SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 05-337
District Docket Nos. XIV-03-062E,
XIV-03-267E, and XIV-03-490E

IN THE MATTER OF

WILLIAM L. NASH

AN ATTORNEY AT LAW

Corrected
Decision

Argued: February 16, 2006

Decided: March 23, 2006

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

Respondent did not appear for oral argument, despite proper notice.

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

This matter was before us on a recommendation for disbarment filed by the Honorable Kenneth R. Stein, J.S.C. (retired), sitting as a special master. For the reasons

expressed below, we agree with the special master's recommendation.

Respondent was admitted to the New Jersey bar in 1992. He has no disciplinary history.

On November 4, 2002, a random audit of respondent's records uncovered "some questionable transactions." As a result, on April 8, 2003, the Supreme Court temporarily suspended respondent, pursuant to R. 1:20-11. In re Nash, 176 N.J. 1 (2003).

In February 2004, after the completion of the random audit, the Office of Attorney Ethics (OAE) issued a five-count complaint charging respondent with violations of RPC 1.15(a), In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979), and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) for his knowing misappropriation of trust account funds in eighteen client matters. Respondent also was charged with having violated RPC 8.4(c) for his fabrication and alteration of documents in one matter, and RPC 1.15(b) (failure to safeguard property) for his failure to promptly disburse trust funds in all matters. The fifth count charged respondent with having violated RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice), as a result of his failure to

comply with R. 1:20-20(b)(15) after his April 2003 temporary suspension.

Through counsel, respondent answered the complaint and denied that he had engaged in any misconduct. The answer also asserted affirmative defenses to the first three counts of the complaint, which focused on respondent's conduct in three of the eighteen matters.

In the first matter, which involved a client named William May, respondent admitted that he had disbursed client funds to himself for his personal benefit, but claimed that he did so with May's "full knowledge and consent as a personal loan" from May to respondent, "a loan which respondent later fully repaid." With respect to the second matter, which involved clients Marie and Varni Vital, respondent admitted that his trust account had been underfunded, but claimed that the delay in payment of certain funds resulted from his "inability to obtain [unidentified] needed information." In the third matter, which involved client Larry Johnson, respondent claimed that he "did not collect sufficient funds at closing to make all required disbursements."

In his answer to the fourth count of the complaint, which encompassed all eighteen matters, respondent admitted that he

did not make prompt payments in these matters, but denied that "this was done intentionally to accomplish 'lapping' or to cover shortages." Finally, in the fifth count, respondent admitted that he had "not yet fully complied with the suspension requirements relating to notification and reporting to OAE."

The first pre-hearing conference in this matter was scheduled for December 17, 2004. Before the conference, respondent's attorney advised the special master that he no longer represented respondent. Respondent appeared at the conference pro se, but did not present a pre-hearing report at that time. The special master advised him of his right to request the assignment judge to appoint pro bono counsel for him.

Respondent failed in his attempt to obtain pro bono counsel. Thereafter, a second pre-hearing conference was scheduled for February 10, 2005. Respondent appeared at the conference, again without a pre-hearing report. A third pre-hearing conference took place on March 24, 2005. Respondent failed to appear for the pre-hearing conference, despite proper notice. At this point, the special master invited the OAE presenter to file an application to strike respondent's answer, enter default against him, and proceed by way of proofs either

at a hearing or on the papers, with no opportunity for respondent to defend against the charges.

On April 15, 2005, the special master entered a third case management order, which, among other things, directed the OAE to file a motion within fifteen days of service of the order upon respondent. The OAE served the order upon respondent via regular, certified, and UPS overnight mail. Although respondent did not claim the certified mail, and UPS was unable to track the overnight mail, the regular mail was not returned.

On May 24, 2005, the presenter filed a motion to strike respondent's answer and to permit the presentation of proofs directly to the special master, without opposition from respondent. According to the motion, respondent had not appeared for the March 2005 conference, despite proper notice, and had not supplied discovery to the OAE. The motion was served upon respondent via regular, certified, and UPS overnight mail. Respondent did not claim the certified mail. The UPS overnight mail was delivered to respondent on May 25, 2005, and the regular mail was not returned.

On June 17, 2005, the special master granted the OAE's motion, struck respondent's answer, and ordered the OAE to present its proofs on July 11, 2005, without opposition. The

proof hearing went forward on July 11, 2005, in respondent's absence. On November 16, 2005, the special master issued his findings and recommendations.

The OAE's only witness at the hearing was OAE compliance auditor Joseph Strieffler, Jr., who testified that a random audit of respondent's attorney records was first scheduled for August 23, 2002. However, the audit was postponed twice, at respondent's request, due to a vacation and a brief hospitalization.

