SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-243
District Docket No. XIV-2013-0125E

IN THE MATTER OF

EUGENE CHMURA

AN ATTORNEY AT LAW

Decision

Argued: November 19, 2015

Decided: April 29, 2016

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

Respondent waived appearance.

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

This matter was before us on a motion for reciprocal discipline, filed by the Office of Attorney Ethics (OAE), following respondent's disbarment in New York for his misappropriation of $6,015, which he was holding as a fiduciary,

and for his fabrication of a bill to cover up his malfeasance. We determined to grant the motion for reciprocal discipline and recommend respondent's disbarment for the knowing misappropriation of $6,015 in escrow funds.

Respondent was admitted to the New York bar in 1991, to the New Jersey and Pennsylvania bars in 1994, and to the Connecticut bar in 1995. At the relevant times, he maintained an office for the practice of law in Astoria, New York.

Respondent has no history of discipline in New Jersey. However, he is currently ineligible to practice in New Jersey based both on his failure to pay his annual registration fee and on his non-compliance with his continuing legal education obligations.

In a two-count petition, dated December 3, 2010, the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts (Grievance Committee) charged respondent with converting funds entrusted to him as a fiduciary, a violation of New York DR 9-102(A) (misappropriation of funds)[1] and DR 1-102(A)(7) (conduct that adversely reflects on the lawyer's

[1] New York DR 9-102(A) is now New York RPC 1.15(a). Both rules provide that "[a] lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own."

fitness to practice law).[2] Respondent also was charged with fabricating a bill to cover up his conversion of the monies, a violation of DR 102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation)[3] and DR 102(A)(7).

Respondent denied the charges, and a two-day hearing took place before special referee David I. Ferber on August 22 and 23, 2011. On January 9, 2012, the special referee issued a report, finding respondent guilty of all charges. Although the special referee did not mention New York DR 9-102(A) in his report, as shown below, the context of his ruling makes it clear that he concluded that respondent had misappropriated the subject funds.

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[2] New York DR 1-102(A)(1)-(6), now New York RPC 8.4(a)-(g), prohibits attorneys from engaging in conduct that violates a DR, circumvents a DR, is illegal, dishonest, prejudicial to the administration of justice, or discriminatory. DR 1-102(A)(7), which is now New York RPC 8.4(h), is a catchall provision that prohibits attorneys from engaging in "any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

[3] New York DR 1-102(A)(4) is now New York RPC 8.4(c). Both rules are identical and prohibit attorneys from engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation."

On September 26, 2012, the Supreme Court of New York, Appellate Division, Second Department, confirmed the special referee's findings and disbarred respondent.[4]

According to the testimony, in October 2006, Allan Sirju, a citizen of Trinidad and Tobago, was detained in Arizona because he was in the United States illegally.[5] Barbara Szalanska, who came to the United States from Poland in 2002, testified that, at the time of Sirju's detention, they had been dating for more than three years.

At Sirju's request, Szalanska agreed to use her own funds to post the $10,000 bond required to secure his release from detention. Sirju promised to pay her back after he was released and had obtained employment.

Szalanska searched a Polish language newspaper for an attorney to represent Sirju. She selected respondent because he speaks Polish, and her English was "not so perfect."

On October 17, 2006, Szalanska called respondent's office and spoke to one of his assistants, AG. Szalanska testified that she had explained Sirju's situation to AG, making it clear that,

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[4] Although disbarment in New Jersey is permanent, an attorney disbarred in New York may seek reinstatement seven years after the effective date of disbarment. See 22 N.Y.C.R.R. 603.14.

[5] Sirju did not testify at the disciplinary hearing. Respondent did not know his client's whereabouts.

although she wanted to pay the $10,000 bond on his behalf, the funds were hers and she wanted the full $10,000 returned to her. Although AG's notes of that initial conversation with Szalanska mistakenly refer to Szalanska as the client, they clearly confirm Szalanska's claim. AG wrote: "Clt wants to pay the bail but wants to make sure that the bail will be refunded back to clt."

Although respondent disputed AG's identification of Szalanska as the client, he did not refute either the statement that Szalanska wanted to pay the bond or the statement that she wanted the funds returned to her.

Later that day, respondent called Szalanska, who testified that she had repeated to him what she had told his assistant about the $10,000. According to Szalanska, respondent promised her that, upon the conclusion of Sirju's court action, she would get "all" of her money back.

