SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-122
District Docket Nos. XIV-2011-0392E and XIV-2012-0425E

IN THE MATTER OF

ROLAND G. HARDY, JR.

AN ATTORNEY AT LAW

Decision

Argued: July 16, 2015

Decided: February 19, 2016

Andrea R. Fonseca-Romen appeared on behalf of the Office of Attorney Ethics.

Jay J. Blumberg appeared on behalf of respondent.

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

This matter came before us on a recommendation for a two-year suspension filed by a special ethics master, based on his findings, in two separate client matters, that respondent violated RPC 1.5(b) (failure to memorialize the rate or basis of the fee); RPC 1.5(e) (dividing a fee between lawyers not in the same firm); RPC 1.7(a)(2) (conflict of interest); RPC 1.8(a) (improper business transaction with

a client); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The special master declined to find that respondent violated RPC 1.5(a) (unreasonable fee) in one matter; RPC 8.4(c) in one matter; and RPC 1.15(a) (knowing misappropriation) and the principles of In re Wilson, 81 N.J. 451 (1979), with regard to both client matters. The special master did not address the remaining counts of the complaints.

For the reasons set forth below, we recommend respondent's disbarment for knowing misappropriation.

Respondent was admitted to the New Jersey bar in 1978. On June 12, 2008, he was reprimanded for engaging in an improper business transaction by borrowing funds from clients without abiding by the requirements of RPC 1.8, for failing to comply with recordkeeping requirements, and for failing to reconcile his attorney trust account, resulting in a negligent misappropriation of client funds. In re Hardy, 195 N.J. 183 (2008).

In the matter now before us, respondent was charged with misconduct in two separate complaints, which were consolidated for hearing.

The Thomas Matter – District Docket No. XIV-2011-0392E

Emma Simons retained the firm of Wilkes and McHugh, P.A., to pursue a malpractice case regarding her care at Whitland Care Center, where she resided. The matter ultimately settled, but during the

pendency of the case, Simons passed away. The settlement proceeds, which passed to the Simons Estate, were the estate's sole asset. Flossie Thomas, Simons' daughter and the Administratrix of the Simons Estate, retained respondent. As seen below, the parties dispute the purpose of the retention.

Because Thomas was too ill to testify at the disciplinary hearing, her son, Richard Hackett, and her friend, Veronica Tingle, testified about the relevant facts.

Thomas, Hackett, and Tingle first met with respondent in August 2008. Admittedly, respondent never executed a fee agreement with Thomas.[1] Tingle believed that respondent had been retained to help Thomas handle the distribution of the estate, specifically because Thomas lived in income-based senior housing and there was a Medicaid lien on the Simons Estate. According to Tingle, at the initial meeting, respondent stated that his rate would be $300 per hour. Hackett, however, believed the fee was going to be calculated as a percentage, but could not articulate on what the percentage would be based.

Respondent maintained that Thomas retained him to set up the estate in order to disburse the settlement funds from the Simons nursing home negligence case. Thomas had indicated that she was living

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[1] Respondent provided a copy of an unsigned fee agreement to the Office of Attorney Ethics. Although Hackett testified that he saw a fee agreement at some point, he was not familiar with the agreement in evidence.

at a Housing Authority property, which would require respondent to determine the income limitations, relevant regulations, and the maximum amount of the settlement funds that Thomas could retain without jeopardizing her eligibility for subsidized housing.

According to respondent, he offered Thomas three fee scenarios: (1) $300 per hour, (2) six-and-a-half percent of the value of the estate, or (3) one-third of the savings on the outstanding Medicaid lien. He claimed that the clients understood each of the alternatives and eventually agreed to the one-third percentage option.[2]

On December 10, 2008, Wilkes and McHugh, P.A., forwarded to respondent a $393,250.05 settlement check. Respondent deposited this check into his attorney trust account number XXXXX0213 at The Bank (ATABank) on December 15, 2008. On that same day, respondent issued check number 2270 to "Roland G. Hardy Jr. & Associates" from ATABank in the amount of $25,000, with the memo notation "Emma Simons." That check cleared respondent's account on December 15, 2008.

Hackett testified that he never saw a document indicating the amount of respondent's attorney fee. Hackett and Tingle both testified that they were not aware that respondent had taken $25,000 for his fee, prior to the resolution of the Medicaid lien.

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[2] Respondent later claimed that when he was retained to handle the estate, it was agreed that his fee would be based on a percentage of the estate. However, he produced no fee agreement to that effect.

Medicaid asserted a $238,756.45 lien against the Simons Estate. Mary Elliott, Supervising Medical Review Analyst, testified on behalf of the New Jersey Division of Medical Assistance and Health Services (DMAHS). She explained that, on September 17, 2008, respondent sent a letter to her predecessor, acknowledging the $238,756.45 lien and requesting an exemption from the Medicaid lien based on Thomas' permanent and total disability. After respondent provided documentation requested by DMAHS, the Medicaid lien was dismissed in its entirety.

For the purpose of calculating his fee, respondent determined that the full amount of the lien was the "amount of recovery." Respondent indicated on his "Disbursement Memorandum" that his fee was $79,505.89, based on one-third of the recovery amount.[3] Respondent then issued the following checks to himself or his law firm from his ATABank: (1) check number 2310, dated June 12, 2009, in the amount of $30,000 with the notation "Simons-Thomas;" (2) check number 2313, dated June 19, 2009, in the amount of $10,000 with the notation "Simons-Thomas;" and (3) check number 2314, dated July 6, 2009, in the amount of $39,505.89 with the memo "Thomas." According to respondent's client ledger, only $14,505.89 of check number 2314 was attributable to the Simons-Thomas matter.

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[3] One-third of the recovery amount of $238,756.45 is $79,585.48, not $79,505.89, a difference of $79.59.

Because Thomas could receive only $20,000 annually without affecting her subsidized housing, she was concerned about the impact of the settlement funds. With Tingle and Hackett present, Thomas discussed with respondent her options regarding the remaining funds. Tingle testified that respondent pointed out that Thomas would receive a low interest rate if she deposited the funds in a bank but, if she invested with him, she would receive a ten-percent return over five years.

On January 15, 2009, Thomas and respondent executed a promissory note for $99,493.60, in Tingle's presence. The note identified the collateral as "accounts receivable of the Law Office of Roland G. Hardy, Jr., which shall be updated from time to time to reflect changes in accounts receivable." The final paragraph in the note stated, "Payee acknowledges receipt of this Note and her right to consult with an attorney to discuss its contents." Attached to the note were two schedules: Schedule A represented the repayment of the $99,493.60 over a five-year period, including annual interest, and Schedule B was a lump sum repayment that was to be paid in full by September 2010. Tingle testified that respondent did not review with them the purpose of Schedule B.

Tingle believed that respondent represented Thomas for this loan transaction. Tingle and Hackett explained that respondent never discussed with Thomas the risks associated with entering into this

loan. Hackett, however, was aware that the funds would be used for respondent's firm. Tingle testified that respondent did not review with Thomas her option to consult another attorney to discuss the loan. Although Hackett testified that respondent "probably" told Thomas she could consult another attorney, the presentation of the loan and its execution were done contemporaneously, precluding any meaningful opportunity for Thomas to do so. Respondent testified that he explained all of the loan provisions and terms to the client, including the right to seek independent counsel.

Respondent deposited the loan proceeds into his business account. Office of Attorney Ethics (OAE) Disciplinary Investigator Greg Kulinich verified that loan proceeds were used to fund respondent's law office and to repay loans to other clients.

In July 2009, respondent borrowed an additional $104,250.56 from Thomas, also at a ten-percent interest rate. He specifically testified that this loan was in addition to the $99,493.60 prior loan. Respondent explained that it was not until the OAE investigation that he realized that he had not prepared a promissory note for the $104,250.56 loan. As a result, the note, although dated July 29, 2009, was not signed until October 7, 2011 – more than two years later.

On January 22, 2010, Thomas executed an Irrevocable Trust Agreement (ITA), as grantor, which respondent signed as trustee. The trust agreement was created by respondent so Thomas could maintain her

housing even after receipt of a large sum of money. The ITA contained the same schedules attached to the original promissory note. Tingle was present when Thomas signed the ITA.

Under the loan terms and payment schedule, respondent paid $30,000 by January 15, 2010, but failed to make a timely payment for January 15, 2011. He attributed this failure to his hospitalization.[4] Tingle subsequently filed a grievance on Thomas' behalf, based on respondent's failure to make the loan repayment.

