria Soriano, another client. However, as, set forth below, Soriano actually received her loan on July 13, 1993. The remaining two checks, for $1,000 and $4,634.16, were used to fund loans to Jose Castro, another client.

C. The Soriano Matter

In April 1993, respondent settled a personal injury case on behalf of Maria Soriano for $14,300. Because the settlement was to be paid by the Joint Underwriting Association ("JUA")[26] and Soriano had to wait eighteen months to receive the proceeds, the JUA agreed to pay her six percent interest, or a total of $15,587.

In July 1993, Soriano received a "Glicken" loan for $9,413.84, at six percent interest, to be repaid from the settlement proceeds. Respondent calculated the loan amount by taking the total settlement amount ($15,587), deducting his one-third fee from the gross amount

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[25] Garcia had repaid the original $500 loan shortly after it was made.

[26] The Market Transition Facility replaced the JUA. However, this memorandum refers to both entities as JUA.

($5,195.66), and then deducting disbursements ($119.50), which left $10,271.84. Respondent then calculated that $9,413.84 at six percent interest for eighteen months equaled $10,271.84.

In the loan documents, Soriano authorized respondent to endorse her name on the settlement check, and to take his fee and expenses, and pay Glicken from the settlement funds.

As set forth above, respondent purportedly used Garcia's loan repayment to fund Soriano's loan. However, Soriano received $9,413.84 on July 13, 1993, Garcia's settlement check was not deposited in the trust account until July 27, 1993, and respondent did not issue the check to Glicken from Garcia's funds until August 11, 1993.

Respondent contended that he had more than $14,000 of his own funds in the account to cover the loan to Soriano. As to why he had shown Garcia as the source of the funds, respondent testified,

> I knew I had more than sufficient funds to cover it. But I didn't want to start going through each name, small amounts to identify it. And I knew Garcia was in the process, the money was coming...So to keep it easier and simple bookkeeping I just attributed it to that as I balanced out the loan from Glicken on the Soriano matter just for purposes of having some record in my own mind. And that way I wouldn't have to get involved in a lot of picayune details with a lot of different clients, the fees that I may have been holding small amounts. [sic]

In December 1994, respondent deposited Soriano's settlement funds, $15,587, in the Summit trust account. After taking his fee and expenses, he transferred the remaining $10,271.84 to the TRP account on January 9, 1995.

As of November 1998, there was $12,433.93 in the TRP account. Respondent disbursed the original $10,271.84 to himself and the interest to his firm.

D. The Castro Matter

Sometime in 1991, Jose and Carolina Castro and their three children retained respondent's firm in connection with an automobile accident. In 1992, respondent's firm filed suit on behalf of the Castros against Peter Darko and Vida Afriyie.[27]

Respondent settled Jose and Carolina Castro's case for $15,000 in July 1993. Because the settlement amount was being paid by the JUA, the Castros were to receive $16,350, which included six percent interest, within eighteen months. The Castros' three children received $400, $400, and $200, also to be paid within eighteen months at six percent interest.

By letter dated August 13, 1993, to the Castros, respondent confirmed that they had requested a $9,000 "Glicken" loan, at twelve percent interest, for "personal living expenses." The Castros assigned their settlement proceeds to Glicken; authorized respondent to endorse their names on the settlement check; and authorized him to repay Glicken, deduct his attorney's fees and disbursements, and pay any medical bills from the settlement proceeds.

On October 16, 1993, Castro signed an acknowledgment that he had received $8,216.50 net proceeds from the loan, after payments to medical providers.[28]

Part of the funds for the Castros' loan came from Garcia's loan repayment. On August 12, 1993, respondent designated two of Garcia's repayments, for $4,634.16 and $1,000, for Castro. On Castro's client ledger card, those amounts are shown as received from Glicken.[29] On

[27] The issue of respondent's suing Afriyie, his client, is discussed below.

[28] There are discrepancies among the acknowledgement, the ledger card, and respondent's list of disbursements as to the medical providers and the amounts owed to each provider.

[29] All of the Castro family's information is shown on Jose Castro's client ledger card and the ledger card includes transactions involving the Midlantic trust account and the Summit trust account.

August 16, 1993, respondent issued four checks, totaling $9,000, to or on behalf of Castro, $3,365.84 more than had been deposited for him. The client ledger card indicates a $3,365.84 deposit from a "Glicken" loan below the checks.

The auditor testified that there was no corresponding $3,365.84 deposit into the trust account. Respondent contended that he had sufficient personal funds in the account to cover the loan. Throughout August 1993, the daily balance in the Midlantic trust account always exceeded $200,000. Without a schedule showing the clients' funds that should have been in the account, it is impossible to determine if respondent used other clients' funds for the Castros' loan.

On January 20, 1995, respondent deposited the Castros' $17,440 ($16,350 for Jose and Carolina, $436 each for two of their children and $218 for their third child) settlement proceeds in his Summit trust account. On January 27, 1995, he took $5,450 for his fee for representing Jose and Carolina and $266 for disbursements, having calculated his fee on the gross recovery. In May 1995, respondent issued three checks to Castro, for $327, $327, and $163.50, the net settlements to the children, leaving a balance of $10,906.50. As of July 1997, that amount remained in the Summit trust account. Respondent testified that the $10,906.50 belonged to him or his firm for the repayment of the "Glicken" loan and for fees deducted from the Castro children's settlements. He did not believe that the funds were still in the Summit trust account as of the ethics hearing.

