SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-327
District Docket No. XIV-2010-0059E

IN THE MATTER OF

ROBERT A. FRANCO

AN ATTORNEY AT LAW

Decision

Argued: January 28, 2016

Decided: July 11, 2016

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Robyn M. Hill appeared on behalf of respondent.

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

This matter was before us on a recommendation for a one-year suspension, filed by a special master. The two-count ethics complaint charged respondent with knowing misappropriation of escrow funds (RPC 1.15(a) and the principles of In re Hollendonner, 102 N.J. 21 (1985)), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (count one); and RPC 1.15(b) (failure to promptly notify clients or third persons of receipt

of funds in which they have an interest and to promptly disburse those funds), RPC 1.15(c) (failure to segregate disputed funds), and RPC 8.4(c) (count two).

The OAE agrees with the findings and determinations of the special master, and urges us to impose, at a minimum, a one-year suspension. Respondent contends that he is guilty of no misconduct and, thus, no discipline should be imposed. For the reasons set forth below, we determine to impose a one-year suspension.

Respondent was admitted to the New Jersey bar in 1989. At the relevant times, he and his wife maintained an office for the practice of law, known as Franco & Franco, in Morristown.

On January 4, 2013, respondent was suspended for three months for having violated RPC 1.5(d) (commingling of funds and charging a non-refundable retainer), RPC 1.7(a) (conflict of interest), RPC 1.8(a) (impermissible business transaction with a client), and RPC 1.15(d) and R. 1:21-6 (recordkeeping violations). On February 28, 2013, he was temporarily suspended from the practice of law for failing to comply with a stipulation of settlement in a fee arbitration matter. In re Franco, 213 N.J. 58 (2013). He remains suspended to date.

On January 4, 2016, respondent filed a motion to supplement the record before us. We will address that motion below.

We turn now to the facts of this case. HMI Management Holdings, Inc. (HMI), borrowed $350,000 from KWK-KASH, LLC (KWK-KASH), a company in the business of making short-term loans. The record contains differing accounts about the nature of the loan. By way of brief overview, according to KWK-KASH, respondent was required to hold the funds in escrow, as evidence of HMI's financial ability, in order for HMI to obtain a $1.2 million dollar loan from a second lender, Doina Capital. The second loan was to take place within forty-eight hours of KWK-KASH's loan. HMI, however, had previously borrowed a total of $175,000 from Doina Capital, with a payoff sum of $350,000. HMI used the $350,000 borrowed from KWK-KASH to repay its prior Doina Capital loans.

In 2009, respondent represented HMI and its principals, Rory Holloway and Wade Thomas. In November 2009, HMI (through a subsidiary) entered into a loan transaction, as borrower, with KWK-KASH, a private lender in Chattanooga, Tennessee. Darrell Knoch, the grievant and former Chief Executive Officer of KWK-KASH, asserted that KWK-KASH's business model was making short-term (twenty-four to forty-eight hour) loans to investors purchasing distressed residential real estate. Knoch explained that, for example, an investor would contract to buy a house, at a foreclosure sale, for $150,000. KWK-KASH would provide the investor with a $150,000 loan to purchase the house. The investor

would immediately market the house to other investors, with the intention of promptly selling the house at a premium, such as for $160,000. Ordinarily, within a twenty-four to forty-eight hour window, the investor would close the second sale, and the original $150,000 in principal, plus a portion of the premium, would be paid to KWK-KASH. Knoch stated that the loan to HMI was outside of the norm for KWK-KASH, given both the size ($350,000) and nature of the loan. Knoch maintained, however, that, prior to the HMI loan, KWK-KASH had completed approximately 200 loan transactions, none of which had failed.

HMI and KWK-KASH were introduced to each other in October 2009, when KWK-KASH was contacted by Brett Adair, a lending broker with whom KWK-KASH had never done business, about providing bridge financing to an HMI subsidiary, HMI RIMIC, LLC, for a commercial real estate purchase in Texas.[1] HMI's accountant, Charles Martin, provided KWK-KASH with documents relating to the Texas transaction, including the purchase and sale contract dated August 17, 2009, and an amendment to the contract, dated October 15, 2009. Pursuant to the Texas contract, as amended, HMI would purchase the property for $27.8 million, and closing would occur

[1] A bridge loan is a type of short-term loan, typically taken out pending the arrangement of larger or longer-term financing. Normally, this type of financing is secured to allow the borrower to meet current obligations by providing immediate cash flow.

by November 30, 2009. The contract expressly identified Rory Holloway, CEO, and Wade Thomas, President, as HMI's principals and points of contact for the transaction, and respondent as counsel for HMI. Neither Holloway nor Thomas were called as witnesses at the hearing.[2]