Respondent's notes of the conversation do not mention the return of Szalanska's money. Moreover, respondent testified that, during his initial conversation with Szalanska, she claimed that she was not concerned about the return of the bond money because "it's [Sirju]'s case and [Sirju]'s money."

Szalanska testified that, during that same telephone conversation, respondent told her that his fee would be $3,000.

According to respondent, Sirju called him later that day, and they agreed to the payment of that amount. Sirju also informed respondent that Szalanska would be "taking care of all the payments," and he authorized Szalanska to sign all documents on his behalf.

On October 19, 2006, Szalanska met with respondent and signed a retainer agreement on Sirju's behalf. The agreement called for the payment of a $3,000 flat fee "for motion to transfer immigration case to NY and to reduce the bond, $ open for further proceedings." Thus, respondent claimed, he earned the full $3,000 fee as soon as the case was transferred and Sirju was released, which, as shown below, took place on October 30, 2006.[6]

The retainer agreement also contained the following provision:

> **NOTE: IF YOUR FIXED FEE MATTER TERMINATES BEFORE COMPLETION OR IF PROBLEMS DEVELOP BEYOND THE USUAL UNCOMPLICATED UNCONTESTED MATTER OF THIS TYPE, THE FIXED FEE LIMIT WILL NOT APPLY BUT YOU WILL PAY [sic] REASONABLE FEE BASED IN PROPORTION TO THE AMOUNT OF WORK PERFORMED.** (For example, if

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[6] It is not clear from the record what, if anything, respondent did to have the immigration case transferred. Respondent's testimony and the Sirju file notes suggest that Sirju's case was moved from Arizona to New York before respondent had filed an appearance on Sirju's behalf.

> uncontested matter becomes contested, if you change your mind requiring additional work, if you will withdraw the case after attorney has already done some work, if the contract or transaction is not finalized for [sic] no fault of your attorney).
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> [Ex.P5.]

Although the agreement stated that the entire fee was to be paid up front, respondent agreed to take $2,000 in advance, with the $1,000 balance to be paid upon Sirju's release from detention. Even then, when Szalanska met with respondent, on

October 19, 2006, she paid him only $1,500 toward the fee, using funds advanced by another friend of Sirju.

Respondent gave Szalanska a receipt for each payment. Both receipts state that the monies were "received from Barbara Szalanska (Allan Sirju)." The $1,500 receipt states that it was for "attorney fee" and the $10,000 receipt states that it was for "immigration bond." Szalanska reiterated that, at this meeting, respondent made it clear that, if Sirju appeared in court, the bond money would be returned to her.

Neither Szalanska nor respondent could post the bond because she was not a United States citizen and he is a lawyer. Thus, respondent gave the funds to his mother, who, on October 24, 2006, after two or three trips to the immigration office with respondent, posted bond for Sirju, who was released on that date.

According to respondent's file notes, venue for Sirju's immigration case was transferred from Arizona to New York on October 30, 2006. Sirju's hearing was scheduled for November 21, 2006. Because that date conflicted with a pre-existing commitment of respondent, he asked Sirju to go alone to the hearing and "ask for the longest possible adjournment."

The hearing was first rescheduled to January 2, 2007, but, due to a national day of mourning for former President Gerald R. Ford, who had recently died, the date was moved to March 6, 2007. Szalanska testified that, on a number of occasions, between December 29, 2006 and March 6, 2007, she expressed concern to respondent about losing her money if Sirju did not appear in court. Respondent's file notes support her testimony. For example, a note on January 1, 2007 states that "she said that she paid from her own moneys the $10,000.000 immigration bond !!!!!!!!!!!!"

Respondent acknowledged that he wrote the above comment. He explained that he uses exclamation points in his notes when "there is some trouble" with the person to whom he is speaking. Later, however, he claimed that he also used exclamation points when he wanted "to impress [his] memory with something that's important."

Respondent insisted that the money belonged to Sirju, despite the absence of anything in writing from Sirju to that effect, because Szalanska's claim that the money belonged to her was "all of a sudden" and "outlandish." Even though respondent did not consider Szalanska his client, he communicated with her about the status of the refund because she was the person who kept Sirju informed about the status of the matter.

Later, respondent testified that Sirju had borrowed the $10,000 from Szalanska, which she then turned over to respondent. He claimed that, after Sirju had received the borrowed funds from Szalanska, they belonged to him. Thus, it was up to Szalanska and Sirju to sort out whose money it was. Their agreement was not respondent's concern.