E. The Sanford Matter

In 1989, Judy Sanford retained respondent in connection with a personal injury action. In August 1991, respondent made a $4,200 loan to Sanford. He used $3,000 of the Wilkerson funds

for the loan, but could not account for the source of the remaining $1,200. However, he was certain that he had sufficient funds in the Midlantic trust account to fund the loan. During August 1991, the balance of the Midlantic trust account always exceeded $90,000 and there was no schedule showing the clients' funds that should have been in the account at that time.

In May 1993, respondent deposited Sanford's $13,780 settlement check in the Midlantic trust account, then forwarded a $3,325 check to Sanford with a settlement statement showing his fee, $4,593, calculated on the gross settlement amount. Respondent also deducted $382 for expenses; $5,067 for repayment of the "Glicken" loan; and $413 for an escrow for Dr. Berlin's bill. Although respondent told Sanford that he was attempting to negotiate a reduction in the bill, there was no evidence of any negotiations.

In July 1993, respondent issued a check to his firm for the fees and expenses. In February 1994, he issued a $5,067 check to Glicken, leaving $412.61 in the account. Those funds were transferred to the Summit trust account on March 1, 1995. Respondent testified that those funds remained in the account because of a question concerning the amount due Dr. Berlin. However, there was an April 1996 bill from Dr. Berlin showing a $413 balance that was more than 120 days overdue.

Count Five of the complaint charged that respondent engaged in conflicts of interest and in conduct involving dishonesty, fraud, deceit, or misrepresentation.

V. <u>The Interest Earned on the TRP Account (Count Three)</u>

On September 30, 1988, respondent transferred $25,963.28 in interest earned on funds in the Midlantic trust account to the TRP account. While the funds had been in the Midlantic

account, respondent had not recorded the interest on each client's ledger card. Rather, he maintained only one ledger card, called the "client interest account." Respondent testified that some of the interest had been generated from fees that he had not withdrawn from the account.

When respondent transferred the interest to the TRP account, he created one "interest" ledger card showing the interest deposited in the account and the monthly interest earned on those funds.[30] As of November 1998, when respondent transferred the funds to Valley National, the TRP interest account had grown to $43,098.27.

With respect to clients' funds transferred from Midlantic to the TRP account, respondent kept separate client ledger cards showing the deposits, withdrawals and interest earned. According to respondent, he initially hand-calculated the interest on those funds based upon the monthly interest rate paid on the TRP account. He later retained a computer software consultant to create a program to calculate the interest and to print individual client ledger cards for the TRP account.

Between 1981 and 1997, the TRP account earned at least $377,260.87 in interest.[31] T. Rowe Price issued 1099 tax forms in the name of "Emanuel Needle Escrow Account," with the law firm's employer identification number. While the funds were in the TRP account, respondent did not report the interest income on his or his firm's tax returns and did not issue 1099 forms to clients whose funds were in the account.

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[30] Interest continued to accumulate on the funds in the Midlantic trust account until 1994, when Midlantic ceased paying interest on non-IOLTA accounts. As of June 30, 1996, there was $12,243.45 in the client interest account at Midlantic.

[31] The OAE was unable to obtain the interest amount for 1992.

The auditor testified that respondent had told her he had issued 1099s to his clients. Respondent denied having made that statement. He insisted that he had told her that his accountant was responsible for issuing 1099 forms for his firm. However, respondent's accountant testified that he did not issue any 1099 forms for respondent's firm.

When the IRS questioned respondent about the $48,506 interest earned on the TRP account in 1995, respondent's accountant replied that it was "not the taxpayers' income. The earnings are disbursed to clients. We have written to you about this account in prior years...Therefore, the $48,506 should not be added to their [respondent and his wife] taxable income." Similar statements were made to the IRS with respect to the interest earned on the TRP account in 1993 and 1996. Respondent's accountant testified that the information provided to the IRS came from respondent.

Respondent testified that he and his law firm operated on a "cash basis" and did not have to pay taxes on fee or interest income until it was withdrawn from the TRP account.

Of the $588,295.68 in the TRP account in November 1998, $43,098.27 was in the interest account. From those funds, respondent disbursed $21,181.30 to his law firm; $1,943.64 to his brother; $2,546.34 to clients; $15,067.88 to IOLTA; and $2,359.21 to his Midlantic trust account. According to respondent, the $21,181.30 was the interest earned on fees that had been left in the Midlantic trust account and transferred to the TRP account. He transferred $2,359.21 to his Midlantic interest account to reimburse it for checks written against that account that should have been written from the TRP account. Because respondent could not issue checks for less than $500 from the TRP account, he issued those checks from the Midlantic interest account.

Respondent remitted $15,067.88 to IOLTA because he was unable to allocate that interest to any client.

Of the remaining $545,197.41 in the TRP account, respondent disbursed $169,820.34 to himself and $231,591.43 to his firm. Although respondent claimed that the primary reason for depositing funds in the TRP account was to earn a higher rate of interest for his clients' benefit until he settled third-party claims, only $77,036.31 was disbursed to clients and $47,373.89 to third parties. The checks sent to twelve clients were never cashed because they were sent to old addresses.

Respondent transferred $11,910.96 to his Summit trust account, purportedly because he was waiting for a release and refunding bond from a beneficiary of the Benjamin estate. The Benjamin estate's funds had been in the TRP account since 1985.