Cammie Bain, KWK-KASH's Chief Financial Officer and bookkeeper, testified that Knoch, who was her boss, had approved the loan to HMI. Bain and Knoch believed that the purpose of the $350,000 loan was for HMI to show cash on hand in order to qualify for a $1.2 million loan from a second lender, Doina Capital. That loan was anticipated to close about November 5, 2009. Bain and Knoch also operated under the belief that a portion of the proceeds from the second loan would be used to promptly pay off the KWK-KASH loan, and the remaining proceeds would be used toward the purchase of the Texas property. Bain testified that, per the escrow agreement, "under the law . . . [the $350,000] was supposed to stay there [in respondent's trust account]" until the larger loan closed.

On November 4, 2009, in connection with the $350,000 KWK-KASH loan, Bain e-mailed to respondent a proposed escrow agreement,

[2] Wade Thomas apparently suffered a massive stroke after 2009, which greatly affected his memory and left him severely disabled. Efforts were made, including by the special master, to have Holloway testify at the ethics hearing, but he was not responsive.

dated November 5, 2009, by and between Bain, HMI, and respondent (on behalf of Franco & Franco). According to Bain, she had not drafted the escrow agreement, and normally did not deal with any of the loan documents in KWK-KASH transactions. Bain's November 4, 2009 e-mail requested that respondent send her a copy of his "E&O/Professional Liab[ility] Insurance Certificate," a requirement Bain was accustomed to imposing on title companies in KWK-KASH's customary transactions. In a reply e-mail, respondent told Bain that he was not her attorney, and that her request for an insurance certificate was "contrary to the purpose of the nature of malpractice insurance."[3] In turn, respondent requested "proof of funds" from Bain for the anticipated $350,000 loan, which Bain produced later that same day. Finally, respondent represented to Bain that "I am going to receive those [$1.2 million] funds tomorrow. We planned for a simultaneous closing [for the KWK-KASH and Doina Capital loans]."

The proposed escrow agreement was prepared by or on behalf of KWK-KASH, and subsequently was modified by Charles Martin, HMI's accountant, and Brett Adair, the lending broker. For reasons

[3] During respondent's September 21, 2011 deposition related to a lawsuit filed by KWK-KASH, he admitted that, at the time he sent this e-mail response to Bain, he actually had no malpractice insurance, and claimed that he informed Bain of that fact in a subsequent e-mail that is not part of the record.

unknown, the draft escrow agreement was crafted for Bain's signature, without reference to her capacity as an authorized signatory or corporate officer for either KWK-KASH or 877-KWK-KASH (the subsidiary making the loan).

Bain testified that, from her perspective, as an employee of KWK-KASH, she had signed the escrow agreement on behalf of KWK-KASH. She said the escrow agreement "should have said KWK-KASH to begin with. Why it didn't, I couldn't tell you." The documents in the record support that 877-KWK-KASH, not Bain, was the lender. Specifically, in reply to respondent's request for proof that KWK-KASH was financially able to fund the loan, Bain had e-mailed to respondent a letter from a manager at KWK-KASH's bank that stated "[t]here has been a deposit of $625,000.00 made into 877-KWK-KASH and the money is available as of 11/4/2009." Additionally, as detailed below, two subsequent escrow agreements corrected this oversight, naming 877-KWK-KASH as the lender, with Knoch signing as a corporate officer. When cross-examined by respondent regarding the language of the escrow agreement, Bain stated "[i]n my opinion, [the first escrow agreement] was signed by me on behalf [sic] as an employee of KWK-KASH. The funds were from KWK-KASH. I personally had nothing to do with it."

Knoch testified that the reason the escrow agreement was incorrect may have been that, around the same time the document

was drafted, Bain was distracted because her child was undergoing serious health issues and she was "distraught." Bain corroborated Knoch's recollection, explaining that, in November of 2009, she was dealing with a "personal crisis" involving her son.

The first escrow agreement that Bain circulated was apparently acceptable to both respondent and HMI and, on November 5, 2009, was executed by Bain on behalf of KWK-KASH, by Rory Holloway on behalf of HMI, and by respondent as escrow agent. Bain and Knoch testified that, ordinarily, Knoch would have negotiated and signed the escrow agreement on behalf of KWK-KASH, but he was traveling at the time and was not accessible. Thus, Knoch was not directly involved in crafting the first escrow agreement or funding the loan. Knoch testified that Bain, as CFO, was authorized to enter into the agreement on behalf of KWK-KASH, but again noted that it was an error that Bain signed the document in her personal capacity, because KWK-KASH, not Bain, was the lender. He, thus, maintained that Bain had signed in a corporate capacity.