On February 4, 2011, Tingle wrote to respondent, requesting a partial disbursement of the trust fund to Thomas to cover her bills. In a May 5, 2011 letter to Thomas, respondent claimed that he was awaiting receipt of certain funds in an unrelated matter, with which he planned to satisfy his overdue obligation. In support of his delay, respondent forwarded to Tingle copies of e-mail communications with other individuals discussing the delay in third-party payments.

Although respondent had paid approximately $7,000 towards the $20,000 January 2011 (missed) payment, by letter dated May 13, 2011, Tingle documented all the efforts she had made on Thomas' behalf to procure the outstanding payment and demanded the balance ($13,000) by 5:00 P.M. that day. On May 17, 2011, respondent issued check number

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[4] Respondent testified that he became "gravely ill" in December 2010, was hospitalized for two months, and was "out of the office for seven months." Respondent's doctor confirmed this testimony.

8626 in the amount of $13,598.68, payable to Richard Hackett, with the notation "Flossie Thomas." This amount represented the balance owed on the $20,000 payment. Hackett tried to cash the check on two occasions; however, the bank refused to cash it, suggesting to Hackett that he communicate with respondent.

On May 19, 2011, Tingle, on behalf of Thomas, wrote to respondent, cautioning that it was their final request for payment. In a May 20, 2011 reply, respondent asserted that he expected to receive, that afternoon, funds due to him from other matters. On June 2011, when Tingle filed the grievance in Thomas' behalf, respondent still had not paid the balance of the January 2011 loan payment. As of November 30, 2012, respondent owed Thomas $108,540.26.

Kulinich testified that, contrary to respondent's testimony, respondent had told Kulinich that his representation of Thomas was limited to resolving the Medicaid lien against the estate funds. According to the "Flossie Thomas Summary Statement" that respondent provided to Kulinich during the investigation, respondent made the following disbursements:

Total Receipts:		$393,250.05
Initial Disbursements (12/16/08)	($25,000.00)	
Payment-Hackett for Thomas (1/15/09)	($30,000.00)	
Attorney Fee	($79,505.89)	
Sub-total		$258,744.16

5 yr Pay-out Schedule Hardy Law Office	($99,493.60)	
Sub-total		$159,250.56
Payment - Thomas (7/29/09)	($25,000.00)	
Payment – Hackett (7/29/09)	($30,000.00)	
Balance – Hardy Law Office (10%)	($104,250.56)	

[4T16;Ex.48.][5]

Kulinich also asked respondent, during the investigation, why he had disbursed $25,000 "early on." Respondent had no explanation but believed that he had spoken with Thomas and/or Tingle about the early disbursement. About an hour after their meeting, respondent telephoned Kulinich, explaining that, "when he was retained to handle the estate, it was agreed upon that his fee would be six percent of the estate and $25,000 was his retainer." Respondent failed to provide a written retainer to the OAE that detailed those terms.

Further, in respect of the back-dated promissory note, respondent explained to Kulinich that $50,000 represented an additional loan and $54,250.56 represented the balance that remained on the first loan (original amount $99,493.60) for a total of $104,250.56. This statement conflicts with respondent's testimony that the second loan of $104,250.56 was in addition to the original $99,493.60 loan. Respondent claimed that the $54,000 remaining on the first loan was to be used to pay Thomas' rent.

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[5] "4T" refers to the transcript of the June 17, 2014 ethics hearing.

Both Kulinich and respondent testified at length about respondent's services in the Thomas matter and the amount of his fee. According to Kulinich, after reviewing respondent's file, he determined that respondent's services in the Thomas matter were limited to obtaining a "tax ID number" for the estate, requesting disability records for Thomas, and negotiating the Medicaid lien. Respondent explained that, to successfully negotiate the Medicaid lien, he conducted legal research, met with Social Services, and drafted letters. He admitted that he spent approximately twenty-four hours on the Thomas matter.

The complaint alleged that respondent:

> (1) engaged in knowing misappropriation and conduct involving dishonesty, fraud, deceit or misrepresentation for taking $25,000 from the Simons' Estate on December 15, 2008, without authorization and before the Medicaid lien had been discharged, all in violation of RPC 1.15(a), RPC 8.4(c), and In re Wilson, 81 N.J. 451 (1979);
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> (2) committed fee overreaching for charging Thomas $79,505.89 for resolving the Medicaid lien, in violation of RPC 1.5(a);
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> (3) failed to provide a written fee agreement, in violation of RPC 1.5(b);
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> (4) engaged in knowing misappropriation and conduct involving dishonesty, fraud, deceit or misrepresentation by taking $206,000 when he was authorized to borrow only

$162,999.49,[6] in violation of RPC 1.15(a), RPC 8.4(c), and In re Wilson, 81 N.J. 451 (1979); and

(5) engaged in a prohibited business transaction with a client by borrowing money from Thomas in violation of RPC 1.8(a).

The Owens Matter – District Docket No. XIV-2012-0425E

Lawrence Owens (Owens) consulted with Emmett Primas, Esq. regarding a potential nursing home malpractice case on behalf of his wife, Peggy, against the Abigail House for Nursing and Rehabilitation, LLC (Abigail House). Peggy allegedly had suffered significant injuries from the facility's negligence, including bed sores and "neurological deficits." Primas recommended respondent.

On June 27, 2006, Owens entered into a fee agreement with respondent on behalf of Peggy and individually. Respondent testified that, based on statutory provisions relating to "nursing home cases" and the ability to pursue attorney fees, the fee agreements "are such that they are contingency and/or hourly fee," claiming that he is entitled to the greater of the two. Owens explained that he did not read the fee agreement because he attended school only until fifth grade and, therefore, he could not read well. On March 17, 2008, after

[6] The appropriate figure, based on the complaint, appears to be $149,493.60.

respondent filed a motion, Owens was appointed as Peggy's guardian ad litem for the purpose of the litigation. On August 12, 2008, respondent filed a second amended complaint on behalf of Owens, individually, and on behalf of Peggy, through her guardian, Owens. All of the causes of action related to Peggy's treatment at Abigail House.

The matter settled and the parties executed a release dated October 1, 2009. Although Owens thought the case settled for $400,000, it had settled for $450,000. According to respondent, after discussions with Owens, they decided to attribute $300,000 of the settlement to Peggy and $150,000 to Owens "as a fair split between himself and his wife." Respondent admitted that neither the insurance companies nor the court played a role in the decision to apportion the settlement funds.

The settlement comprised two checks: a $37,500 check from Podiatry Insurance Company of America, dated October 15, 2009, and a $412,500 check from James River Insurance Company, dated October 21, 2009. Respondent deposited the $37,500 check into his ATABank on October 26, 2009. On October 28, 2009 he issued a $37,000 check from his ATABank to Roland G. Hardy Jr. & Associates with the notation "Reimb. expense – Owens." He deposited that check into his attorney business account number xxxxxx0212 at The Bank (ABABank). He then deposited the second settlement check for $412,500 into his attorney trust account number xxxxxx3471 at PNC Bank (ATAPNC).

Despite Owens' signature on the back of the $412,500 check, Owens denied having signed it or even having seen it before the disciplinary hearing. Owens admitted that, at respondent's direction, he had endorsed check no. 1001, issued from respondent's ATABank dated November 2, 2009, payable to "Lawrence Owens" in the amount of $85,128.51 with the memo "Owens v. Abigail House." Owens signed a "Disbursement Memorandum" for both $300,000 and $150,000, but stated that respondent never reviewed these documents with him. In turn, respondent testified that he reviewed these documents with Owens.

On November 2, 2009, respondent issued check no. 1002 in the amount of $116,190.63 from his ATAPNC to "Roland G. Hardy Jr. & Associates, P.C." with the memo "Owens fee." On that same date, respondent issued check no. 1003 from his ATAPNC to "Emmett E. Primas, Jr., Esq." in the amount of $38,615.62 with the notation "Peggy Owens atty fee." Owens was not aware that respondent had paid Primas any fee.

Respondent admitted that he was not a certified civil trial attorney, that Primas did not perform any work in connection with the underlying litigation, and that the clients did not know about the payment of the referral fee. During the course of the hearing, respondent's counsel stipulated that, by that conduct, respondent had engaged in improper fee splitting.