On November 4, 2002, the audit proceeded at respondent's office. Initially, respondent's records appeared to be in order. However, Strieffler stated, a closer look at the client ledger cards demonstrated that "there were some questionable transactions that had taken place just a couple of weeks prior to [Strieffler's] November 4th visit."

According to Strieffler, respondent's trust account was not reconciled. He explained:

> The bank statement itself was not reconciled in that there was no schedule of outstanding checks or deposits in transit and also that the client ledger cards were not reconciled to the bank statement in that a monthly listing of open balances was not prepared and compared against the monthly bank statement.
>
> [T15-15 to 21.[1]]

Nevertheless, Strieffler was able to reconcile these financial records in about an hour because of the lack of activity in respondent's account. Strieffler's review of the records uncovered a shortage in respondent's attorney trust account.

On December 3, 2002, Robert J. Prihoda, Chief, OAE Random Audit Compliance Program, wrote a deficiency letter to respondent, asking him to prepare and complete certain information. The letter advised respondent that Strieffler would return to his office on January 15, 2003, to ensure respondent's compliance with the information requested.

On January 14, 2003, respondent wrote to Strieffler and requested a two-week extension. On January 24, 2003, Prihoda wrote to respondent and scheduled a records production for

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[1] "T" refers to the July 11, 2005 transcript of the hearing before the special master.

February 5, 2003, at the OAE's office, where respondent was to appear personally.

Strieffler testified that respondent appeared, as directed, on February 5, 2003. He was cooperative and presented the records requested of him. Strieffler removed certain records from respondent's office and re-reconciled respondent's account. According to Strieffler, upon his completion of the re-reconciliation, the actual trust shortage, as of May 31, 2002, was $32,122.02, and involved eleven client matters.

The William May Matter (First Count)

On October 19, 1997, William May was injured in an automobile accident. He retained respondent, who filed a lawsuit against the responsible parties. On June 8, 2001, respondent settled the case for $15,000. On July 14, 2001, the insurance company issued a $15,000 settlement check, payable to respondent and his client. Respondent endorsed the check by signing his and May's name.[2] On July 20, 2001, respondent

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[2] The complaint alleges that respondent signed May's name under a power of attorney. The endorsement makes no mention of a power of attorney. Nevertheless, there are no allegations that respondent forged May's signature.

deposited the check into his trust account, thereby bringing its balance to $16,990.36.

According to the Claim Settlement Closing Statement (settlement statement) prepared by respondent, he had advanced $1,728.09 in costs and expenses on behalf of May; after reimbursement to respondent in an equivalent amount, $13,271.91 remained for respondent's $4,423.97 fee and May's $8,847.94 net share of the recovery.

Between July 21 and November 27, 2001, respondent withdrew $13,750 from the trust account via one counter or teller check and eight trust account checks, all of which were made payable to his business account in even-dollar amounts. Strieffler testified about the significance of the even-dollar amounts, respondent's use of counter checks, and other facts pertaining to his withdrawal of funds in all of the matters at issue.

First, the checks drawn in even-dollar amounts generally were not "designated to be charged against a specific client matter." In fact, most of the checks were not recorded on any ledger card, which prevented Strieffler from cross-referencing. Second, respondent's use of counter checks, rather than pre-printed trust account checks, was suspicious because, if respondent were owed a fee, then he simply could have written a

check from the attorney trust account. In short, there was no need for him to withdraw the funds via a counter check. Indeed, the teller transactions suggested to Strieffler that the removal of the funds from the trust account was "questionable and that there's possibly a motivation of trying to conceal some misappropriation."

Third, with respect to those checks that Strieffler could link to a specific client matter, the face of the check reflected the client to which it belonged when the fee was legitimate, had been earned, was taken from the trust account, and was recorded on the client ledger card. In the personal injury matters, the cards showed that respondent's fee was never a round number.

By November 1, 2001, when respondent cashed the eighth of nine checks he had written since July 1 of that year, the trust account balance had plummeted to $1,390.36, well below the $8,847.94 that he was obligated to hold in trust for May. By that time, respondent was out of trust by $7,457.58 in connection with the May matter alone.

Subsequent infusion of funds from unknown sources brought the trust account balance to $173,111.53 on December 31, 2001. On January 16, 2002, respondent issued a check to May in the

amount of $8,847.94.[3] May cashed the check on February 5, 2002. Six months had elapsed between respondent's deposit of the May settlement funds and his distribution to May.