The escrow agreement stated that the $350,000 loan proceeds were to be deposited into respondent's attorney trust account "for the use by HMI for any 'upfront fees' required . . . in order to obtain a larger loan in the amount of [$1.2 million] to be used for the related expenses associated with certain real property located in Colleyville, Texas . . . ." The escrow agreement further

provided that "[o]nce the larger loan is closed . . . the principal sum of [$350,000] plus an additional fee in the amount of [$28,000] will be returned to the below listed account of Cammie Bain." The "below listed account" was not Bain's personal account, but was a bank account identified as belonging to 877-KWK-KASH. The escrow agreement required that the $378,000 be paid back to KWK-KASH "not later than 48 hours from the date of the [$350,000] deposit." Respondent testified that HMI was willing to enter into such a short-term loan because "the expectation was a back-to-back closing," first the $350,000 KWK-KASH loan, then promptly thereafter, the $1.2 million loan from Doina Capital.

The escrow agreement further required that the $350,000, plus the additional fee, be returned to KWK-KASH's account "not later than 48 hours from the date of the deposit by the Escrow Agent unless otherwise instructed to return these sums anytime within the two day period." Because November 5, 2009 was a Thursday, the funds were to be returned to KWK-KASH no later than Monday, November 9, 2009.

Although the term "upfront fees" was placed in quotation marks in the escrow agreement, it was not defined within the document. Knoch, Bain, and respondent presented conflicting testimony as to their understanding of the meaning of this term. Knoch testified that he never saw the first escrow agreement

"until after the fact, unfortunately," but believed the essence of the deal was that KWK-KASH would loan the money to HMI, and that those funds would remain in respondent's trust account to secure the $1.2 million loan. Bain testified that the "upfront fees" referred to the concept that "the $350,000 was always supposed to be in the escrow account we sent it to . . . the 350 was never supposed to move or be moved for anything out of the escrow account. It was always supposed to be there just for proof of funds."

In turn, respondent maintained that the "upfront fees" language meant that the $350,000 could be used for "any purpose" necessary for HMI to secure the larger loan from Doina Capital. The record contains no evidence that the specific meaning of this term was ever discussed between respondent and KWK-KASH.

On November 5, 2009, having received the fully-executed escrow agreement and the required proof of funds from Doina Capital, as detailed below, Bain wired $350,000 from KWK-KASH's account into respondent's attorney trust account. The next day, respondent wired the entire $350,000 to attorney Douglas Arntsen, specifically into his then firm's (Crowell & Moring LLP) attorney trust account. Arntsen purportedly represented the lender, Doina

Capital.[4] Unbeknownst to anyone at KWK-KASH, several months earlier, in or around September 2009, Arntsen had used Doina Capital's funds to extend two loans, totaling $175,000, to HMI. The terms of those loans required that HMI repay the sum of $350,000 to Arntsen within sixty to ninety days.

During the hearing, respondent admitted that he was aware that HMI owed the $350,000 to Doina Capital, because the original Doina Capital loan proceeds had flowed through his trust account. Respondent denied, however, that he had negotiated the prior Doina Capital loans on behalf of HMI. In his March 17, 2010 response to Knoch's grievance, however, respondent had not revealed the prior Doina Capital loans, instead asserting "I cannot state how the [KWK-KASH] funds were used by [Arntsen], as [I] had no control over any such action." During his May 2, 2013 interview with the OAE, respondent disclosed the existence of these prior two loans from Doina Capital to HMI. Specifically, respondent told the OAE

---

[4] Arntsen admitted that he was not authorized to utilize Doina Capital's funds for loans. The principals of Doina had no idea he was using their funds, as well as other clients' funds, in a complex lapping scheme from which he personally profited. He made multiple unauthorized loans, kept the interest, and stole clients' funds. On September 19, 2011, Arntsen was arrested while in Hong Kong and returned to the United States. In October 2012, in New York, he pleaded guilty to three counts of grand larceny and one count of scheme to defraud. He was serving a prison sentence at the time he testified. Arntsen has been disbarred in all jurisdictions in which he had been admitted to practice law: New Jersey, New York, and Washington, D.C.

that "the $350,000-dollar [sic] KWK-KASH loan was to satisfy up-front fees and those up-front fees were the prior two loans [from Arntsen that] needed to be satisfied."