On February 27, 2007, Szalanska accompanied Sirju to respondent's office where he paid respondent $200 toward the fee. According to the file notes, Sirju was instructed to attend the March 6, 2007 hearing alone and "apply for long adjournment [sic] !!!!!!!!!!!"

Respondent testified that, at that meeting, he told Sirju, in Szalanska's presence, that "we can get the final payment from the immigration bond," explaining that the funds would be placed in escrow and that he would charge Sirju "from that money."

According to respondent, Sirju agreed, and Szalanska raised no objection. He continued:

> She never said anything indicating, don't touch my money or this is my money or don't even. Because if she said that, then I would probably have finished my representation right there. I mean, after so many assurances by Mr. Sirju, why would I all of a sudden tell him, okay, I will actually keep representing you for free? I mean, not only for free, he owed me $1,300 for the work I have already done. And he was asking me to continue representing him for future work for which he did not pay me even one penny. But after his assurance that immigration bond of $10,000, that I would be paid from that money, I agreed to continue representing him.
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> [Ex.Dp.961.6 to Ex.D.p.961.17.][7]

Szalanska disagreed with respondent's version of what had transpired at the February 2007 meeting. She testified that, at this meeting, Sirju made no claim that the bond money was his, and there was no discussion about the use of the bond money to pay legal fees.

On March 3, 2007, Sirju was arrested and detained in the Sullivan County, New York jail. When Szalanska informed respondent, he stated that he could not represent Sirju in the

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[7] "Ex.D" refers to the transcript of the August 22, 2011 hearing.

criminal matter. Although bail was set at $10,000, Sirju was unable to post bond.

On the date of the immigration hearing, March 6, 2007, respondent called the immigration court and reported that Sirju would not be able to attend because he was in jail. According to the file notes, respondent requested that Sirju be excused "so that the immigration bond is not cancelled."

Also, according to the file notes, on April 25, 2007, respondent received a notice from the immigration court, dated April 19, 2007, ordering Sirju's removal from the United States of America for his failure to appear in court, presumably on March 6, 2007. On May 7, 2007, respondent reviewed an April 30, 2007 letter from the U. S. Immigration and Customs Enforcement (ICE) to his mother, stating that she "must deliver clt to [ICE] office on 5/30/2007, 9:00am or clt will forfeit the bond." Thereafter, respondent wrote in his notes that "[mother] does not have to appear on that date b/c clt will either appear or not (in which case clt will forfeit the bond)."

Szalanska testified that, in May 2007, respondent informed her that the $10,000 bail money had been "lost" because Sirju did not appear for the March 6, 2007 court date. Respondent's file notes reflect the following conversation between him and Szalanska on May 28, 2007:

> EC tel w/ SZALANSKA Barbara – clt's friend; EC informed clt re current case status; EC told her that the immigration bond will be lost b/c clt will not be able to appear at the [ICE] office as required.
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> [Ex.P12.][8]

At some point in 2008, Sirju told Szalanska that he was going to England, and stated that he would do "everything possible" to secure the return of her $10,000 from respondent. According to Sirju, the bond money had not been lost but, rather, respondent had not applied for its return.

A March 19, 2008 file note states that Sirju, who had remained in immigration detention, called respondent and reported that his immigration counselor had informed him that he needed to obtain a letter from the county confirming that Sirju had had a court appearance on March 6, 2007[9] and, therefore, he could not have appeared at the immigration court hearing on that date. The note continued: "clt will try to exonerate the immigration bond & to obtain the bond refund at the next court appearance; !!! AS OF NOW, EC DOES NOT HAVE TO DO ANYTHING ELSE !!!"

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[8] "Ex.P12" is a copy of file notes of conversations between Szalanska and respondent and Szalanska and members of his office staff.

[9] Sirju did not have a county court appearance on March 6, 2007. Rather, he was in jail following his arrest three days earlier.

On March 27, 2008, Sirju and respondent had two telephone conversations. In the first, Sirju reported that Szalanska had claimed that respondent "took the immigration bond money" and told her that the bond had been forfeited due to Sirju's failure to appear at the immigration hearing. In the second, Sirju reported that his immigration counselor told him that the bond was not forfeited and that respondent had to complete "form I-300 or I-305" to obtain a refund. According to the file notes, "clt will be removed from the US soon."[10] The notes also reflect respondent's opinion that Sirju was incorrect in the claim that the bond could be refunded at that point, surmising that Sirju had "probably misinform[ed] SZALANSKA . . . to avoid responsibility & to blame EC for everything."