According to Strieffler, his investigation established that respondent had engaged in a number of misdeeds in order to conceal his theft of May's funds. Specifically, respondent fabricated information and altered documents. For instance, the May ledger card that respondent prepared falsely states that the settlement check was received on December 14, 2001, and that respondent issued a check to May on December 31, 2001. In addition, the settlement statement falsely states that respondent received the settlement draft on December 31, 2001, and paid May on January 16, 2002.

Furthermore, a copy of the $15,000 settlement check found in respondent's file contains an altered date of December 14, 2001, rather than the actual July 14, 2001 date shown on the copy of the original check, which Strieffler had subpoenaed from the bank. Finally, a copy of respondent's January 16, 2002 letter to May, found in respondent's file, enclosed the altered settlement closing statement, the $8,847.94 check, and a copy of

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[3] The check was dated January 16, 2001, but Strieffler believed that was a mistake caused by the turn of the new year.

the $15,000 settlement check showing an altered December 14, 2001 date. According to Strieffler, all of these deceptions were designed to give the impression that the settlement check had been received in December 2001, rather than July 2001, in order to camouflage respondent's theft of May's funds.

Based on respondent's actions, the complaint charged him with failure to promptly disburse trust funds, a violation of RPC 1.15(b); knowing misappropriation of client funds, a violation of RPC 1.15(a) and In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979); and conduct involving dishonesty, fraud, deceit or misrepresentation, a violation of RPC 8.4(c).

The Marie and Varni Vital Matter (Second Count)

Strieffler testified that respondent represented Marie and Varni Vital in connection with their purchase of an Irvington, New Jersey, home from Andy and Dorothy Parker. The closing took place on June 27, 2002. On that date, the Vitals' lender, Gateway Funding Diversified Mortgage Services (Gateway), wired $117,307.41 into respondent's trust account.

The HUD-1 form, which respondent prepared, reflected a purchase price of $118,500. According to the form, the cash due from the Vitals at closing was $12,643.57. The record contains

a receipt from respondent showing that they gave him this amount on July 1, 2002. Respondent, in turn, deposited in his trust account $12,640.25 of these monies, together with the Vitals' $2000 earnest money deposit, on July 2, 2002.[4] The HUD-1 form also showed that respondent withheld $17,000 of the sellers' proceeds for the purpose of paying off two judgments and a tax lien.

On August 6, 2002, Gateway wrote to respondent and informed him, among other things, that the HUD-1 form contained some miscalculations. Specifically, the cash due at closing from the Vitals was $8,197.46, not $12,643.57, as originally stated on the form. As a result of this error, the Vitals had overpaid respondent by $4,446.11.

According to Gateway's letter, one of Gateway's representatives and respondent had prior "conversations" about these matters. The letter requested proof that respondent had returned the Vitals' overpayment to them.

The record contains no evidence that respondent ever complied with Gateway's request that the Vitals' overpayment be

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[4] The record does not explain why the Vitals paid these sums <u>after</u> the June 27, 2002 closing.

refunded to them. Indeed, as part of Strieffler's investigation, he contacted Mrs. Vital and asked her about the overpayment and the refund. She told him that she and her husband were not aware that they were due a refund, and had not received one.[5]

Strieffler also testified about the disposition of certain funds withheld from the sellers. First, the HUD-1 form showed that $10,000 was withheld for payment of a tax lien, but, as of July 5, 2002, only $9,104.07 was owed. Moreover, respondent did not pay the taxes until February 10, 2003, more than seven months after the closing. By then, according to Strieffler, penalties had increased the amount owed to $12,418.08.

In addition, respondent withheld $7000 for the payment of two judgments, but, when Strieffler contacted the Superior Court of New Jersey about the amounts owed, he learned that the

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[5] Although Strieffler's testimony about his conversation with Mrs. Vital was hearsay, the rules regarding hearsay are less strictly applied in disciplinary proceedings. Kevin H. Michels, New Jersey Attorney Ethics § 42:5-2(a) at 1022 (2004). Nevertheless, "a fact finding or legal determination cannot be based upon hearsay alone." Ibid. (quoting Weston v. State, 60 N.J. 36, 51 (1972)). Rather, hearsay may be used to "corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony." Ibid. (quoting Weston, supra, 60 N.J. at 51).

judgments totaled only $5848. Moreover, according to Strieffler, as of September 3, 2003 (fourteen months after the closing), the judgments had not been satisfied.

Based upon this information, following the June 27, 2002 closing and up through December 24, 2002, respondent should have held more than $21,000 in trust for the Vitals and the sellers. Yet, as of December 24, 2002, his trust account balance was only $56.65, even though he still had not refunded the Vitals' overpayment, had not paid the Parkers' tax lien and judgments, and had not refunded the excess funds withheld from the Parkers for the payment of these obligations.