Also on November 2, 2009, respondent issued from his ATAPNC check no. 1004 to "Roland G. Hardy Jr. & Associates, P.C." in the amount of $4,619.60 with the memo "Owens-reimb. costs" and check no. 1007 to "Roland G. Hardy Jr. & Associates, P.C." in the amount of $34,651.78 with the notation "Medicaid fee," which was based on one-third of the $104,059.41 lien that Medicaid had asserted. The $34,651.78 fee was in addition to the hourly fee that respondent had charged. According to respondent, the $34,651.78 fee was not detailed in the fee agreement because "Medicaid paid it." Nevertheless, respondent admitted that any work done with regard to the lien had been included in the hours he had billed the client.

Owens testified that he never saw a bill for respondent's services. Respondent, however, produced to the OAE a series of invoices totaling $154,806.25, which reflected a $275 hourly rate. Although not exact, this fee was allocated to both Peggy's and Owens' recovery, $103,489.87 and $50,972.62 respectively (based on a two-thirds and one-third allocation).

On December 8, 2009, respondent issued check no. 1015 from his ATAPNC to "Roland G. Hardy Jr." in the amount of $3,000 with the notation "Reimb-Owens, Lakewood."[7] Although respondent had claimed, in his answer, that the $3,000 payment related to a separate matter,

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[7] Lakewood is a nursing and rehabilitation center where Peggy resided until her death.

Kulinich could not identify any such matter during the investigation. Further, respondent included this amount on the Owens client ledger card as a deduction.

On December 16, 2009, respondent issued check no. 1016 from his ATAPNC to "Roland G. Hardy Jr. & Associates" in the amount of $5,500 with the memo "Owens." This check was deposited into his ABABank on December 17, 2009. According to the client ledger card produced by respondent, various payments were made to Lakewood at Voorhees from this deposit. The balance after the disbursements was $1,748.30.

Mary Elliott, the DMAHS representative who had testified in the Thomas matter, also testified about the lien in the Owens matter. By letter dated October 26, 2009, DMAHS informed respondent that it then had a Medicaid lien in the amount of $104,059.41 against Peggy. Based on the attorney fee, administrative costs, and Peggy's $300,000 settlement, DMAHS found that New Jersey Medicaid was entitled to reimbursement of $58,273.27. Respondent paid Medicaid $58,273.27 on November 2, 2009 from his ATAPNC.

In a December 11, 2009 letter to respondent, DMAHS acknowledged receipt of the $58,273.27 and stated:

> Please note that if your client receives additional settlement funds from either this defendant or other defendants, DMAHS will seek additional reimbursement. Furthermore, should a Special Needs Trust (SNT) be created, the balance of the unpaid claim remains as a claim against the SNT after the death of the Medicaid recipient

> pursuant to 42 U.S.C.A. 1396p(d)(4)(A) and N.J.A.C. 10:71-4.11(g)1.xii.
>
> If a Special Needs Trust is created, a copy of the trust must be forwarded to this office in addition to a copy of the Settlement Order. The Recovery Unit within the Office of Legal and Regulatory Affairs has the responsibility of tracking, approving all expenditures over $5,000 and collecting all monies due upon the death of the Medicaid beneficiary for whom the SNT was written.
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> [2T41-2T42;Ex.32.][8]

This letter put respondent on notice that the State had a continuing interest in any funds that Peggy received or would receive in the future and that respondent would be required to notify the State if an SNT were created.

In an effort to protect the remaining settlement funds, respondent created the "Peggy Owens Self-Settled Special Needs Trust" (SNT), naming himself as the trustee. Although the trust document was dated January 15, 2010, Owens did not sign it until February 18, 2010. The SNT stated that its purpose was to permit the use of the trust assets to supplement Peggy's governmental assistance for "special needs" that other assistance programs might not provide. The document also indicated that, upon Peggy's death, notice "shall be provided" to DMAHS and that notice of any expenditures in excess of $5,000 must be provided to the Camden County Board of Social Services ("CCBSS").

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[8] "2T" refers to the transcript of the June 10, 2014 ethics hearing.

The sole investment provision in the SNT permitted the trustee to have the option to invest the corpus in mutual funds.

Respondent also prepared a "Trust Authorization Agreement," dated January 15, 2010, which allowed him to use the trust funds for his business purposes. Although Owens admitted signing the "Trust Authorization Agreement," he claimed that he did so because he believed it authorized respondent to put $50,000 in Peggy's account at the nursing home. He denied that respondent had explained that he could use the funds for his own purposes.

Respondent issued check no. 1021 from his ATAPNC in the amount of $50,000 with the notation "Owens-Spec. Needs" and deposited these funds into his ABABank on January 11, 2010, prior to the date the trust documents were executed. Respondent used these funds to pay his own business and personal expenses. The nursing home confirmed that it had never received any portion of that money.

During his testimony, respondent attempted to explain the $50,000 disbursement made prior to the execution of the trust documents. He claimed that, at the time of the disbursement, he and Owens had discussed setting up the SNT but that Owens had to reschedule various appointments to sign the documents, resulting in the delay in their execution.

Respondent sent a letter, dated January 29, 2010, to Owens explaining that "$50,000 has been invested with The Hardy Law Office

LLC at an annual interest rate of five percent" and "the payout will be $600 per month so as to cover the monthly remainder costs to Lakewood at Voorhees for Peggy's care." Peggy's "private pay portion" obligation at Lakewood was $600 per month, which would be the basis for the SNT. The letter also stated that, if Peggy were to pass away before the trust funds were depleted, the remaining balance would "go to the State." Owens maintained that respondent never informed him of this or explained the letter to him.

According to Owens, respondent had asked him to sign papers but had not disclosed that respondent was the trustee. Respondent claims to have sent Owens an "annual report" as to the activity of the SNT on September 9, 2011.

Elliot testified that respondent never informed DMAHS that an SNT had been created or that there were any expenditures over $5,000, noting that the $50,000 respondent borrowed from the SNT constituted such an expenditure about which respondent was obligated to inform the State. When asked whether DMAHS would have authorized the loan, Elliot explained, "[w]e don't really authorize or not authorize. It would just basically be — we wouldn't authorize it, of course, because of what the number value was. It would just have to be explained on what the circumstances are and is it for the sole benefit of the client? That's, you know, first and foremost." According to respondent's

client ledger card, the loan balance, as of November 9, 2011, was $45,705.82.

Respondent claims to have notified the CCBSS on December 20, 2011, that Peggy had passed away on November 22, 2011. According to respondent, the CCBSS never responded.

On May 7, 2013, respondent sent a letter to Elliot informing her that: (1) Peggy had passed away a year-and-a-half earlier, on November 22, 2011; (2) Peggy's funds were invested in his firm at an annual interest rate of 5%; (3) he was paying $600 per month to Lakewood at Voorhees for Peggy's expenses; (4) the SNT was approved by the CCBSS; (5) he had previously advised the CCBSS of Peggy's death; (6) he was holding the 2012 payment totaling $7,200; and (7) the balance was still invested in his office.

Respondent produced the verification from the CCBSS, which stated "The Peggy Owens Trust is a valid Special Needs Trust." Although respondent claimed that he had notified Elliot and DMAHS that Peggy's funds would be disbursed to a SNT and that he had sent a copy of the SNT to Elliot's attention on February 19, 2010, Elliot testified that the SNT was not in DMAHS's file.

By letter dated May 21, 2013, DMAHS explained that, upon Peggy's death, respondent was obligated to reimburse Medicaid as the contingent beneficiary and that Medicaid had paid $847,806.14 in total for Peggy's benefit. Respondent paid only $14,200 to DMAHS, which

amounted to his loan payments owed for 2012 and 2013. As of the date of the hearing, respondent still owed $38,709.38 to the State, from the $50,000 that he had borrowed from the SNT.

The complaint alleged that respondent:

(1) engaged in a conflict of interest for unilaterally deciding the apportionment of the $450,000 settlement between Lawrence and Peggy Owens, in violation of RPC 1.7(a)(2);

(2) engaged in knowing misappropriation and conduct involving dishonesty, fraud, deceit or misrepresentation by taking $193,790.73 in legal fees knowing he was authorized and entitled to only $135,960.73, in violation of RPC 1.15(a), RPC 8.4(c), and In re Wilson, 81 N.J. 451 (1979); and

(3) alternately, engaged in fee overreaching by taking $193,790.73 in legal fees, knowing he was authorized and entitled to only $135,960.73, in violation of RPC 1.5(a);

(4) engaged in knowing misappropriation and conduct involving dishonesty, fraud, deceit or misrepresentation by taking $50,000 from the Owens settlement, which should have been placed in the SNT, in violation of RPC 1.15(a), RPC 8.4(c), and In re Wilson, 81 N.J. 451 (1979);

(5) alternately, by his taking the $50,000, respondent engaged in a conflict of interest, a prohibited business transaction, failure to safeguard funds, and failure to promptly disburse funds, in violation of RPC 1.7(a)(2), RPC 1.8(a); RPC 1.15(a), and RPC 1.15(b); and

(6) improperly split his fee by paying Primas a referral fee of $38,615.62 from the settlement, in violation of RPC 1.5(e).