The remaining funds in the TRP account were disbursed to the folk dance group and other individuals and entities that were not respondent's clients.

Respondent testified that the funds disbursed to his firm were for fees and the interest earned on the fees while they were in the TRP account, as well as the interest on "Glicken" loans. Respondent did not explain why he did not disburse the interest on the "Glicken" loans to himself.

Of the $169,820.34 respondent disbursed to himself, $125,151.54 was from his McMillan Company investment. He also took $3,000 from Barbara Levin for legal fees. The remaining monies were loan repayments from six clients.

Count Three of the complaint charged that respondent knowingly misappropriated the interest earned on trust and escrow funds in the TRP account, failed to safeguard those funds and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

VI. <u>The Perez Trust Funds (Count Seven)</u>

Sometime in 1987, Cecilia Perez retained respondent's firm to represent her with respect to a personal injury claim. By letter dated June 29, 1992, respondent confirmed that he had agreed to represent Perez's son, Alberto, in a criminal matter and that Perez had assigned $2,500 to respondent from the proceeds of any recovery on the personal injury claim to pay Alberto's legal fees, "together with such additional sums as may be required." Thereafter, Alberto acknowledged that he owed $12,143.61 to respondent.

On December 22, 1993, respondent deposited Perez's $12,720 settlement check in the Midlantic trust account. He thereafter withdrew $4,179.56 for his fee and $181.33 for expenses, leaving $8,359.11 in the account.

On February 21, 1995, the auditor's assistant completed a schedule of client ledger balances for the Midlantic trust account as of December 31, 1994, based on the open client ledgers respondent had given to her. Respondent did not give her the Perez ledger.

The auditor testified that she later learned that Perez's funds should have been in the trust account from another OAE employee, who was investigating a grievance filed by Perez.[32]

[32] The Perez grievance was ultimately dismissed.

Adding the Perez balance to the schedule of client ledgers resulted in an $8,366.50 shortage in the account as of December 31, 1994.[33]

Respondent testified that he must have withdrawn the $8,359.11 from the account pursuant to the assignment prior to December 31, 1994. However, he had no evidence to support that contention. Furthermore, on November 8, 1995, in reply to an OAE inquiry in connection with the Perez grievance, respondent had represented that the $8,359.11 remained in the Midlantic trust account.

The auditor testified that, in February 1995, she instructed respondent to reconcile his Midlantic trust account, pay out all of the balances promptly and bring the account into balance. However, when she returned to respondent's office in July 1996, she determined that the shortage in the Midlantic trust account had grown to $9,347.09 as of June 30, 1996. In addition to the $8,359.11 for Perez, there was $674.50 owed to the folk dance group, a non-client, $100 for the Southside High School reunion, another non-client, and $12,243.45 in the client interest account. Respondent had not prepared any schedule of client ledgers between December 1994 and June 1996, despite the auditor's requests that he do so. Therefore, the auditor was uncertain whether any client's funds should have been in the Midlantic trust account.

Neither respondent nor the auditor was able to account for the increased shortage in the Midlantic trust account as of June 30, 1996. The special master noted that a discrepancy in the balance for the folk dance group and an interest payment to a client might have accounted for the difference. According to respondent's schedule of client balances, which was produced during

[33] There was a $7.39 shortage in the account before Perez's funds were added but the auditor did not consider that shortage to be significant.

the hearing, there was a $201.54 negative balance for the folk dance group. However, the auditor's schedule shows a $674.50 positive balance. Furthermore, respondent made an interest payment to Moody from the client interest account on December 4, 1995. Those two discrepancies seemed to account for the apparent increase in the shortage.

Count Seven of the complaint charged that respondent negligently misappropriated client trust funds, failed to cooperate with disciplinary authorities, and failed to comply with the recordkeeping requirements of R. 1:21-6.

VII. The Afriyie/ Castro Matter

During the ethics hearing, there was testimony that respondent engaged in a conflict of interest by suing Afriyie on behalf of the Castros, after he had represented Afriyie in two matters, was still holding funds in escrow to pay her doctors and was purportedly attempting to get Blue Shield to pay the medical bills.

Respondent testified that Donna Mantel, an associate with his firm, handled the Castro file. His testimony was based on Mantel's June 1993 letter to the Castros, enclosing settlement releases. However, respondent also testified that Mantel joined his firm shortly before he moved his offices from Newark to Maplewood in July 1993. Therefore, she was not with the firm in 1992, when the suit was filed on behalf of the Castros against Afriyie.[34] Furthermore, all of the other correspondence in the Castro file was addressed to or from respondent. Therefore, the evidence shows that respondent was primarily responsible for the Castro file.

Respondent did not believe there was a conflict in his suing Afriyie because he had

[34] The Castros' complaint was not in evidence.

settled Afriyie's case in 1988, his firm did not commence its representation of Castro until 1991, the cases were not related, and his holding Afriyie's funds and his attempts to obtain payment of her medical bills did not preclude him from suing her.

The special master found respondent guilty of all of the violations charged in the complaint, including the knowing misappropriation of clients' funds. The knowing misappropriation finding was based on respondent's "taking of the interest [in the TRP account] as well as the improper fee...supported by his hiding the amounts in an improper trust account until he thought he had succeeded in avoiding detection on the issue."