Strieffler testified that the shortage in respondent's trust account was caused, in part, by five trust account withdrawals to his business account in even-dollar amounts that totaled $15,000. These transactions were made between July 5 and 23, 2002.

Based on respondent's conduct, the complaint charged him with failure to promptly disburse trust funds, a violation of RPC 1.15(b), and knowing misappropriation of trust funds, a violation of RPC 1.15(a), In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979), and RPC 8.4(c).

The Larry Johnson Matter (Third Count)

Strieffler testified that respondent represented Larry Johnson in connection with the purchase of a Newark property. The closing took place on February 20, 2002.

On February 21, 2002, Johnson's $12,766.93 deposit was wired into respondent's trust account.[6] From these funds, Johnson (through respondent) was required to pay his lender, Century Bank Mortgage Corporation (Century), $4250 for points, an appraisal review, a credit check, application fee, and overnight delivery charges.

On March 18, 2002, Century wrote to respondent and informed him that payment of the $4250 was his responsibility, inasmuch as "these fees are paid by the borrower and need to be brought to closing by the borrower." On May 2, 2002, Century wrote a follow-up letter to respondent. As of March 13, 2003, respondent had not paid Century the money.

Strieffler detailed respondent's actions in collecting and distributing the relevant funds for the Johnson matter. Strieffler relied upon respondent's client ledger card, a re-

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[6] As with the Vital matter, there is no explanation as to why Johnson's payment was wired into respondent's account after the closing, rather than before.

created client ledger card that Strieffler had prepared, and bank records. According to respondent's own ledger card, the $4250 was not paid to Century, and, by January 21, 2003 – almost one year after the closing – the Johnson matter had a negative balance of $289.95. On the other hand, Strieffler's re-created ledger card showed that $2,770.06 in escrow funds had remained undistributed as of February 5, 2003. Strieffler could not explain the discrepancy between these two balances.

In addition to the $4250 that respondent failed to pay Century, he delayed payment of other charges. The closing took place in February 2002, but respondent did not pay the $2,186.32 in property taxes due the City of Newark until January 22, 2003, almost a year later. Moreover, $630 in recording fees were not paid until eleven months later, which also is how long it took respondent to record the closing documents.

Furthermore, the title insurance company invoiced $1101 on February 4, 2002, but that amount was not paid until February 5, 2003, a year later. Finally, respondent never paid the $425 due for the property survey.

Based on this information, Strieffler determined that, following the February 2002 closing, respondent should have had approximately $8600 available to pay both the $4250 owed to

Century and the $4,342.32 owed for property taxes, recording fees, title insurance premium, and the survey. Yet, as of April 19, 2002, respondent's trust account balance had fallen to just over $7500. By May 20, 2002, the balance was $631.95, bringing the account out of trust by more than $7900. By December 24, 2002, the account balance had dropped to $56.65.

According to Strieffler, the shortfall in funds for the Johnson matter was the result of respondent's trust account withdrawals for his personal use. Between February 22 and May 20, 2002, respondent removed $15,400 from the account via seven trust account checks and two counter checks payable to his firm's business account, in even-dollar amounts.[7]

Based on respondent's conduct, the complaint charged him with failure to promptly disburse trust funds, a violation of RPC 1.15(b), and knowing misappropriation of trust funds, a violation of RPC 1.15(a), In re Wilson, 81 N.J. 451, 455 n.1, 461 (1979), and RPC 8.4(c).

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[7] Strieffler did not explain the discrepancy between the $15,400 in check withdrawals and the $7900 shortfall in the Johnson matter.

Lapping (Fourth Count)

Strieffler also testified about respondent's "lapping," which he described as "a process in which you delay payment on one item in order to pay an item that you . . . previously should have paid weeks or months or even years prior." He answered "yes" when the special master asked him if this was the same as "robbing Peter to pay Paul."

According to Strieffler, in the Vital, Johnson, and May matters, respondent had engaged in this practice. However, Strieffler testified, respondent also engaged in this conduct in several real estate transactions, as set forth in schedule 1 to Strieffler's report, which was attached to the complaint. The schedule was based upon the documents identified as Exhibits J-1 through J-30. These exhibits are comprised of Strieffler's re-creations of respondent's trust ledger cards and respondent's own versions of the ledger cards. The schedule reflected only delays in payment and did not include trust account balance information.

Strieffler testified that respondent also engaged in lapping in some personal injury actions, as detailed in schedule 2, which also was attached to the complaint. This schedule was supported by the documents marked K-1 through K-10.

Strieffler provided no substantive testimony on the lapping claims. Instead, it appears that the OAE relied solely upon the schedules and the supporting documentation.