* * *

In the Thomas matter, the special master determined that, based on the complaint, he was to consider whether respondent was guilty of: (1) misappropriation of client funds, in violation of RPC 1.15(a) and In re Wilson, 81 N.J. 451 (1979); (2) conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c); (3) fee overreaching, in violation of RPC 1.5(a);[9] (4) failing to prepare a written retainer agreement, in violation of RPC 1.5(b); and (5) engaging in a prohibited business transaction with a client, in violation of RPC 1.8(a).

The special master declined to find that respondent's fee disbursement of $25,000 on the same date of the deposit of the settlement check amounted to a knowing misappropriation. Instead, he found that Hackett believed the fee to be based on a percentage and that, when respondent took the $25,000 portion of his $79,505.89 fee, the settlement check had been received and properly deposited. The special master acknowledged that the disbursement occurred before the Medicaid lien was resolved and, therefore, the $25,000 disbursement was not based on one-third of that lien, but he concluded that the fee amounted to about 6.5 percent value of the estate. The special

[9] The special master noted that the complaint charged RPC 1.15(a), but he stated "clerical error presumed" and substituted RPC 1.5(a).

master found that the proofs did not establish the intent required for a violation of RPC 1.15(a).

The special master found that respondent violated RPC 1.5(b), based on his inability to produce an executed fee agreement, coupled with the fact that the client had never received a copy of any such agreement.

The OAE also alleged that the $79,505.89 fee amounted to overreaching, pursuant to RPC 1.5(a), because the time expended on the matter was slightly more than twenty hours, which would have resulted in an hourly fee of approximately $5,300. Although the special master found that rate to be "extraordinarily high," he found no basis from the proofs to conclude that it was "unprecedented" in contingent fee matters or that it amounted to overreaching. He, therefore, declined to find a violation of RPC 1.5(a).

The special master found the business transactions with Thomas (borrowing funds on two separate occasions) to be both "suspect and inappropriate." He concluded that, although respondent provided the client with options for investing the proceeds, he failed to properly advise her of the desirability of seeking the advice of independent legal counsel "who could have reviewed the financials . . . and advised the clients of the risks of this transaction." The special master, therefore, found a violation of RPC 1.8(a).

In the Owens matter, the special master considered whether respondent was guilty of: (1) misappropriation of client funds, in violation of RPC 1.15(a) and In re Wilson, 81 N.J. 451 (1979); (2) conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c); (3) engaging in a prohibited business transaction with a client, in violation of RPC 1.8(a); (4) a conflict of interest, in violation of RPC 1.7(a)(2); and (5) improper fee splitting between lawyers not in the same firm, in violation of RPC 1.5(e). The special master accepted respondent's stipulation to improper fee splitting between lawyers, in violation of RPC 1.5(e).

The special master first considered the allegation that respondent's fee disbursement amounted to a knowing misappropriation. He accepted as valid the fee agreement that allowed respondent to receive the greater of an hourly fee or a contingent fee. Although the invoices reflected a fee of $154,806.25, the special master found that respondent had distributed $154,462.49 to himself and to Primas for the hourly fee.

As to respondent's $34,651.78 Medicaid fee, in addition to the hourly fee, for a total fee of $189,458.03, the special master concluded, "I can find no basis for the Medicaid Fee to be charged in addition to the fees charged to the Owens [sic]." Further, he found that the additional fees were never disclosed to the client, in violation of RPC 8.4(c). The special master, however, declined to find

that charging the additional Medicaid fee was an "intentional misappropriation."

As to the $50,000 loan to respondent's law office from the SNT, the special master found a violation of RPC 1.8(a), but did not analyze this transaction under Wilson. Rather, he found that respondent had neither discussed the risks of the loan with Owens nor suggested that Owens seek the advice of independent counsel.

The special master briefly addressed the issue of conflict of interest as it related to the allocation of the settlement amount between Owens and Peggy. He found this violation of RPC 1.7(a) to be "technical in nature" because the allocation was not accomplished through a court proceeding, noting, however, that there was no claim that the allocation was not fair or reasonable.

Finally, the special master found that respondent violated RPC 1.5(e) based on his admitted improper fee splitting with Primas.

The special master made specific discipline recommendations for each violation: RPC 1.5(b), absence of a fee agreement in the Thomas matter, a censure because of the "overall approach" of how respondent handled client funds; RPC 1.8(a) in both matters, based on prior discipline for the same conduct, a six-month suspension for one transaction and one-year suspension for the other; RPC 8.4(c) for misrepresenting his fee in the Owens matter and taking the Medicaid

fee, a six-month suspension; and RPC 1.5(e), improper fee splitting, an admonition. In total, he recommended a two-year suspension.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. We address first the charges that are more easily resolved, with the remaining issues, specifically the allegations of knowing misappropriation, to be discussed at greater length.

RPC 1.5 - Fees

In the Owens matter, respondent violated RPC 1.5(e) by sharing his fee with the referring attorney. RPC 1.5(e) allows a division of fees between lawyers who are not in the same firm only if the division is based on services performed, the client is notified of the division, the client consents, and the fee is reasonable.[10] Here, respondent issued check no. 1003 from his ATAPNC to "Emmett E. Primas, Jr., Esq." in the amount of $38,615.62 with the notation "Peggy Owens atty fee." The parties agreed respondent is not a certified civil trial attorney, Primas did not perform any work in connection with the underlying

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[10] RPC 1.5(e) also allows a fee division where permitted by Court Rule. Thus, had respondent been certified, he permissibly could have shared his fee with the referring attorney pursuant to R. 1:39-6(d), regardless of the fact that the referring attorney had not rendered any services in the matter.

litigation, and Owens was not aware of the payment of the referral fee. Respondent stipulated to these facts. Thus, consistent with the finding of the special master, respondent violated RPC 1.5(e).

Respondent violated RPC 1.5(b) in the Thomas matter by his failure to reduce to writing the basis or rate of his fee and to provide a copy of the writing to the client before or within a reasonable time after commencing the representation. Although respondent produced an unexecuted written fee agreement, Hackett was not familiar with that document and respondent did not produce any other document evidencing its execution or transmittal to the client. Thus, in our view, the special master correctly found that respondent failed to properly communicate his fee in writing, in violation of RPC 1.5(b). Further, as discussed below, respondent's failure to properly document his fee served as the basis for a charge of knowing misappropriation and overreaching.

As noted by the special master, the writing that respondent produced in support of his fee agreement was, at best, "confusing in its failure to define what the one third fee is actually measured on." Acknowledging that respondent spent between fifteen and twenty-one hours on the matter, the special master calculated respondent's "effective hourly rate" to amount to between $3800 and $5300, which seemed to him "extraordinarily high." That notwithstanding, the special master declined to find that the OAE had established

overreaching on respondent's part, in violation of RPC 1.5(a). We are unable to agree.

In determining whether a fee is reasonable under RPC 1.5(a), certain factors must be considered, including whether the fee was fixed or contingent. RPC 1.5(c) allows a fee to be contingent on the outcome of the matter for which the service is rendered, but requires that the fee agreement be in writing and that it state the method by which the fee is to be determined. See also R. 1:21-7 (setting forth the basis for which contingent fees are calculated).

In Starkey, et al. v. Estate of Nancy Nicolaysen, et al., 172 N.J. 60 (2002), the Court concluded that a contingent fee agreement was unenforceable because it was not reduced to writing for a delayed period, in violation of RPC 1.5(b). Id. at 67. The underlying matter involved a complicated real estate transaction for which the law firm was retained to assist. Id. at 62. There was an oral agreement that the firm's fee would be one-third of the amount received over a condemnation offer. Ibid. The sale never consummated and the attorney-client relationship was terminated. Id. at 64. The Court held that the oral contingent agreement was not enforceable and that the writing requirement exists to avoid misunderstandings and fraud. Id. at 69. Fee agreements between lawyers and clients are to be construed against the lawyer. Id. at 67 (citing Cohen v. Radio Elecs. Officers Union, 146 N.J. 140, 156 (1996) ("An otherwise enforceable agreement between

an attorney and client would be invalid if it runs afoul of ethical rules governing that relationship").