It was obvious that the special master did not find respondent to be a credible witness. He noted that respondent often lowered his voice and put his hand in front of his face when answering difficult questions and that he had a "convenient" memory, not recalling many events, "but when helpful, he could remember conversations from the 1980s."

As to respondent's failure to produce records that the court rules require he maintain, the special master stated that there was "no question" in his mind that respondent's

> actions and inactions were designed to delay the inevitable and give him an opportunity to create any explanation which might fit the factual scenario discovered by the OAE. Respondent volunteered nothing and he grudgingly provided perhaps 50% of that which he was obligated by Rule to provide.

The special master recommended that respondent be disbarred. He expressed concern about the funds respondent was still holding and respondent's failure to declare income on his tax returns. He recommended, among other things, that respondent be required to file amended tax returns from 1982 on to reflect all of the interest he earned during that time. He also recommended that the matter be referred to the IRS or the United States Attorney's Office.

The special master's concluding paragraph reflects his assessment of respondent's character.

> Having witnessed Respondent's tactics during the hearing, having heard his *modus operandi* for the period of 20 years reviewed, having heard his dealings and delays regarding the OAE investigation, it is obvious that Respondent will use the same tactics and *modus operandi* to delay loss of any funds accrued over at least 20 years as a result of his unethical and likely illegal actions. Only actions beyond discipline to include corrective action can remedy the situation for clients, third parties and governmental entities.

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. However, we are unable to agree with the special master that there is clear and convincing evidence that respondent knowingly misappropriated trust and/or escrow funds.

The OAE argued that respondent deposited trust and escrow funds in the TRP account with the intent to misappropriate them; that, but for the OAE audit, "every dollar from the [TRP] account would have gone into respondent's pocket"; and that respondent's "overall handling of the [TRP] account is tantamount to knowing misappropriation of interest on trust funds."

The Court has defined knowing misappropriation as "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." In re Wilson, 81 N.J. 451, 455 n.1 (1979). Here respondent did not use, even temporarily, clients' funds or the interest on the funds while they were in the TRP account. He simply allowed the funds to remain in the account, earning additional interest. The OAE is likely correct that respondent would have ultimately taken the funds for himself if not for the OAE's intervention. The deposit of trust funds in an out-of-state mutual fund account might be

considered constructive theft and the retention of the funds in the account for extended periods of time might evidence an intent to permanently deprive clients and third parties of their funds. However, there was no evidence that respondent misused any client's funds during the seventeen years that the TRP account was open. Taking into account all of the evidence in this matter, we do not find clear and convincing evidence that respondent knowingly misappropriated interest on trust and/or escrow funds.

The OAE also argued that all of the interest earned on funds in the TRP account belonged to clients and that respondent knowingly misappropriated clients' funds when he ultimately paid some of the interest that had accumulated in the TRP account to his law firm. The OAE cited N.J. Advisory Comm. on Professional Ethics Opinion 326, 99 N.J.L.J. 298 (1976), which states that clients' trust funds may be deposited in an interest-bearing account, but that, "it must be clearly understood that any interest or accretion is the property of the client."[35]

The OAE also cited In re Goldstein, 116 N.J. 1 (1989) for the proposition that "misappropriation of interest from a client's trust account [is] unethical." In Goldstein, an OAE random audit revealed that, between 1980 and 1986, Goldstein's trust account had accrued in excess of $32,000 in interest from real estate closing funds and personal injury settlement funds. Between 1982 and 1986, Goldstein withdrew $25,000 from the account and deposited the funds in his business checking account or money market account. He reported the interest to the IRS as income. During the relevant time, Goldstein opened separate interest-bearing accounts for

[35] Prior to 2002, the Court Rules did not specifically address interest–bearing trust accounts. However, effective September 2002, R. 1:21-6(b) was amended to add "[n]othing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney."

clients who specifically requested them. Goldstein contended that he was unaware of Opinion 326.

The OAE had argued that Goldstein's conduct was tantamount to the misappropriation of trust funds and that Goldstein should be disbarred. However, the Court found that there was no clear and convincing evidence that Goldstein had known that his taking the interest was improper. Critical to the Court's determination was the fact that it was the first time that the Court had "addressed the discipline of an attorney for the retention of interest from trust funds." Id. at 2. The Court publicly reprimanded Goldstein but warned that "such conduct belies the public trust in the legal profession's handling of clients' funds, *see In the Matter of Wilson*, 81 *N.J.* 451, 455 (1979); in the future, such conduct will be subject to more severe discipline." Ibid. See, also, In re Sorensen, 122 N.J. 58 (1991) (public reprimand where the attorney had withdrawn $13,403 in interest earned on his trust account between 1986 and 1988); In re Pressler, 132 N.J. 155 (1993) (public reprimand where the attorney had withdrawn $8,802.15 in interest earned on his trust account between 1984 and 1986); In re Kelley, 140 N.J. 69 (1995) (admonition where the attorney had withdrawn $2,912.17 in interest earned on his trust account between 1989 and 1992, where it was stipulated that the attorney did not know about Opinion 326 or Goldstein until 1993, forwarded a $2,912.17 check to IOLTA, and reported his actions to the OAE).

Unlike Goldstein and the attorneys in the other cases cited above, respondent denied that he took interest earned on clients' trust funds. Rather, he contended that he paid the interest earned on clients' funds to clients or to IOLTA. According to respondent, the interest disbursed to him or his firm had been earned on legal fees, on "Glicken" loan repayments or on his own

funds that were left in the TRP account. There is no clear and convincing evidence to the contrary.