Respondent's Failure to Comply with R. 1:20-20(b) (Fifth Count)

Strieffler's testimony on this issue was limited. He stated that he had compiled the evidence that was used to petition for respondent's immediate temporary suspension, which occurred on April 8, 2003. Since that date, respondent never filed the affidavit required by R. 1:20-20.

The special master concluded that respondent knowingly misappropriated trust funds, a violation of RPC 1.15(a) and the Wilson rule; failed to promptly deliver funds to third persons who were entitled to receive them, a violation of RPC 1.15(b); engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, a violation of RPC 8.4(c); and engaged in conduct prejudicial to the administration of justice, a violation of RPC 8.4(d).

With respect to the first count of the complaint, the special master found that, while respondent had deposited the May settlement proceeds into his trust account on July 20, 2001, he did not disburse the $8,847.94 settlement funds due May until

January 16, 2002; that, within the six-month period between respondent's receipt of the $15,000 and his payment of the monies due his client, he had removed $7500 from the trust account; that, by November 1, 2001, the account had less than $2000; that respondent had forged May's name on the $15,000 settlement check; that he had falsely stated on the client ledger card that the $15,000 was deposited on December 14, 2001 (rather than July 20, 2001) and that the proceeds were disbursed to May on that same date; and that he had altered the date from July 14, 2001 to December 14, 2001 on the copy of the $15,000 check that he sent to May.

Although the hearing proceeded in respondent's absence and upon the special master's ruling that respondent had essentially defaulted, the special master considered the answers and defenses asserted by respondent in his answer to the complaint. He rejected all of them for lack of proof. In addition, the special master noted that respondent's deceptive practices (such as the alteration of the settlement check's date) were inconsistent with his claim that the monies had been withdrawn pursuant to a loan and that the loan had been repaid.

Based on these findings, the special master concluded that respondent had delayed the disbursement of and knowingly

misappropriated May's trust funds, a violation of RPC 1.15(a) and (b). The special master also concluded that respondent had violated RPC 8.4(c) in his attempts to conceal the May misappropriation.

With respect to the second count of the complaint, the special master found that the Vitals were entitled to a $4,446.11 refund from respondent for monies that they had overpaid toward the cost of purchasing their home; that respondent had withdrawn $15,000 from the trust account without the Vitals' consent after he had deposited their $12,000+ deposit; that respondent did not have sufficient funds in his trust account from which to refund the overpayment; and that he never paid them.

In addition, the special master found that respondent had withheld $19,000[8] from the sellers for the purpose of paying off liens and judgments, whereas the actual amounts owed totaled only $14,952.07; that, as of July 5, 2002, the tax collector was owed $9,104.07, in addition to judgments in the amount of $4348 and $1500; that, as of December 24, 2002, these liens and judgments had not been satisfied, but the trust account balance

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[8] The amount should be $17,000.

was $56.65; that, although respondent paid the taxes due in February 2003, by that time the amount owed had increased to $12,413.08; and that respondent never paid the two judgments. The special master rejected respondent's affirmative defenses, for lack of proof.

The special master concluded that respondent had knowingly misappropriated trust funds in this matter, a violation of RPC 1.15(a) and the Wilson rule. The special master further concluded that respondent had violated RPC 8.4(c) when he failed to refund the overpayment to the Vitals and failed to pay the Parkers' judgments. Finally, in recognition that respondent may have paid the judgments after the OAE's investigation was completed, the special master concluded that, even if that had occurred, respondent would have violated RPC 1.15(b) because the payments had not been made promptly.

With respect to the third count of the complaint, the special master found that, after the February 20, 2002 closing on Johnson's purchase of the Newark residence, respondent owed the lender $4250, plus $4300 in real estate taxes, title

insurance, recording fees, and survey charges;[9] that, as of May 20, 2002, the trust account balance was only $631.95; that, by December 24, 2002, only $56.65 remained; that, in the meantime, respondent had withdrawn $15,400 from the trust account; and that, almost a year later, respondent paid the real estate taxes and the recording fees. Implicitly, the special master also found that the other amounts owed were never paid.

As with the May and Vital matters, the special master rejected respondent's separate defenses, for lack of proof, and concluded that respondent's conduct had violated RPC 1.15(a) and (b), the Wilson rule, and RPC 8.4(c).

With respect to the lapping charge, it is not clear from the special master's report that he ever found that respondent had engaged in the practice. The special master's analysis began with his recognition of respondent's admission in his answer that he had failed to promptly disburse funds in the eighteen matters, together with respondent's denial that his failures were intentional or done for the purpose of lapping or covering shortages. In addition, the special master recited his

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[9] The special master found that, by March 25, 2002, only the $425 survey charge had been paid. This finding was presumably an oversight, inasmuch as Strieffler testified that the survey charge was never paid.

understanding of lapping: "Lapping is a term used by the Investigator to describe a process in which a payment on one item is delayed in order to pay an item that should have been paid earlier."