The Court found that, although the contingent fee agreement was unenforceable, the law firm was entitled to recover the reasonable value of its services under a quantum meruit theory. Id. at 67. The Court stated, "[w]here an attorney performs legal services for another at his request, but without any . . . understanding as to the remuneration, the law implies a promise on the party who requested such services to pay a just and reasonable compensation." Id. at 68 (citation and internal quotes omitted). Thus, the firm was awarded a quantum meruit fee.

Here, the OAE charged respondent with fee overreaching for taking a $79,505.89 fee in the Thomas matter when he spent only approximately twenty hours on the matter. In his defense, respondent argued that he had entered into an (oral) contingent fee agreement and the fee amounted to one-third of the recovery for the Medicaid lien. The special master incorrectly relied on that oral agreement in finding that respondent did not violate RPC 1.5(a).

First, as discussed above, respondent failed to reduce the fee agreement to writing. Clearly, there was confusion, even at the time of the hearing, as to the scope of the representation and method by which the fee would be calculated. Tingle believed that respondent was retained to help Thomas handle the distribution of the estate and that

his rate was $300 per hour. Hackett, however, believed that the fee would be based on a percentage of an unknown amount.

Respondent maintained that Thomas retained him to set up the Simons Estate in order to disburse funds from the malpractice case and that they discussed an hourly rate of $300. He asserted that, during a subsequent meeting, Thomas changed the scope of representation, which increased the number of hours he would need to spend on the case. According to respondent, he offered Thomas three fee scenarios: $300 per hour, six-and-a half percent of the estate, or one-third of the savings on the outstanding lien. Despite the clients' confusion even at the hearing, respondent claimed that they eventually agreed to a fee based on one-third of the savings on the Medicaid lien. For the reasons set forth in Starkey, the fee agreement is unenforceable and respondent was not permitted to take a contingent fee.

Second, and in respect of a quantum meruit analysis, there was significant testimony by both Kulinich and respondent about the services performed to justify respondent's fee. According to Kulinich, after reviewing respondent's file, he determined that the only work respondent performed in the Thomas matter was to retain a tax identification number for the estate, request disability records, and negotiate the lien. Respondent explained that he successfully negotiated the Medicaid lien, after conducting legal research, meeting

with Social Services, and drafting letters. Respondent's own testimony, however, supported, at most, only twenty-four billable hours.

Although the exact hourly fee that would have supported a quantum meruit analysis is not part of the record and would more appropriately be addressed by a fee arbitration panel, respondent certainly exceeded that fee. He admitted that he spent a maximum of twenty-four hours working on the Thomas matter. As a result, as noted by the special master, a fee of $79,505.89 would have amounted to an effective hourly rate well in excess of $3,000, which, in our view, is clearly unreasonable. We, therefore, find that respondent's fee violated of RPC 1.5(a).

RPC 1.7 – Conflict of Interest

RPC 1.7(a)(2) prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest, which exists "if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person . . . ."

The OAE charged respondent with violating RPC 1.7(a)(2), based on his unilateral apportionment of the $450,000 settlement in the

Owens matter between Peggy and her husband.[11] Although the special master recognized that respondent had not sought an independent apportionment of the settlement proceeds, he found that there had been no claim that the allocation was unfair or unreasonable and, further, that a basis for the allocation "apparently" existed. In this respect, the special master referred to the hearing transcript in which respondent testified that he and Owens had agreed to the specific division, citing Owens' need of the funds to support his grandchildren. Thus, the special master characterized any violation of RPC 1.7(a) as "technical in nature." We disagree.

Respondent's responsibilities to Peggy were severely limited by his need to allocate a portion of the settlement proceeds to Owens. That the division, in hindsight, may or may not have been fair does not vitiate respondent's responsibilities to each of his clients to maximize their recoveries. Peggy was in need of long-term medical care and assistance. An independent third party surely would have promoted

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[11] As an initial matter, consistent with case law addressing Medicaid liens, the entire settlement was subject to the Medicaid lien and should not have been apportioned. Under Medicaid law "all of the settlement proceeds are available for reimbursement of the State's Medicaid payments." In re Kietur, 332 N.J. Super. 18 (App. Div. 2000). For the purpose of Medicaid recovery by the State, "an award to the beneficiary's parents is considered an award to the beneficiary herself." Waldman, et al., v. Candia et al., 317 N.J. Super. 464, 475 (App. Div. 1999). The New Jersey Medicaid statute does not provide for the allocation of a Medicaid recipient's recovery or for compromise of a Medicaid lien. Ibid.

her receipt of a larger portion of the settlement, if not the full amount. Owens was charged with the care and responsibility of at least one of their grandchildren. Peggy's illness and injuries precluded her from participating in that care. An independent third party surely would have promoted Owens' receipt of a larger portion of the settlement proceeds based on his per quod claim. Thus, in our view, respondent's unilateral apportionment of the settlement proceeds violated RPC 1.7(a).

RPC 1.8 – Prohibited Business Transaction

The special master correctly determined that respondent violated RPC 1.8(a) for engaging in a prohibited business transaction with Thomas as to both loans. RPC 1.8(a) prohibits an attorney from entering into a business transaction with a client, unless (1) the transaction and terms are fair and reasonable to the client; (2) the transaction and terms are fully disclosed and transmitted in writing to the client; (3) the client is advised in writing of the desirability of seeking independent legal counsel; (4) the client is given a reasonable opportunity to seek the advice of independent legal counsel; and (5) the client gives informed consent in a writing. A loan from a client is viewed as a business transaction, triggering the requirements of RPC 1.8(a). In re Frost, 171 N.J. 308, 319-20 (2002). A "passing suggestion" that a client should consult a second attorney is not

sufficient. _In re Smyzer_, 108 _N.J._ 47, 55 (1987), citing _In re Wolk_, 82 _N.J._ 326, 333 (1980). Rather, the Court has consistently emphasized that an attorney should approach such business arrangements with caution and must "carefully explain to his client the need for independent legal advice," making sure that his client understands that his objectivity and ability to give his client "undivided loyalty" may be affected. _In re Smyzer_, _supra_, 108 _N.J._ at 54-55, citing _In re Wolk_, _supra_, 82 _N.J._ at 333.

The special master found respondent's loans in the Thomas matter to be "suspect and inappropriate," noting that respondent had failed to insist that his clients consult with another attorney. Tingle believed respondent represented Thomas for this loan transaction, which suggests that the parties had no understanding that respondent had an adverse interest. Tingle and Hackett also explained that respondent never discussed with Thomas the risks associated with entering into the loan. Although Hackett was aware that the funds would be used for respondent's firm, it is questionable whether the terms were fair and reasonable, considering the nature of the collateral (respondent's accounts receivable), when respondent could not even collect the necessary receivables to make payment on the loan. Indeed, OAE disciplinary investigator Kulinich verified that respondent deposited the loan proceeds into his business account and

used a portion of them to repay loans to other clients.[12]

Tingle testified that respondent failed to review with Thomas her option to consult another attorney to discuss the loan. Although Hackett testified that respondent "probably" told Thomas she could consult another attorney, the presentation of the loan and execution were done contemporaneously, which did not give Thomas a "reasonable opportunity" to seek the advice of independent counsel.

Although the final paragraph of the promissory note contained a clause that Thomas had the right to consult with an attorney and respondent testified that he had informed Thomas of the right to seek counsel, such was merely a "passing suggestion" and one that did not sufficiently comply with the very specific and strict requirements of RPC 1.8(a). We, therefore, find that respondent violated that rule.

Similarly, respondent's compliance with RPC 1.8(a) was even more deficient in respect of the second promissory note. He explained that it was not until the OAE investigation that he realized that he did not have a promissory note for the additional loan, which ultimately was executed in October 2011, well after he had disbursed the loan

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[12] Respondent's failure to insist that his client consult with independent counsel in respect of the proposed loan is particularly troublesome in the context of the very unstable nature of this "collateral" – a fact apparently not discussed with his client. Had he done so, review by independent counsel clearly would have resulted in rejection of the terms in favor of more stable or secured collateral.

proceeds to himself. Because there was no promissory note at the time of disbursement, we are left to rely merely on respondent's word that he properly informed Thomas of the terms and of her right to seek counsel. In fact, the evidence proves to the contrary, as noted by the special master. Further, respondent did not satisfy the requirement that he provide a contemporaneous writing explaining the terms of the transaction or that he obtained his client's written informed consent to it. Thus, for these reasons, we find that respondent violated RPC 1.8(a) in the second Thomas loan as well.