Szalanska testified that, at some point, she also called respondent and told him that the money was not lost. Although respondent promised to apply for its return, she never heard from him. However, respondent's file notes reflect that, between June 13 and August 25, 2008, he was taking steps to seek the return of the $10,000.

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[10] Szalanska testified that Sirju was deported to Trinidad in the spring of 2008. Respondent claimed that Sirju did not inform him of the deportation.

In August 2008, Szalanska sought assistance from a lawyer at the Polish Slavic Union Federation. The attorney called respondent, who acknowledged, at the disciplinary hearing, that the attorney had asked him to refund Szalanska's money. According to respondent, however, the lawyer's tone was "kind of colleague to colleague friendly, listen, why don't you give her the money and he meant to avoid any trouble."

According to Szalanska, respondent told the lawyer that he would get the money to her. Szalanska followed up directly with respondent, who told her that he had applied for the refund, that the check would take three days to clear the account, and that, at that time, she could pick up the funds.

Respondent's file notes indicated that, on August 25, 2008, Szalanska called him to inquire about the refund. He called ICE and learned that the refund had been approved on August 21 and that a check was mailed to him on the following day. Respondent then called Szalanska and informed her of "case status." She stated that she would "wait until EC receives the check."

The next day, August 26, 2008, respondent received a $10,487.39 check from the United States Department of the Treasury, representing the $10,000 bond plus interest, which he then deposited into his trust account. Despite respondent's receipt of an order, in April 2007, requiring Sirju's removal

from the United States, as well as the notation in his March 27, 2008 file notes indicating that Sirju had informed respondent that he would be removed from the United States "soon," respondent claimed that he intended to hold the monies until Sirju was released from prison. At that time, he maintained, he and his client would resolve the issue of unpaid attorney fees and respondent would refund the balance of the bond monies. According to the file notes, after the check cleared, respondent would disburse the funds.

Respondent's August 29, 2008 file notes indicate that he informed Szalanska, on that date, that he had deposited the check in his attorney escrow account and that he would "discuss the issues with her next week," after the check had cleared. On September 3, 2008, respondent wrote that he had informed Szalanska that he "must resolve all issues" with Sirju, whose current address was apparently unknown to him. Further, according to his notes, Szalanska did not know Sirju's address but had his telephone number and agreed to give respondent Sirju's "contact info."

Szalanska's version of the telephone call was different. She described their conversation as follows:

> So he say to me he don't have nothing to do with me. You not my client. I even don't supposed to talk to you. You are just

> was person who bring the money to the office.
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> . . . .
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> So I say, you promise me. I'm ask you many times, when his case over I'm going to get my money, and now you stole my money. I work so hard for that money.
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> . . . .
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> So, [respondent] was very nasty. I just say, I cannot talk to you anymore. I'm going to do what I supposed to do with this case and I hung up on him.
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> [Ex.Dp.271.14-1.24.]

Szalanska never heard from respondent again and has not seen "a dime" of her money.

Respondent denied yelling at and hanging up on Szalanska. He said that they had two or three conversations after the August 29, 2008 call. The last time they spoke was on September 3, 2008, at which point he did tell her that she was not his client.

On November 8, 2008, respondent issued an attorney escrow account check, in the amount of $6,015, from the returned bond funds, to his attorney business account. The check, which was issued against the wrong account, was returned for insufficient funds. Accordingly, on November 20, 2008, respondent issued a replacement escrow account check. He retained the $4,472.39 balance in the escrow account.

At the hearing, respondent summarized the work that he had performed for Sirju, following Sirju's release from detention. That work consisted of telephone calls and meetings with Sirju, document review, and letters pertaining to the immigration proceeding and the second criminal matter (for which Sirju had retained separate counsel).

Respondent claimed that the $6,015 represented the fees owed by Sirju in the immigration matter and the criminal matter. Although respondent claimed to have taken the $6,015 on the authority of Sirju, he did not have a writing from Sirju confirming the authorization.