Because there was virtually no testimony on the lapping issue, in assessing the case presented, the special master relied solely upon Strieffler's schedules 1 and 2, which purportedly provided the lapping details in all eighteen matters. Inasmuch as Strieffler's schedules showed "a pattern of delayed payments," the special master concluded that, in each matter, respondent had failed to promptly deliver to the client or third persons funds to which they were entitled, a violation of RPC 1.15(b).

With respect to count four's allegations that respondent also violated RPC 1.15(a) and RPC 8.4(c), the special master concluded that the OAE "did not sustain its burden of proof regarding a violation of those Rules as regards Johnson."

Finally, the special master found that respondent had been temporarily suspended since April 8, 2003, and that he had admitted in his answer to the OAE's complaint that he had failed to comply with the requirements of R. 1:20-20(b)(15). Accordingly, the special master concluded that respondent had

violated RPC 8.4(d) by his failure to comply fully and timely with the Supreme Court's order of suspension.

In a detailed conclusion, the special master found that respondent had committed certain recordkeeping violations, which, while not charged, the special master considered to be an aggravating factor. Additional aggravating factors included respondent's failure to participate in the proceedings, the seriousness and number of his violations, and his continuing course and pattern of misconduct. The special master did not find that any mitigating factors had been established.

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent engaged in unethical conduct is supported by clear and convincing evidence. Initially, however, we note that, once respondent's answer was stricken, he stood in the shoes of a respondent who had failed to file an answer, and this matter could have proceeded to us as a default, pursuant to R. 1:20-4(f)(1). In re Farr, 178 N.J. 458 (2004).

In Farr, the special master struck all of the attorney's answers to several ethics complaints after counsel for the attorney had notified the special master that his client would not appear at the hearing in one matter and that the attorney

wished to withdraw his answers in the other matters. In the Matter of L. Gilbert Farr, Docket No. 03-322 (DRB November 21, 2003) (slip op. at 1-2). In the one matter, the special master entered an order striking respondent's answer Id. at 1-2. In the remaining matters, he entered an order striking the answers, deeming the allegations in the complaint admitted, and directing that the record be certified to us as a default pursuant to R. 1:20-4(f). Id. at 2.

Notwithstanding the special master's order adjudging attorney Farr in default, he did not certify the record directly to us. Ibid. Instead, he made findings of fact and conclusions of law and issued a report recommending discipline. Ibid. We treated all of the matters as defaults, and reviewed the allegations of the complaints "to determine if they contain[ed] sufficient factual support for each charged violation." Id. at 3. The attorney was disbarred. Id. at 22.

In this case, the special master raised, but did not address, the issue of whether the order striking respondent's answer "place[d] this case in the same posture as if a verified answer had not been filed, thus resulting in the consequences set forth in R. 1:20-4(F)(1)." Under Farr, thus, the special

master could have treated this matter as a default, instead of proceeding to a proof hearing.

The special master correctly concluded that respondent had knowingly misappropriated escrow funds in the May, Vital, and Johnson matters. Moreover, he correctly concluded that respondent had engaged in conduct involving dishonesty, fraud, deceit and misrepresentation in the May matter, when he fabricated and altered certain documents. Finally, the special master correctly concluded that respondent had failed to comply with R. 1:20-20(b)(15) and, therefore, engaged in conduct prejudicial to the administration of justice.

As to the lapping charges, as seen below, the record does not contain clear and convincing proof of that violation.

In the May matter, respondent violated RPC 1.15(a) and the Wilson rule when he knowingly misappropriated his client's funds. In addition, respondent violated RPC 1.15(b) when he failed to disburse May's share of the settlement proceeds until six months after the receipt of the settlement check.

The evidence establishes that, on July 14, 2001, the insurance company drafted a settlement check in the amount of $15,000, which respondent deposited in his trust account on July 20, 2001. After payment of costs, expenses, and respondent's

fee, May was due more than $8800. Respondent did not promptly disburse this money to his client. Instead, he knowingly invaded these funds and transferred $13,750 to his business account. These unauthorized withdrawals caused the balance in respondent's trust account to fall below $8800 on several occasions, before he finally distributed May's funds in January 2002.