RPC 1.15 – Knowing Misappropriation

The Court has described 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 there from." In re Wilson, 81 N.J. 451, 455 n.1 (1979).

The Supreme Court subsequently addressed an attorney's use of escrow funds, as distinguished from client funds. In re Hollendonner, 102 N.J. 21 (1985). The Court concluded that "absent some extraordinary provision in an escrow agreement . . . it is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both

parties." Id. at 28. "The parallel between escrow funds and client trust funds is obvious. . . . So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of In re Wilson." Id. at 28-29.

In In re Quinn, 88 N.J. 10 (1981), the Court disbarred an attorney for, among other violations, withdrawing settlement proceeds with the knowledge of a Welfare Board lien on the funds. In the Matter of Robert E. Quinn, DRB 81-116, June 17, 1981 (slip op. at 6). The attorney was retained on a contingent fee basis to represent the client with regard to a personal injury matter after she sustained injuries in an accident. Id. at 4. The attorney negotiated a $5,000 settlement and deposited those funds into his attorney trust account. Ibid.

Prior to settlement, the attorney had been notified that the Bergen County Welfare Board asserted a lien against any recovery by the client, who was receiving welfare benefits. Ibid. The attorney told the client that he would negotiate with the Welfare Board to have the lien reduced or released and withdrew the remainder of the settlement funds. Ibid. At the hearing, the attorney explained that the client had agreed to lend him those funds but he failed to produce evidence of the "loan." Ibid. The Court found that "at the time [he] withdrew the remainder of the settlement proceeds, he was aware of the Welfare Board's lien on the funds" and that such conduct "on its face" was "fraudulent and deceptive. Id. at 4-6. The Court found the

attorney's conduct to amount to knowing misappropriation within the Wilson definition.

Similarly, in In re Frost, 171 N.J. 308 (2002), the Supreme Court held that the attorney knowingly misappropriated escrow funds when he borrowed money, with the client's permission, knowing that the workers' compensation insurance carrier had asserted a lien on the settlement funds. Id. at 327. The attorney was retained to represent a client who had fallen off a roof during the course of his employment. Id. at 314. The matter settled for $500,000 and a workers' compensation lien for at least $79,000 was asserted by the insurance carrier. Id. at 315. The attorney sent a trust account check to the insurance company in the amount of $79,000 for what he believed was the compromised lien amount. Ibid. The insurance company rejected the payment, presumably because it was not sufficient. Ibid. The attorney subsequently transferred those funds from his trust account to his escrow account under the client's name. Ibid.

The attorney later asked the client to lend him money. Ibid. After consulting with counsel, the client declined. Id. at 316. A few weeks later, the attorney again contacted the client to request a loan. This time, the client agreed based, in part, on the attorney's misrepresentation about the value of the loan collateral. Ibid. The attorney issued two checks totaling $79,000, which the client endorsed. Id. at 317. The $40,000 check was deposited into the

attorney's business account and used for law firm expenses. Ibid. The disposition of the $39,000 check was not clear. Ibid. The workers' compensation carrier ultimately settled for $83,740, but the attorney did not make the payment. Ibid. The insurance carrier sued the attorney civilly and the attorney filed for bankruptcy. Id. at 317-318.

The Court found that the attorney's loan transaction with the client constituted a conflict of interest and prohibited business transaction, in violation of RPC 1.8(a). Id. at 319-20. The Court found the failure to make payment "highlights the worthlessness of the loan agreement." Id. at 321. The Court also found that the attorney violated RPC 8.4(c) for the unfair and unreasonable loan agreement and for his misrepresentation of assets. Id. Although we declined to find that the attorney knowingly misappropriated escrow funds, the Court held that, even though the client authorized the withdrawal of the funds, the consent of the third party, the insurance company, was also required. Id. at 322. The attorney was found to have explicit knowledge of the lien, especially since he initially attempted to make payment to the insurance company. Id. at 324. That the attorney had the client's consent was irrelevant. Id. at 324. The Court found that the attorney had knowingly misappropriated escrow funds by borrowing them from a client, despite his awareness that an insurance company also had an interest in them and that the insurance company had not consented to the loan. Id. at 324-25.

We evaluate the OAE's allegations that respondent is guilty of knowing misappropriation against this legal framework.

Thomas

On December 10, 2008, Wilkes and McHugh, P.A., forwarded check number 1100066 to respondent in the amount of $393,250.05, which represented the "net settlement to client." Respondent deposited this check into his ATABank on December 15, 2008. On the same day of the settlement deposit, respondent issued check number 2270 to "Roland G. Hardy Jr. & Associates" from ATABank in the amount of $25,000 to himself with the memo notation "Emma Simons." Check number 2270 cleared respondent's account on December 15, 2008.

Hackett and Tingle both testified that they were not aware that respondent had taken $25,000 for his fee prior to the resolution of the Medicaid lien. Kulinich also asked respondent during the investigation why he disbursed $25,000 "early on." Although respondent offered no explanation, about an hour after the initial conversation, respondent contacted Kulinich and told him that the $25,000 fee was based on the initial fee agreement that he would receive six-and-a-half percent of the estate value.

The special master declined to find that respondent's payment of $25,000 on the same date of deposit of the settlement in the Thomas matter amounted to knowing misappropriation. Instead, he found that

Hackett believed the fee to be "percentage in nature," noting a "discrepancy as to whether there would be a fee charged of 6.5% of the entire estate . . . or a fee charged of one third of the amount saved from the . . . Medicaid lien." The special master further noted that, on the date respondent took $25,000 of his $79,505.89 fee, the settlement check had been received. He, therefore, found that the proofs did not establish the requisite intent to support a violation of RPC 1.15(a), given respondent's explanation of the fee calculation based on a percentage of the estate. The special master did not address the accompanying charge of RPC 8.4(c).

As established, respondent did not have a written retainer agreement for the Thomas matter. There was contradictory testimony from Tingle, Hackett, and respondent about the terms of the fee agreement. Although respondent's failure to provide a fee agreement should not inure to his benefit, the evidence does not clearly and convincingly establish that the distribution of the $25,000 was unauthorized. If, as Hackett suggests, the fee was based on a percentage of the value of the estate, respondent's immediate taking of a partial ($25,000) fee would fall within those parameters. Thus, for this conduct, like the special master, we conclude that respondent did not violate RPC 1.15(a) or the principles set forth in Wilson.

Likewise, because the evidence is inconclusive as to whether the fee agreement initially was based on a percentage of the estate or a

percentage of the savings on the Medicaid lien, we decline to find a violation of RPC 8.4(c) in respect of this conduct.

The OAE also charged respondent with knowing misappropriation in the Thomas matter for taking $206,000 as a loan, contending that he was authorized to take only $149,493.60. The special master did not address this allegation in his hearing report.

According to the complaint, during the OAE investigation, respondent admitted that he withdrew $206,000 from the Simons Estate. The complaint, however, alleged that he was authorized to borrow only $149,493.60, which consisted of $99,493.60 detailed on the first promissory note and $50,000 that was a "verbal loan referenced in Schedule B."

Respondent executed a second promissory note, on October 7, 2011, in the amount of $104,250.56 with ten percent annual interest. Respondent had backdated this note to July 29, 2009 because he realized that he had not prepared the requisite documentation applicable to this loan. As evidenced by the backdated note, the client corroborated respondent's claim that he had the authority to borrow the additional funds.

Based on respondent's statements made during the investigation, the OAE complaint alleged that the $104,250.56 loan comprised the $54,125.97 outstanding balance from the first $99,493.60 loan and the

verbal $50,000 loan referenced in Schedule B.[13] During the hearing, however, respondent testified that the $104,250.56 represented an additional and separate loan from the $99,493.60 and that there were two separate promissory notes signed by Thomas. This statement is confirmed by the "Flossie Thomas Summary Statement" respondent provided to the OAE, which showed both the $99,493.60 and $104,250.56 loans as distributions from the Simons Estate funds. Thus, the evidence establishes that respondent was authorized to borrow $203,744.16.