The record contains two versions of the bill that respondent claimed he sent to Sirju. The first, dated July 16, 2009, was not produced by respondent until the second day of the disciplinary hearing, on August 23, 2011. The second version, dated April 12, 2010, was printed out by respondent on the morning of his Grievance Committee interview.

Respondent explained that the bill he presented to the Grievance Committee was dated April 12, 2010, rather than a date in 2009, when he claimed to have sent it to Sirju, because the computer program that he used automatically dates the bill on the day it is printed, rather than the date on which it was prepared, and he had printed the bill just prior to the April

12, 2010 interview. Indeed, respondent produced a copy of the same bill, bearing the date of July 16, 2009, which, he claimed, was the date on which he printed it out and sent it to Sirju. Yet, the presenter noted, he did not produce that bill at the interview, and there was no proof of mailing or even a cover letter.

Respondent testified that he sent the 2009 bill to a Brooklyn address even though he "wasn't sure" where Sirju was living at the time, although he believed that Sirju was in jail. Nevertheless, it was Sirju's last known address.

In addition to the different dates, the bills were different in one other respect. The July 2009 bill included a $500 charge on October 24, 2006, described as the fee "charged by Maria CHMURA - the Bond Obligor for the time, costs & risk" of going to the immigration office and posting Sirju's bond. On the April 2010 bill, the same fee appeared on the same date, but the description read "additional attorney fees for reviewing the immigration bond documents and refund paperwork."

Respondent acknowledged that the $500 fee, charged on the July 2009 bill, for respondent's mother's time, was "absolutely a hundred percent unprofessional, unethical and illegal." He blamed that entry on AG and stated that it was "a ridiculous mistake on his part" not to have noticed and corrected it. He

asserted that the $500 charge should have been for his time instead.

The questioning then turned to the entry above the $500 charge, which was for the same date and represented time charged for respondent's trip to the immigration bond office with his mother. Respondent blamed this mistake on AG as well. When asked why he charged twice, the $800 and the $500 mistakenly attributed to his mother, respondent's answer suggested that the $800 charge was correct but that he actually had not earned the $500 charged below, which he described as a mistake for which he took "full responsibility."

Respondent testified that, despite the retainer agreement's provision that the $3,000 fixed fee included reducing the bond, he billed an additional $1,500 to reduce the bond because "the agreement assumes that I don't go to immigration to handle the bond." Rather, the client was supposed to take care of posting the bond.

Respondent then justified the charges by stating that they fell within the bold-faced clause that provided for additional fees if the matter became "complicated." Here, respondent stated that the matter had become complicated, though "not . . . legally," because he "had to spend a whole day [sic] immigration, three times."

The first entry in respondent's March 4, 2007 file notes for the second criminal matter states that respondent never represented Sirju in that matter. Yet, respondent billed Sirju $900 for numerous telephone conferences and the preparation and review of documents for that matter. He explained that, even though he never filed an entry of appearance on Sirju's behalf, he still spent time on the case, answering Sirju's questions about it. Indeed, he actually spent in excess of $900 worth of time on the criminal matter, but he did not charge more than that amount because "[t]he poor man was not only under deportation but also in jail for a criminal serious exposure case."

According to respondent, the remaining $4,000 was still in his escrow account, "waiting for Mr. Sirju."

Respondent did not speak with Sirju after he was deported, in the spring of 2008. Respondent did, however, send Sirju a bill in 2009 to "his address," which was listed on an August 2007 letter from Sirju, informing respondent that he would be deported within ninety days of his release from prison, which he estimated to be in February or March 2008. Thus, respondent sent the bill to the address that Sirju had stated was his and his brother's. Moreover, in his last conversation with Szalanska,

she promised that she would provide Sirju's contact information to respondent, but never did so.

The special referee found that the credible evidence established that the $10,000 that Szalanska had given to respondent was her money. Moreover, the special referee noted, respondent agreed that Szalanska had informed him that the funds were hers, both before and after she had delivered them to him. Further, respondent also had assured Szalanska, on numerous occasions that the funds would be returned to her when Sirju appeared for his immigration hearing. Finally, the special referee pointed out that respondent had offered conflicting accounts "relating to the bond monies," rendering his testimony "simply not credible."

The special referee concluded that, when the bond money was refunded to respondent, he should have held the funds in trust for Szalanska's benefit. "By unilaterally taking a portion of those funds into his business account, and by failing to refund even the balance" to Szalanska, respondent violated New York DR 1-102(a)(4) (now RPC 8.4(c)) and New York DR 1-102(a)(7) (now RPC 8.4(h)). The special referee's report was silent on the New York DR 9-102(A) (misappropriation of funds) charge.