In N.J. Advisory Comm. on Professional Ethics Opinion 582, 117 N.J.L.J. 394 (March 27, 1986), the Committee stated that a law firm could allocate interest earned on its trust account between the firm and its clients. The law firm had a large personal injury practice and always had a large balance in its trust account comprised of clients' funds and contingent fees. However, the Committee noted that

> there would be a period of time between the date of disbursement made by the law firm to the client and the clearance of the draft or check so issued, during which time interest would accrue on that amount for the benefit of the law firm. This is commonly known as a "float." In our opinion, this would be improper and, in effect, if permitted, would result in the law firm receiving interest on monies belonging to the client.

Although the Committee cautioned that attorneys could not take interest earned on clients' funds, even during a "float" period, there was no proscription against taking interest earned on fees while they were in the trust account.

Of course, respondent left his fees in the TRP account for many years, a fact not contemplated in Opinion 582. Furthermore, in some cases, respondent's entitlement to a fee is less than clear. However, in the absence of any evidence that respondent took the interest earned on clients' funds, there was no clear and convincing evidence that respondent knowingly misappropriated trust or escrow funds.

There is clear and convincing evidence that respondent failed to safeguard clients' funds. While his clients' funds were in the Midlantic trust account, respondent kept one "client interest" ledger card, rather than recording the interest on each client's ledger card. He compounded that error when he transferred the interest account to the TRP account without apportioning the

interest among his clients. The result was that respondent ultimately sent more than $15,000 to IOLTA because he was unable to allocate that interest to his clients. Furthermore, respondent kept his clients' funds for years, while making no effort to keep them informed about that fact, which resulted in his being unable to locate his clients when he was ordered to return their funds to them.

As to the charge that respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, respondent repeatedly lied to the IRS about the TRP account, claiming that all of the monies in the account were clients' trust funds, when, in fact, most of the funds belonged to respondent or his firm. From 1981 until at least 1998, respondent failed to pay income tax on the substantial interest paid on the account. Furthermore, while respondent disbursed the principal amounts of the "Glicken" loan repayments to himself, he disbursed the interest on those loans to his firm.

With respect to the charge that respondent commingled trust and personal funds in the TRP account, the evidence shows that respondent deposited clients' trust funds, escrow funds, non-client funds, personal investment funds, and fees in a mutual fund account in a financial institution located outside New Jersey. Respondent's contention that he was not aware, until the audit, that his use of the TRP account was improper is not credible.

The Rules of Professional Conduct were adopted in July 1984, to be effective September 10, 1984. RPC 1.15(a) specifically requires an attorney to "hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the

lawyer's own property. Funds should be kept in a separate account maintained in a financial institution in New Jersey."[36]

Furthermore, the court rule requiring trust accounts to be maintained only in approved New Jersey financial institutions became effective March 1, 1985. Pressler, Current N.J. Court Rules, Comment 1 on R. 1:21-6 (2003). Thereafter, the Court issued numerous notices to the Bar listing the approved financial institutions. Therefore, it is not credible that respondent did not realize that the TRP account violated the court rules. Also, attorneys are required to be aware of their ethical responsibilities. "It is well-settled that ignorance of the law does not diminish responsibility for an ethics violation." In re Gifis, 156 N.J. 323, 355 (1998).

Finally, respondent had no excuse for why he ignored the auditor's February 1995 demand that he transfer clients' funds to a New Jersey institution. It was not until the OAE filed a petition for respondent's temporary suspension and respondent entered into a consent order in 1998 that he transferred the funds from the TRP account.

Respondent also argued that the TRP account was "not designed to function *as* an Attorney Trust Account, but rather *with* an Attorney Trust Account which served as a conduit for both deposits and disbursements." The argument is creative, but without any legal basis. Respondent also claimed that he had believed that it was appropriate to deposit all of the monies

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[36] The Court rejected the Debevoise Committee's recommendation that would have permitted clients' funds to be maintained in another state with the consent of the client. Comment to RPC 1.15, 114 N.J.L.J. Supp. at 7 (July 19, 1984). The predecessor Disciplinary Rule, DR 9-102(A), required that all clients' funds "be deposited in one or more identifiable bank accounts maintained in this State, and no funds belonging to the lawyer or law firm shall be deposited therein" except funds to cover bank charges and funds belonging in part to the client and in part to the lawyer, where the client disputes the lawyer's right to the funds.

in one account because he was holding all of the funds in a fiduciary capacity. That argument is without any factual or legal basis.

As to the charge that respondent used an improper designation for the TRP account, R. 1:21-6(a)(2) requires that attorney trust accounts be designated as an "Attorney Trust Account." The TRP account was designated "Emanuel Needle Escrow Account." Although the charge is tangential to the primary issues and a minor violation, the designation violated the court rule.

Therefore, there is clear and convincing evidence that respondent violated RPC 1.15(a), RPC 8.4(c) and R.1:21-6, as charged in Counts One, Two and Three of the Complaint.

With respect to the charge that respondent took excessive contingent fees from his clients' settlement funds, of the clients whose funds were deposited in the Midlantic trust account during 1993, respondent took excessive fees in thirty-four cases. He took his correct fee in only ten cases. In eight of the ten cases, there were no costs. In three cases, he had not yet taken his fee. In summary, respondent took excessive fees in thirty-four of the thirty-six cases (94%) in which there were costs and he took his fee.