The checks drawn to respondent's business account were in even-dollar amounts and bore no designation of a client matter. By contrast, when respondent issued checks from his trust account for the payment of fees in other personal injury matters, the amounts were never in round numbers and always identified the client matter from which the money was disbursed. These particular facts amply support the conclusion that the $13,750 withdrawn from respondent's trust account was not used to pay any costs, expenses, or fees related to the May matter. In re Roth, 140 N.J. 430, 445 (1995) (observing that circumstantial evidence can add up to the conclusion that a lawyer knew, or had to know, that a client's funds were being invaded).

To conceal his knowing misappropriation of May's funds, respondent embarked upon a course of forgery and deceit. In

this regard, the proofs clearly and convincingly establish that respondent engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, a violation of RPC 8.4(c). Specifically, respondent forged May's name to the $15,000 settlement check so that he could cash it without the client's knowledge. He then falsified the client ledger card to show that he received the $15,000 settlement on December 14, 2001, when, in fact, he had deposited the check in his trust account on July 20, 2001. In addition, respondent's ledger card falsely stated that he had distributed May's funds on December 31, 2001, rather than January 16, 2002. This false entry was intended to deceive the OAE into believing that he had received and disbursed May's proceeds within two weeks, rather than six months.

In furtherance of this scheme, respondent altered the date on the $15,000 check from July 14, 2001 to December 14, 2001. His intent was to create the impression that May's funds had been disbursed shortly after the receipt of the settlement check. Respondent then placed a copy of the altered check in the file. The OAE was unaware that the check had been altered until after it subpoenaed respondent's bank records and received

a copy of the original check that reflected the July 14, 2001 date.

Respondent also engaged in further misconduct for the purpose of leading his client to believe that he did not receive the settlement proceeds until December 2001. When respondent finally transmitted May's proceeds to him, in January 2002, he enclosed a copy of the altered $15,000 check, as well as the settlement statement, which falsely stated that he had received the settlement check on December 14, 2001. Thus, May would have had no reason to believe that respondent had received the funds (and invaded them) six months earlier.

The evidence, thus, clearly and convincingly demonstrates that respondent knowingly invaded May's funds, engaged in deceitful conduct to cover up his theft, and that he failed to turn over the funds to his client until six months after he had received them.

In the Vital matter, too, respondent violated RPC 1.15(a), the Wilson rule, and RPC 8.4(c) when he knowingly misappropriated his clients' funds. He also violated RPC

1.15(a), In re Hollendonner, 102 N.J. 21, 26-27 (1985),[10] and RPC 8.4(c) when he knowingly misappropriated the Parkers' funds. In addition, respondent violated RPC 1.15(b) when he failed to pay the Parkers' property taxes until more than six months after the closing. Miscalculations on the HUD-1 form resulted in the Vitals' overpayment of approximately $4400 in connection with the June 27, 2002 purchase of their home. After the closing, Gateway brought the miscalculations to respondent's attention and requested proof that he had refunded the Vitals' overpayment.

Respondent never complied with Gateway's request. The Vitals never received a refund. In fact, they were unaware that they were due a refund at all.

In addition, at the closing, respondent withheld $17,000 from the sellers' funds to pay outstanding taxes on the property and to satisfy two judgments. The judgments were never satisfied. Moreover, respondent did not pay the taxes until more than seven months after the closing. During that seven-month period, respondent invaded all funds withheld from the

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[10] In In re Hollendonner, 102 N.J. 21, 26-27 (1985), the Supreme Court held that, in the future, disbarment would be mandated for knowing misuse of escrow funds.

sellers, as well as the $4400 that he should have refunded to the Vitals.

Upon completion of the closing, respondent was duty-bound to maintain in trust $21,000 ($4400 for the Vitals and $17,000 for the sellers). However, as of December 24, 2002, respondent's trust account balance was a mere $56.65. As in the May matter, the evidence demonstrates that respondent's knowing misappropriation of the parties' funds was caused by his withdrawals from the trust account in even-dollar amounts via checks that contained no reference to any client matter.

We find, thus, that the proofs clearly and convincingly establish that respondent knowingly misappropriated client funds and engaged in dishonest conduct when he failed to refund the amount due his clients. We also find that respondent knowingly misappropriated non-client escrow funds and engaged in dishonest conduct when he took more money than was due from the sellers and then failed to pay the amounts he was required to pay on their behalf. In both instances, respondent failed to disburse funds promptly a violation of RPC 1.15(b).

In the Johnson matter, respondent violated RPC 1.15(a), the Wilson rule, and RPC 8.4(c) when he knowingly misappropriated Johnson's funds. He also violated RPC 1.15(b), when he failed

to pay certain charges until a year after the closing. The closing took place on February 20, 2002. Among other charges, Johnson was required to pay Century $4250 in closing costs. To this end, he wired $12,700 into respondent's trust account. Respondent, however, did not pay Century, despite the lender's requests, and delayed the payment of other charges, some of which he never paid at all. More significantly, respondent knowingly invaded these funds for his own benefit.