To the extent respondent was authorized to borrow $203,744.16 but took distributions totaling $206,000, the $2,255.84 discrepancy was not addressed during the proceedings. Without any direct evidence in this regard, we are left to speculate as to the nature of the discrepancy. Did it represent a miscalculation, or did respondent knowingly take more than he was authorized to borrow? We conclude that the evidence is unclear in this respect. Thus, we find that respondent did not violate <u>RPC</u> 1.15(a) and the principles set forth in <u>Wilson</u> as to the loan disbursements totaling $206,000.

<u>Owens</u>

The complaint charged that respondent knowingly misappropriated funds by borrowing $50,000 from the settlement proceeds, when those

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[13] Based on the complaint, the total of the second loan would amount only to $104,125.97, contrary to the actual loan amount.

funds should have been placed in the SNT. The special master found that this loan transaction implicated only RPC 1.8(a). We disagree.

On January 11, 2010, respondent issued check no. 1021 from his ATAPNC in the amount of $50,000 with the notation "Owens-Spec. Needs" and deposited these funds into his ABABank that same day. It is undisputed that respondent used these funds to pay his business and personal expenses, and not for Peggy's benefit.

Four days later, on January 15, 2010, respondent prepared the "Trust Authorization Agreement," which, he maintains, permitted him to use the trust funds for his business purposes. The SNT also was dated January 15, 2010, but was not signed by Owens until February 18, 2010.

At the ethics hearing, respondent attempted to explain the disbursements made prior to the execution of the documents. Specifically, he claimed that, at the time of the original disbursements, he and Owens had discussed establishing the SNT, but that Owens had to reschedule various appointments to execute the documents. Presumably, the special master found this testimony credible because he found only that respondent violated RPC 1.8(a).

Although Owens admitted signing both the SNT and the "Trust Authorization Agreement," he stated that he did so because, based on what respondent told him, he thought the purpose was for respondent to deposit the $50,000 in Peggy's account at the nursing home. Owens

further testified that he did not know respondent was going to be the trustee, only that respondent asked him to sign the papers. It was not until Peggy died that Owens learned from the nursing home that no funds had been received from respondent for Peggy's benefit. Moreover, Owens testified, that, until he received a copy of the formal ethics complaint, he did not learn or understand that respondent had invested the funds in his own law firm, instead of depositing them into the SNT he had created ostensibly for Peggy's benefit.

This testimony supports the conclusion that Owens did not knowingly consent to lend respondent the funds to finance his law practice. Rather, it is painstakingly clear that Owens relied on respondent's explanation of the purpose of the SNT and the Trust Authorization Agreement when he signed those documents. He testified unequivocally that had respondent explained to him that he wanted to borrow Peggy's money for his own benefit, he never would have authorized it. Thus, it is clear to us that respondent never had Owens' authority to use Peggy's money for his own personal purposes. For that conduct, he is guilty of knowing misappropriation of client trust funds, a violation of RPC 1.15(a) and In re Wilson, 81 N.J. 451 (1979).

In any event, even if Owens had authorized the SNT and the loan for respondent to use the funds for his business expenses, it is questionable whether Owens had the legal authority to do so. The order appointing Owens guardian ad litem was for the limited purpose of

litigation, not subsequent handling of finances. The record contains no evidence of any other document, such as a power of attorney, conferring such authority on Owens. The fact that Owens signed the SNT and Trust Authorization, therefore, is irrelevant because he lacked the authority to do so – a fact that certainly should have been apparent to respondent. Respondent, thus, had no legal authority to borrow the money.

Our further analysis also supports a finding that the $50,000 loan from the SNT constituted a knowing misappropriation. The SNT stated that the purpose of the trust was to permit the use of the trust assets to supplement Peggy's governmental assistance for "special needs" that other assistance programs might not provide. The document also indicated that, upon Peggy's death, notice "shall be provided" to DMAHS and that, if any expenditures in excess of $5,000 were made, notice must be provided to CCBSS. The sole investment provision in the trust documents gave the trustee the option to invest the corpus in mutual funds. The trust instrument did not allow for a private investment in respondent's law firm.

Respondent's January 29, 2010 letter to Owens acknowledged that, if Peggy were to pass away before the trust funds were depleted, the remaining balance would "go to the State." Elliot, on behalf of DMAHS, testified that, by letter dated October 26, 2009, DMAHS informed respondent that it then had a Medicaid lien in the amount of

$104,059.41. Although the Medicaid lien was resolved and DMAHS was paid $58,273.27, Elliot subsequently informed respondent, in a December 11, 2009 letter, that if an SNT were created, the balance of the unpaid lien would remain a claim against the SNT. The letter further informed respondent that, if an SNT were created, a copy must be sent to DMAHS and that its Recovery Unit must be notified of expenditures exceeding $5,000. Additionally, upon the death of the Medicaid beneficiary for whom the SNT was written, all monies due would be paid directly to the State. Elliot testified that this letter was intended to put respondent on notice that the State had a continuing interest in any funds Peggy received or would receive in the future and that if an SNT were created, respondent would be obligated to provide that information to the State. It is clear, thus, that respondent both knew of Medicaid's continuing interest in the funds and understood that any funds remaining in the SNT on Peggy's death belonged to the State. Yet, he neither notified Medicaid of the disbursement nor secured its authorization to remove the funds from the SNT.

On May 7, 2013, respondent notified Elliot that Peggy had passed away a year-and-a-half earlier, on November 22, 2011. He explained the status of the funds, specifically that he had borrowed funds and had yet to repay the loan in full. By letter dated May 21, 2013, DMAHS informed respondent that, upon Peggy's death, he had been obligated

to reimburse Medicaid as the contingent beneficiary and that Medicaid had, by that time, paid $847,806.14 on Peggy's behalf. Respondent paid only $14,200 to DMAHS, representing his loan payments for 2012 and 2013. As of the date of the hearing, respondent still owed $38,709.38 to the State.

We conclude, under these facts, that, by taking the $50,000 loan from the SNT, without Medicaid's authorization to do so, and knowing that Medicaid had a clear interest in the funds, respondent was guilty of knowing misappropriation.

Respondent's conduct is similar to the attorney's conduct in Frost, supra. As in Frost, respondent borrowed funds when he was well aware that a third party, DMAHS, had asserted a Medicaid lien against Peggy's settlement. Respondent's knowledge of Medicaid's lien is evidenced by his partial payment of the lien; the provisions he drafted as part of the SNT; his communication with Owens informing him that, if Peggy were to pass away, the funds would be paid to the State; and his communications with DMAHS. Just as the Court reasoned in Frost in respect of the workers' compensation lien, the fact that, here, Owens may have consented to the loan, assuming he could even do so, is irrelevant. Similar to the attorneys in Frost and Quinn, respondent borrowed escrow funds with full knowledge that a third party had an interest in those funds, specifically a lien, and failed to obtain third-party consent. Respondent admittedly never notified DMAHS or

CCBSS of the loan when he took it, unilaterally concluding that the personal loan to himself did not constitute an "expenditure," but, rather, an "investment." We are perplexed by respondent's conclusion – particularly in the context of his prior written acknowledgements to the contrary and the fact that the sole provision for investment authorized in the SNT respondent himself created was in mutual funds – not a private loan to his law practice.

We note as well that respondent failed to comply with specific statutory provisions associated with Medicaid and special needs trusts designed to protect the grantor. Specifically, pursuant to N.J.S.A. 10:71-4.11(g), cited by Elliot in her December 11, 2009 letter to respondent, "the trust shall state that the trust is for the sole benefit of the trust beneficiary" and that the trustee shall comply with state laws including the Prudent Investor Act, N.J.S.A. 3B:20-11.1. Additionally, upon the death of the primary beneficiary, the state must be notified and must be paid all amounts remaining, up to the total value of medical assistance provided. Further, the State must be given notice of any expenditure in excess of $5,000.

First, we cannot conclude that respondent maintained the trust for the sole benefit of Peggy. Indeed, the care facility received no payments in Peggy's behalf from respondent or from the SNT he created for her care, as Owens had anticipated would occur. Moreover, as earlier discussed, the loan here, like the loan in Thomas, was

questionable, at best. Its terms were neither fair nor reasonable and certainly not in compliance with the Prudent Investor Act. Although the investment standards set forth in the Act do not contain a per se prohibition against any one type of investment or course of action, the Act does require each investment or course of action to be consistent with an overall investment strategy, exercising "reasonable care, skill, and caution." Respondent exercised no such care as the SNT trustee. Instead, his "investment strategy" consisted of using the SNT funds for his own purposes, without any regard to his ability to repay the loan and again making no effort to encourage his client to seek independent counsel.