There is no documentation of the incidence of excessive fees from clients whose funds were in the Summit trust account. Respondent did not complete a spreadsheet for 1994 and the first two months of 1995, as he was required to do. However, the auditor testified that respondent "routinely" calculated his fee on the gross settlement amount. Furthermore, it was apparent from the settlement statements of clients whose cases related to other counts of the complaint that respondent regularly calculated his fee on the gross settlement amount.

Respondent blamed his secretary for the incorrect calculations. However, respondent signed all of the checks and most of the settlement statements. Thus, there is clear and

convincing evidence that respondent knowingly took excessive contingent fee sonal injury cases.

Respondent blamed his failure to complete a spreadsheet for and return ex clients whose funds had been deposited in the Summit trust account on the fact that section of the auditor's letter only referred to the Midlantic trust account. However, the au told respondent, in February 1995, that he had to recalculate his fees through February 1995 an remit the excess fee amounts to clients. Both respondent and the auditor knew that respondent had stopped depositing settlement funds in the Midlantic account when he opened the Summit account in January 1994. Therefore, respondent could not have reasonably believed that the auditor had limited her request to the Midlantic account. Moreover, respondent had an independent obligation, pursuant to the Rules of Professional Conduct, not to charge excessive fees and the Court Rules specifically state the method for calculating contingent fees. There is no merit to respondent's argument that he was not required to complete a spreadsheet for and return excess fee amounts to clients whose funds were deposited in the Summit account in 1994 and 1995.

With respect to the Garcia matter, respondent argued that he was entitled to divide the total settlement amount into two components, the amount remitted to the client and the amount remitted to the workers' compensation carrier, and to take a one-third fee on each of the components. Respondent conceded that the Appellate Division rejected his argument in a 1975 case. McMullen v. Maryland Casualty Company, 127 N.J. Super. 231 (App. Div. 1974), aff'd sub nom McMullen v. Conforti & Eisele, Inc., 67 N.J. 416 (1975). He argued, however, that there is no clear and convincing evidence that he knowingly violated R. 1:20-7(c) because the

court in Pacillo v. Harris Mfg. Co., 182 N.J.Super. 322 (Law Div. 1981) permitted the attorney to take one third of the aggregate net recovery. However, the attorney in Pacillo had filed an application for, and his client had consented to, the enhanced fee. The Pacillo court discussed the fee limitations under R. 1:20-7(c) and McMullen, but determined that the attorney was entitled to an enhanced fee because of a number of factors, pursuant to R. 1:21-7(f).

Unlike the attorney in Pacillo, respondent did not apply to the court for an enhanced fee. Thus, Pacillo provides no support for his argument that he did not knowingly violate R. 1:20-7(c). It is noteworthy that respondent prepared the amended settlement statement for the Garcia matter after the auditor had discussed the issue of excessive fees with him. At the ethics hearing, he initially used his fee remittance to Garcia as an example of his compliance with the auditor's demand that he return excess fees. Yet, he limited his compliance to returning only that portion of the excess fee attributable to his having calculated the fee on the gross recovery.

Therefore, there is clear and convincing evidence that respondent violated RPC 1.5(a), RPC 8.4(c), and R. 1:21-7(d), as charged in Count Six of the Complaint.

With respect to monies owed to third parties, in a number of cases, respondent escrowed funds from clients' personal injury settlements to pay medical providers or welfare liens, but failed to pay the third parties. Respondent then transferred the funds to the TRP account, where it remained for years. Woods' funds had been deposited in 1982, Bottone's in 1985 and Moody's in 1987. The auditor found no evidence that respondent had negotiated with the third parties.

The OAE contended that respondent transferred the funds to an out-of-state institution hoping that the third parties and his clients would forget about the funds or cease their efforts to

obtain them, leaving respondent a substantial sum of tax-free money. There is evidence to support the OAE's argument.

In the Bottone matter, respondent ignored several letters and telephone calls from OCBSS. When pressed, he told OCBSS that he was researching the issue of its lien – five years after Bottone's case had been settled. In 1991, when OCBSS was pressing respondent for payment, respondent transferred the funds from the TRP account to the Midlantic trust account, but returned them to the TRP account in 1994, without resolving the lien issue. Bottone had believed that respondent had paid the welfare lien in 1985.

In the Woods matter, respondent ignored twelve letters from ECWB between 1980 and 1987. In 1988, he misrepresented to ECWB that Woods' case was still pending when it had been settled prior to December 1982. ECWB did not learn of the settlement until 2000, when the OAE auditor called to find out whether ECWB had received respondent's 1998 check.

In the Moody matter, respondent told his client that he would escrow the funds for ECWB's lien for a time to see whether ECWB would forget about the lien. Respondent's plan was successful because ECWB closed its collection case in 1991.

Respondent also used delaying tactics and misrepresentations to avoid paying medical providers. In the Afriyie matter, he held funds owed to two physicians for ten years while purportedly waiting to see if Blue Shield would pay their bills. Yet, he apparently did nothing during that ten-year period to ascertain the status of the claim.

In the Joyner and McMillan matters, respondent did not attempt to settle CTPTI's claims until collection actions were commenced against his clients. He made misrepresentations to CTPTI's attorney to settle the suits for less than the amount owed, then failed to pay the

settlement amounts. The result was that CTPTI obtained judgments against Joyner and McMillan. Although respondent had represented both clients in CTPTI's suits, he purportedly was unaware that judgments had been entered against them.