Strieffler testified that respondent should have held $8600 in trust for the satisfaction of these obligations. Nevertheless, as of December 24, 2002 – ten months after the closing – respondent's trust account balance had dipped to $56.65. According to Strieffler, this shortage was caused by respondent's withdrawal of trust funds for his personal use. Specifically, between February and May 2002, respondent removed $15,400 from the account via even-dollar checks made payable to his business account.

Respondent never paid the $4250 owed Gateway. He never paid the $425 owed to the surveyor. In addition, he waited eleven months to pay the property taxes and recording fees, and almost a year to pay the title insurance.

The evidence, thus, clearly and convincingly demonstrates that respondent knowingly misappropriated the funds set aside to pay closing obligations in this matter. Respondent also failed to disburse funds promptly, a violation of RPC 1.15(b), when he delayed payment of other charges.

Notwithstanding these specific cases of misappropriation, the evidence fails to establish that respondent engaged in lapping. Colloquially, lapping is defined as "robbing Peter to pay Paul." In other words, the attorney takes the designated funds of one client and uses them to pay for another client's needs. In re Brown, 102 N.J. 512, 515 (1986). In this case, the evidence is insufficient to support a finding that respondent had robbed any of the eighteen Peters to pay even a single Paul.

The complaint charged respondent with lapping in twelve real estate matters, including Johnson and Vital, as well as six personal injury matters, including May. However, other than Strieffler's testimony with respect to May, Johnson, and Vital, the evidence concerning the other matters consisted only of the OAE's submission of two schedules that were attached to Strieffler's investigative report and the complaint, as well as underlying documentation, including the client ledger cards, as

prepared by respondent and Strieffler. Strieffler did not testify about these other matters. In essence, the task of reviewing these documents to determine if lapping had occurred fell on the special master and now falls on us.

Our review of the record developed below does not uncover sufficient evidence to support the conclusion that respondent engaged in lapping. While it was established that respondent invaded funds in the May, Vital, and Johnson matters, reducing the balance in the trust account to a point where certain items could not be paid, which caused respondent to delay payment, which he finally made after the trust account was replenished, there is no indication as to the source of the funds used to remedy the trust account shortages. If the evidence established that respondent had replenished his trust account with funds of other clients and then had drawn against them to pay the charges in May, Vital, or Johnson, then a case for lapping would have been made. However, in the absence of such evidence, it is possible that he could have replenished the account with his own funds. In such a case, his use of those funds to pay the delinquent charges would not have constituted lapping.

In short, while it is possible that respondent engaged in lapping, there is insufficient evidence for us to reach that conclusion. We, therefore, dismiss the lapping charge.

Respondent also violated RPC 8.4(d) (conduct prejudicial to the administration of justice) when he failed to file the required affidavit after his temporary suspension. Respondent was temporarily suspended on April 8, 2003. R. 1:20-20(b)(15) required him, within thirty days, to file "a detailed affidavit specifying . . . how [he] had complied with each of the provisions of this rule and the Supreme Court's order." Respondent did not file the affidavit. According to R. 1:20-20(c), respondent's failure to "file the affidavit of compliance" constituted a violation of RPC 8.4(d), as well as a violation of RPC 8.1(b) (failure to cooperate with ethics authorities.

In summary, respondent knowingly misappropriated client and third-party funds in three separate client matters, a violation of RPC 1.15(a), as well as the Wilson and Hollendonner rules; failed to disburse funds promptly, a violation of RPC 1.15(b); and engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, a violation of RPC 8.4(c). Respondent also violated RPC 8.4(d) when he failed to submit the affidavit

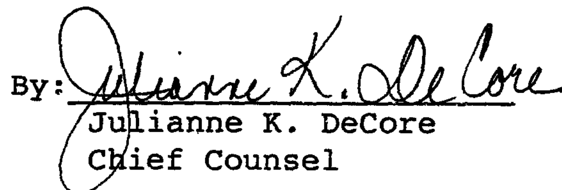
required by R. 1:20-20(b)(15) after his temporary suspension. Each of these violations was established by clear and convincing evidence. In addition, all of these violations were deemed admitted by respondent's refusal to participate in the proceedings to the point where his answer was stricken.

Respondent must be disbarred for knowingly misappropriating client and third-party escrow funds. In re Wilson, supra, 81 N.J. at 455 n.1, 461; In re Hollendonner, supra, 102 N.J. at 26-27. We so recommend to the Court. Accordingly, we need not consider what would be the appropriate discipline for the balance of respondent's violations.

Member Lolla did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair



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