The special referee also found that, according to the retainer agreement, respondent was entitled only to $3,000 for

the representation of Sirju, against which he had been paid $1,700. By taking $6,015 of the bond refund monies, respondent had actually received $7,715 for the representation.

The special referee observed that it was not until respondent appeared for his April 12, 2010 examination under oath that he produced an invoice, of the same date, for the $7,715 in legal fees. Further, the additional legal fees, which were based on the "activities" of respondent or his mother were "inconsistent with the original retainer agreement." Thus, it "appear[ed]" to the special referee that "these items were a poorly fabricated basis for Respondent's breach of his professional responsibility in this matter."

Based on the above facts, the special referee concluded that respondent violated New York DR 1-102(a)(4)[11] (now RPC 8.4(c)), and New York DR 1-102(a)(7) (now RPC 8.4(h)).

As stated previously, the Supreme Court of New York, Appellate Division, Second Department, confirmed the special referee's findings and disbarred respondent. Although it, too, failed to mention New York DR 9-102(A) (misappropriation of

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[11] The special referee actually cited New York DR 1-104(a)(4), which does not exist and was not charged. Further, New York DR 1-104 applies, generally, to the responsibilities of law firms, partners, supervisory lawyers, and subordinate lawyers to comply with the disciplinary rules.

funds) charge, the decision clearly demonstrates that the Appellate Division found that respondent had knowingly misappropriated funds belonging to Szalanska. The court wrote:

> We agree with the findings of the Special Referee, who after hearing the testimony of the respondent and Szalanska, was "convinced" that the bond money belonged to Szalanska and that the respondent was well aware of that fact. We agree as well with the Special Referee's finding that the April 12, 2010 bill was a fabrication.
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> The respondent offered no evidence in mitigation.
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> The respondent has a significant disciplinary history of three admonitions and two letters of caution.
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> . . . .
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> The respondent shows no remorse and remains defiant in his claim that he is "entitled" to deduct his fees from the bond money. The evidence shows that the respondent took advantage of a fellow Polish immigrant. His offer to return the balance of the bail money, but only to Sirju, who is no longer in the country, underscores the bold nature of his theft. His testimony was riddled with inconsistencies and contradictions. Not only did the respondent wrongfully deduct his fees from the bail money, but he padded his bill with improper charges, a bill which was fabricated to justify his conduct. Of note, the respondent was previously admonished in 2005 for similar conduct.
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> Under the totality of the circumstances, the respondent is disbarred for his professional misconduct.

[In re Chmura, 951 N.Y.S.2d 553, 555 (N.Y. App. Div. 2012).]

On March 20, 2013, respondent was disbarred in Pennsylvania based on the disbarment in New York. The record does not reflect what, if any, discipline was imposed by the State of Connecticut.

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

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

None of the exceptions in this rule warrant a deviation from the discipline imposed on respondent by New York. Accordingly, respondent should be disbarred in New Jersey.

"[A] final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." R. 1:20-14(a)(5). Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

In addition to the special referee's findings, which were confirmed by the Appellate Division, the clear and convincing evidence, set forth in the record, establishes that respondent knowingly misappropriated funds belonging to Szalanska. For this, he must be disbarred in New Jersey.

In In re Wilson, 81 N.J. 451, 455 n.1 (1979), the Court described knowing misappropriation as follows:

> Unless the context indicates otherwise, "misappropriation" as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is "almost invariable," *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant; it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. . . . While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since *Wilson*, it has been invariable.
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> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, there must be clear and convincing evidence that the attorney took client funds, knowing that the client had not authorized him or her to do so, and used them. This same principle also applies to other funds an attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985). Such was the nature of the funds respondent held in this case.

Despite the conflicting testimony of Szalanska and respondent, the special referee found him to be without credibility. Thus, his claim that the $10,000 belonged to Sirju was rejected.

Although respondent claimed that the funds belonged to Sirju, the evidence overwhelmingly demonstrates the contrary. The very first entry in respondent's file notes, dated October 17, 2006, states clearly that Szalanska was going to use her own monies to post the bond and that she wanted to be sure that the monies would be returned to her. Respondent did not dispute the content of this entry, other than to say that Szalanska had been incorrectly identified as the client.