Even after the auditor told respondent to remit the funds in the TRP account to the third parties, respondent failed to do so. It was not until the OAE petitioned the Court for respondent's temporary suspension and respondent signed a consent order that respondent finally did so.

The complaint also charged that respondent engaged in conduct prejudicial to the administration of justice because he failed to comply with OCBSS's two subpoenas seeking his settlement statement for Bottone. OCBSS's contemporaneous letters and Perlberg's testimony establish that respondent never provided the document to OCBSS, even though it was in respondent's file for Bottone.

Therefore, there is clear and convincing evidence that respondent violated RPC 1.15(b), RPC 8.1(b), RPC 8.4(c), and RPC 8.4(d), as charged in Count Four of the Complaint.

With respect to the "Glicken" loans, there was no dispute that respondent loaned money to clients. Although respondent claimed that the funds initially came from Harry Glicken in the 1970s, then from his wife, Molly Glicken, there was no evidence that (1) Harry or Molly Glicken had given respondent any monies, (2) that they received any loan repayments, or (3) that they ever existed. Respondent testified that he had kept no record of the funds received from or paid to the Glickens. Despite that fact, he was certain that he had repaid them all of their funds. The auditor testified that, when she asked respondent how she could contact Molly Glicken, respondent replied that he did not know her address or telephone number.

In any event, respondent admitted that he represented to his clients that Molly Glicken funded the loans when, in fact, it was respondent's money. He also admitted that he used Glicken's name on the loan documents, issued trust checks to Glicken when the loans were repaid, endorsed Glicken's name on the checks, redeposited the checks in his trust account and used the funds for loans to other clients.

A lawyer is prohibited from entering into a business transaction with a client unless the terms are fair and reasonable to the client, are fully disclosed and transmitted in writing to the client, the client is advised to seek independent counsel and the client consents in writing to the transaction. RPC 1.8(a).

Respondent argued that he complied with all of the requirements of RPC 1.8(a). He ignored the fact that he did not disclose to his clients that he was funding their loans. Indeed, respondent misled his clients into believing that he was representing them in the transactions and misrepresented that Harry or Molly Glicken was the source of the funds.

Furthermore, there was no evidence that respondent disclosed, in writing, the loan transactions to Wilkerson or Sanford or that Wilkerson or Sanford consented, in writing, to the transactions. There were loan documents for some, but not all, of the loans to Garcia.

Therefore, there is clear and convincing evidence that respondent violated RPC 1.8(a) and RPC 8.4(c), as charged in Count Five of the complaint.

With respect to the Perez matter, respondent had no records showing what had happened to the $8,359.11 that was left in the Midlantic account in 1993 from Perez's settlement funds. Furthermore, respondent failed to prepare a schedule of client ledger balances for the Midlantic trust account, as required by R. 1:21-6 (c)(1)(B). Even after the auditor specifically told

respondent to complete them, he did not do so. Therefore, there is clear and convincing evidence that respondent violated RPC 1.15(d) and RPC 8.1(b).

It is not so clear that respondent negligently misappropriated client trust funds in the Perez matter. The auditor initially found a $7.39 shortage in the Midlantic trust account, which she did not consider to be significant. After she learned of the Perez client ledger card and added Perez's funds to the schedule of client ledgers, she determined that the shortage was $8,366.50, leading her to conclude that respondent had negligently misappropriated the funds. However, respondent was entitled to Perez's funds, pursuant to Perez's assignment of her personal injury recovery to pay her son's legal bills. Respondent cannot be found guilty of negligently misappropriating funds to which he was entitled, even if he could not prove when he had taken the funds.

The special master hypothesized that there was a pre-existing shortage in the account that was covered by the Perez funds. However, such hypothesis does not amount to clear and convincing evidence.

In July 1996, the auditor prepared another schedule of client ledgers and determined that the shortage had grown to $9,347.09 as of June 30, 1996. Deducting the Perez funds leaves a $987.98 shortage. Neither respondent nor the auditor was able to account for the increase in the shortage from December 31, 1994. However, the special master noted that a discrepancy in the balance for the folk dance group and an interest payment to Moody might have accounted for the difference. The only ledgers listed on the auditors' schedule besides Perez were the client interest account ($12,243.45), the folk dance group ($674.50), and the Southside High School reunion ($100). The folk dance group and the reunion committee were not clients. There was no

evidence as to whether the $12,243.45 in the client interest account represented interest earned on legal fees or on clients' funds.

In light of the vague and ambiguous evidence, we cannot find that respondent negligently misappropriated trust funds in the Perez matter.

Although not charged in the complaint, there was clear and convincing evidence presented at the ethics hearing that respondent violated RPC 1.7(a) by suing Afriyie, a client. RPC 1.7(a) prohibits a lawyer from representing a client if the representation of that client will be directly adverse to another client unless the attorney reasonably believes that representation will not adversely affect the relationship with the other client and both clients consent after full disclosure of the circumstances. Respondent had the burden of proving that he had his clients' consent to the representation. See R. 1:20-6(c)(2)(C); In the Matter of Patrick Patel, Docket No. DRB 98-261, DRB decision at 14, n. 3 (January 11, 1999). He did not recall if he spoke with Afriyie about the issue. There was no testimony as to whether he spoke with the Castros.