Respondent's loan to himself is particularly troubling in the context of his financial difficulty. As noted earlier, respondent could not collect on his accounts receivable — a fact well known to him at the time he took the loan and ostensibly the very reason he needed the loan. That he provided for an arguably generous interest rate is virtually meaningless in this context.

Further, although he was aware of his obligation to do so, respondent did not pay the State when Peggy passed away. Moreover, respondent admittedly did not notify DMAHS or CCBSS of the loan, even though it exceeded $5,000. Rather, he unilaterally and disingenuously determined that the loan to himself constituted an investment and not an expenditure he was obligated to report. Elliot's testimony clearly

established otherwise. Although we determine that respondent violated these statutory provisions, we do not view those violations as necessary to establish that respondent knowingly misappropriated escrow funds.

The special master found that this transaction implicated only RPC 1.8(a). Although we agree that respondent's conduct in this loan transaction violated RPC 1.8(a), for the reasons set forth above, we also find that the evidence supports a finding that respondent knowingly misappropriated client and escrow funds in violation of RPC 1.15(a) and the principles of In re Wilson and In re Hollendoner. Further, for this loan transaction, respondent violated RPC 8.4(c), RPC 1.7(a)(2), and RPC 1.15(b).

Although the complaint also charged respondent with knowing misappropriation in the Owens matter for other transactions, the evidence falls short of "clear and convincing" for those matters. Specifically, the complaint charged that respondent took $193,790.73 in legal fees, when he was entitled to only $135,960.73. Through a series of checks, respondent disbursed $154,806.23 as his legal fees, based on a billing rate of $275 per hour. He also issued a $38,615.62 check to Emmett E. Primas, Jr., attributable to the Owens matter.

Respondent's distributions for his fees and costs totaled $235,825.93. According to the complaint, respondent was entitled to only $178,078.53: his one-third distribution of the $450,000

settlement after costs ($135,960.73) plus costs ($42,117.80). The discrepancy lies essentially in four main areas: (1) respondent charged fees to both Owens and Peggy and pro-rated their share of his actual billable hours, rather than charging a one-third contingent fee, claiming that his fee agreement allowed him to take the greater of the billable hours or the contingent fee;[14] (2) he distributed a Medicaid lien fee to himself in the amount of $34,651.78; (3) he did not attribute the $3,000 payment, which was noted as "Reimburse-Owens Lakewood" to this Owens matter; and (4) he never accounted for the $1,748.30 remaining after the distributions to Lakewood from the $5,500 transfer.

Although the OAE alleged that these discrepancies amounted to knowing misappropriation, the evidence does not support such a finding. Respondent based the calculation of his fee on his belief that his fee agreement permitted him to take the greater of the billable hours or a contingent fee. His belief was based on fee-shifting provisions applicable to nursing home negligence cases. Although this conduct seems to place the client at somewhat of a

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[14] We note that the payment to Primas came from distributions to which respondent believed he was entitled, not in addition to his fees.

disadvantage as to the fees incurred, the OAE did not establish that such a provision was prohibited. As a result, based on that good-faith belief, we cannot conclude that respondent's conduct in this respect amounted to knowing misappropriation.[15]

In further support of its position that respondent took an impermissible fee, the OAE relies on R. 1:21-7(i), which provides, "[w]hen representation is undertaken on behalf of several persons whose respective claims . . . arise out of the same transaction . . . the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries . . . and shall be charged to the clients in proportion to the recovery of each." This provision, however, addresses how a contingent fee must be calculated and not whether the "greater than" provision was permissible.

Another component of the knowing misappropriation charge related to respondent's taking of the "Medicaid fee." Respondent issued a check to himself in the amount of $34,651.78. Although the calculation is not

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[15] Although not addressed by either party, respondent's position appears consistent with N.J.S.A. 30:13-8 (Nursing Homes, Responsibilities and Rights of Residents), which states "[a]ny person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation . . . . Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney's fees and costs of the action." See also Rendine v. Pantzer, 141 N.J. 292 (1995) (suggesting that in a Law Against Discrimination case where the losing party must pay reasonable attorney's fees to the attorney for the prevailing party, a retainer agreement that included a "greater than" provision was permissible).

exact, respondent testified that it was based on one-third of the amount of the original Medicaid lien ($104,059.41) as detailed in the October 26, 2009 letter from DMAHS to respondent.

The $34,651.78 fee was in addition to the hourly fee respondent had charged and was not detailed in the fee agreement because, respondent maintained, the fee came from Medicaid. That notwithstanding, respondent admitted that any services he provided with regard to the lien were also included in the hours he billed the client. Thus, respondent's own statements support a conclusion that the additional (Medicaid) fee was improper. Consistent with the finding of the special master, there was no basis for this payment and the Medicaid lien should have been deducted from the aggregate settlement to avoid such "double-dipping." We find that respondent's failure to do so and his taking of the additional and overlapping Medicaid fee amounted to fee overreaching, in violation of RPC 1.5(a).

We cannot conclude, however, that respondent's "double-dipping" supports a finding of knowing misappropriation, as charged. Certainly, respondent was aware that he took the $34,651.78 in addition to his hourly fees. However, his testimony that he believed he was entitled to these fees because they derived from the resolution of the Medicaid lien, was credible. A showing of a reasonable good-faith belief of entitlement to funds will defeat a finding of knowing misappropriation, even if that belief turns out to be erroneous. See, e.g., In re Rogers,

126 N.J. 345 (1991), and In re Cotz, 183 N.J. 23 (2005). We find that respondent held a good-faith belief that he was entitled to take an additional fee on the Medicaid lien and, therefore, do not find clear and convincing evidence of knowing misappropriation in this respect. However, respondent's failure to disclose this additional fee to his client violated RPC 8.4(c), as also found by the special master.

Finally, respondent failed to attribute the $3,000 to his fee in this Owens matter and apparently believed that the fee applied to a separate matter. After reviewing respondent's records, Kulinich could not identify a companion case to which it would have applied. Further, respondent included this distribution on his own client ledger card for Owens. Thus, the record supports the conclusion that the $3,000 was collected as a fee in this Owens matter. Yet, no evidence was presented to support a finding that respondent over-disbursed these funds purposely.

Likewise, the $1,748.30 remaining after the distributions to Lakewood from the $5,500 transfer also may be viewed as merely an oversight. The OAE failed to establish whether these funds were still held intact in respondent's account or whether they had been disbursed. The presenter attributed these funds to respondent's fee because the balance remained "on the books," but the evidence is unclear as to whether respondent actually withdrew or disbursed these funds.

In sum, we find respondent guilty of multiple instances of unethical conduct. In the Thomas matter, he violated of RPC 1.5(a); RPC 1.5(b), and RPC 1.8(a). In the Owens matter, respondent is guilty of violations of RPC 1.5(a); RPC 1.5(e); RPC 1.7(a); RPC 1.8(a); RPC 1.15(b); RPC 8.4(c); and, most notably, RPC 1.15(a) and the principles set forth in In re Hollendonner, based on his knowing misappropriation of escrow funds, and In re Wilson, based on his knowing misappropriation of Peggy's funds. We, therefore, recommend that respondent be disbarred. Although we recommend respondent's disbarment on the basis of our finding that he is guilty of knowing misappropriation, we are deeply disturbed by his ongoing improper business transactions with clients – an offense for which he already has been disciplined. Thus, in our view, respondent has demonstrated an inability and/or an unwillingness to conform his conduct to expected standards, further fortifying our conclusion that he should be disbarred.

Member Clark did not participate.

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

Disciplinary Review Board
Bonnie C. Frost, Chair

By:
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

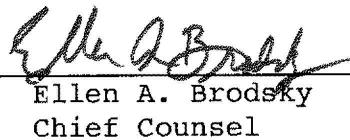
In the Matter of Roland G. Hardy, Jr.
Docket No. DRB 15-122

Argued: July 16, 2015

Decided: February 19, 2016

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost	X					
Baugh	X					
Clark						X
Gallipoli	X					
Hoberman	X					
Rivera	X					
Singer	X					
Zmirich	X					
Total:	7					1



Ellen A. Brodsky
Chief Counsel