Moreover, on January 1, 2007, just over two months after Szalanska had asserted her claim to the monies, respondent's own notes reflected a further claim on her part that the bond monies belonged to her. Although respondent claimed that Szalanska's assertion was "all of a sudden," that is clearly not the case, as she had first stated her claim in October, a fact that respondent did not then dispute.

In addition, although respondent claimed that Sirju had instructed him to apply the $10,000 to the outstanding attorney fees, he had nothing in writing, either directly from Sirju or in his file notes to support that claim. The receipt that

respondent gave to Szalanska stated nothing other than that the funds were for "immigration bond." Respondent had nothing in writing from Sirju confirming that the monies belonged to him. For that matter, he had nothing in his own file notes to that effect. There was certainly nothing suggesting that Szalanska had given him permission to keep her funds.

If the intended use of Szalanska's funds had changed at any point along the way, respondent was duty bound to reduce that change to writing. Cf., In re Banas, 144 N.J. 75 (1996). In Banas, the client's mother gave $5,000 to the attorney for the purpose of seeking bail for her son. Id. at 76-77. The attorney gave her a receipt that stated, in part, "to be held for bail application" and to be returned to the mother "if bail not obtained." Id. at 77. The mother's understanding and intent was that her money would be refunded if her son were not released on bail.

Although bail was set, the client could not fund the full amount due and, therefore, remained incarcerated. Ibid. At the client's specific instruction, the attorney applied the $5,000 to his outstanding attorney fees. Ibid. When the attorney refused to refund the $5,000 to the client's mother, she filed a grievance.

The Court rejected the attorney's assertion that he was entitled to the funds on the ground that the application for bail had been granted. Id. at 79. The Court upheld our finding that the attorney had agreed to return the $5,000 to his client's mother if the client were not released from prison. Id. at 80. The Court also agreed with our determination that, "[i]f respondent's understanding of the agreement was different [from the mother's], he had an obligation to word the receipt carefully and clearly so as to eliminate any possible misunderstanding" on her part. Id. at 79.

Here, there is no wording on the initial receipt indicating that the funds could be used for the payment of anything other than bail. There was no amendment to that receipt, or any memorialization of a change in that purpose.

Finally, there was no indication in respondent's own file notes suggesting that respondent had taken issue with Szalanska's claim to the funds. Indeed, when respondent received a call from the Polish Slavic Union Federation attorney, asking him to refund the money to Szalanska, he never told the attorney that the money did not belong to her.

In short, nothing in the record, other than respondent's self-contradictory and self-serving testimony, suggests that the bond monies belonged to Sirju. To the contrary, the record,

including respondent's file notes, supports Szalanska's claim that the funds belonged to her. Thus, respondent knowingly misappropriated the $6,015 that he applied to Sirju's bill without Szalanska's authority.

Although our review of the record did not lead us to conclude that respondent had fabricated the bill to conceal the knowing misappropriation, we find that he altered the bill to mask an inappropriate charge. First, although the bill that respondent produced to the Grievance Committee reflected the date of his interview, April 12, 2010, which was years after the representation of Sirju had concluded, he did produce a bill, dated July 16, 2009, at the hearing. Second, although there was a suggestion that respondent had fabricated the 2009 bill, there is another difference between the bills that renders the 2010 bill suspicious.

The first bill clearly charges Sirju for respondent's mother's time in going to immigration. Respondent conceded that was an inappropriate charge. The second bill, that is, the bill that respondent produced in 2010 to the Grievance Committee changed the charge for respondent's mother's time to reflect the same charge for respondent's time instead. In our view, this supports respondent's assertion that he sent the bill dated July 2009 to Sirju in 2009 but, when he was asked for a copy of it by

the Grievance Committee, he altered that particular entry to render it more appropriate. Even then, the altered bill still reflected the inappropriate charges because, in the previous entry, respondent had already charged for his time in going to the immigration office. The discrepancies in the two bills matter not in the final analysis because the record clearly establishes that respondent knowingly misappropriated escrow funds belonging to Szalanska.

Having so concluded, we determined that respondent must be disbarred. Wilson, supra, 81 N.J. at 455 n.1, 461; Hollendonner, supra, 102 N.J. at 26-27. Accordingly, we need not consider the appropriate quantum of discipline for respondent's other acts of misconduct.

Member Zmirich 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
Ellen A. Brodsky
Chief Counsel