Respondent argued that he was no longer representing Afriyie when he filed suit against her. However, he was still holding part of her settlement funds to pay medical providers and was purportedly attempting to obtain payment from Blue Shield. Therefore, there is no merit to respondent's claim that Afriyie was no longer his client.

The ethics complaint did not charge that respondent violated RPC 1.7(a) by filing suit against Afriyie. However, the evidence was submitted without objection by respondent, respondent testified about the charge, the special master found a conflict of interest and respondent addressed the issue in his brief. Therefore, we deemed the complaint amended to conform to the evidence and found a violation of RPC 1.7(a). In re Logan, 70 N.J. 222, 232

(1976).

Respondent's treatment of his clients was reprehensible. He took advantage of his clients by routinely taking excessive fees from them. He also misrepresented to clients that he was assisting them in obtaining loans from a third party, when, in fact, he was the lender. He charged one client eighteen percent interest and another client twelve percent interest.

Respondent claimed that he was keeping the funds owed to medical providers and welfare liens in the TRP account to benefit clients. However, his claim is belied by his actions. First, he did not keep his clients informed about the status of their funds. When he was finally forced to disburse the funds, he was unable to locate most of the clients. Furthermore, his failure to pay CTPTI resulted in collection actions against Joyner and McMillan. Respondent made misrepresentations to CTPTI's attorney to convince him to settle the suits for less than the amount owed, and then failed to pay the settlement amounts. The result was that CTPTI obtained judgments against Joyner and McMillan. Respondent professed not to know about the judgments even though he represented Joyner and McMillan in the collection actions.

Respondent avoided paying income tax on the interest earned on loans by recycling them from one client to another, using his trust accounts to conceal the interest income. He also avoided paying income tax on fees and investments by commingling his fee and investment income with trust funds, then misrepresenting to the IRS that all of the funds belonged to clients. Even when respondent was forced to disburse the funds from his trust account, he disbursed only the principal loan amounts to himself and disbursed the interest income to his firm.

In summary, respondent took excessive fees from clients' personal injury settlements; engaged in unethical business transactions with clients; commingled personal and trust funds;

failed to safeguard clients' funds; failed to promptly notify third parties that he had received funds to which they were entitled; failed to promptly deliver funds to third parties; made misrepresentations to disciplinary authorities, clients, other attorneys, the IRS, welfare agencies, and medical providers; failed to cooperate with disciplinary authorities, engaged in conduct prejudicial to the administration of justice, and violated the recordkeeping requirements of R.1:21-6.

Respondent's conduct was more egregious than that displayed by some attorneys who have been disbarred for knowing misappropriation of trust funds. He should suffer no less serious consequences.

In In re Smyzer, 108 N.J. 47 (1987), the attorney convinced several clients to invest money in financially troubled companies in which he held an interest. Smyzer did not fully disclose his interest in the companies or the extent of their problems to his financially unsophisticated clients. In fact, Smyzer's limited disclosures were so misleading that they constituted "independent violations [of the disciplinary rules], which prohibit the making of a false, fraudulent, misleading, or deceptive statement." Id. at 56. Smyzer also commingled trust and personal funds and there were overdrafts in his trust account. Although the Board had concluded that the overdrafts established knowing misappropriation of client funds, the Court found it unnecessary to decide the issue because it determined that respondent's other misconduct warranted disbarment. Id. at 57-58.

Like Smyzer, respondent commingled personal and trust funds, failed to disclose his interest in loan transactions to his clients, and made false statements to his clients concerning the transactions. Respondent's conduct with respect to the loans to clients was not as egregious as

that of Smyzer in that he did not persuade clients to invest in financially troubled companies. However, respondent also engaged in other serious unethical conduct as set forth above. See, also, In re Maguire, 166 N.J. 87 (2001) (attorney was disbarred for his reckless handling of an elderly client's funds; he put the interests of his business partners/clients, who were sophisticated developers, ahead of his client's interests; lent her funds to an acquaintance, without any security for the loan; failed to pay her taxes; and, after her death, made excessive distributions to one of her beneficiaries, from whom he obtained loans); In re Ort, 134 N.J. 146 (1993) (attorney was disbarred for withdrawing fees from an estate account without authorization, misrepresenting to a court the value of his services, preparing deceitful time records and charging excessive and unreasonable fees); In re Wolk, 82 N.J. 326 (1980) (attorney was disbarred for advising a widowed client to make a hopeless investment in a building in which he had an interest, while concealing such material information as the fact that the building was in foreclosure; and attempted to commit a fraud on a federal district court and his clients to obtain a larger legal fee than was due).

Based on the foregoing, we determined to recommend that respondent be disbarred. One member concurred in the disbarment recommendation based primarily on his finding that respondent intended to misappropriate client and escrow funds and would have done so but for the OAE's audit. Two members did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

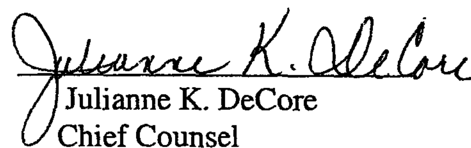
In the Matter of Emanuel Needle
Docket No. DRB 03-134

Argued: October 16, 2003

Decided: January 21, 2004

Disposition: Disbar

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley	X						
O'Shaughnessy	X						
Boylan	X						
Holmes							X
Lolla	X						
Pashman	X						
Schwartz							X
Stanton	X						
Wissinger	X						
Total:	7						2



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Chief Counsel