At the DEC hearing, respondent called as a witness Aziz Munir, a CPA and a friend of Martin, HMI's CPA. Munir stated that he had made efforts to assist HMI in obtaining a loan to repay $350,000 to Doina Capital. Munir testified that the new loan for $350,000 "was just needed [to pay back the first loan] . . . [and] set up a [second] loan for $1.2 million to HMI. [Arntsen] wanted to see that this $350,000 was in escrow and the transaction [for the $1.2 million loan] was supposed to close the same day." Munir recounted that the $1.2 million loan did not close the same day, even though the $350,000 that KWK-KASH lent to HMI was used to pay off the original loan.[5] Munir explained that he had previously introduced HMI to Arntsen, leading to the original $175,000 loan that had a $350,000 payoff, but had not reviewed any documents relating to the KWK-KASH loan to HMI. Munir believed, however, that Bain and KWK-KASH were aware that HMI planned to use the $350,000 from KWK-KASH to pay off HMI's original Doina Capital loans and, thus, "trigger for them to close the $1.2 [million loan] with HMI."

---

[5] As set forth in detail below, Arntsen testified that he wanted the $350,000 loan repaid before he would consider a second loan to HMI. In essence, to secure the repayment of the $350,000, he led respondent and HMI to believe that a back-to-back closing would occur.

Munir further testified that HMI eventually closed the $1.2 million loan with Doina Capital, "three or four weeks later." Munir then distanced himself from HMI and "fell out" with Holloway after he learned that HMI had closed the $1.2 million loan, but had not repaid KWK-KASH. Munir claimed a belief that respondent was unaware that HMI eventually closed the $1.2 million loan. Munir stated that "HMI had every legal obligation to pay back Cammie Bain her money and that fee," but did not do so.

Testifying from prison, Arntsen stated that respondent represented HMI in connection with the $1.2 million Doina Capital loan, and that it was never related to any Texas transaction. Arntsen did not recall the purpose of the original $175,000 in loans that he had made to HMI, but explained that he had secured them by filing UCC statements against HMI's assets and by obtaining personal guarantees from HMI's principals, Holloway and Thomas. In November 2009, respondent informed Arntsen that HMI would be wiring the $350,000 to satisfy those original loans, and that HMI wanted Doina Capital to fund a second, $1.2 million loan.

A few days before November 6, 2009, to satisfy a condition imposed by KWK-KASH, respondent requested that Arntsen send him proof that Doina Capital was able to fund the $1.2 million loan. On November 3, 2009, in reply, Arntsen sent respondent a "snapshot" of a Doina Capital bank account that contained $2,018,680.86. On

Friday, November 6, 2009, respondent wired the $350,000 to Arntsen, paying off the two loans that Doina Capital had funded in September 2009. At that time, Arntsen was not aware of the November 5, 2009 escrow agreement between KWK-KASH, HMI, and respondent. He denied any knowledge of KWK-KASH and maintained that the second, $1.2 million loan was for a Missouri real estate transaction called "Renaissance," which HMI was pursuing with a partner, Jose Lindner. Arntsen further clarified that he never learned of KWK-KASH's existence until 2010, when KWK-KASH sued his law firm.[6]

Despite receiving the $350,000 payoff of the prior loans from respondent and HMI, Arntsen did not immediately fund the $1.2 million loan. Arntsen explained that the second loan was "for a lot more money . . . and we needed more collateral." On November 7, 2009, the day after respondent wired the $350,000 to Arntsen, respondent apparently realized that Arntsen would not immediately fund the larger loan, and attempted to stop or recall the $350,000 wire he had sent. Respondent's efforts were thwarted, however, when Arntsen refused to authorize his bank to send those funds back to respondent.

---

[6] Arntsen hid the lawsuit from his firm, stating that, because of his criminal enterprise, he "needed [the lawsuit] like I need[ed] a hole in my head." Arntsen covertly answered the complaint, hoping his firm would not find out about it, and his crimes would not be discovered.

When Arntsen failed to promptly fund the $1.2 million loan, neither HMI nor respondent repaid the $378,000 to KWK-KASH, as required by the first escrow agreement. On Monday, November 9, 2009, after learning that HMI had not wired the payoff to KWK-KASH, Knoch became directly engaged in the transaction, telephoning both respondent and HMI; neither returned his calls that day. Knoch left additional messages with HMI and respondent and sent e-mails that threatened to involve the FBI and the United States Attorney if he did not promptly get his money back. Bain testified that, although she had handled the making of the loan to HMI, at this point, she "turned it over to Darrell [Knoch]."

On or about November 10, 2009, respondent telephoned Knoch and informed him that HMI's lender had required more documentation and, thus, the Texas transaction had been delayed. Knoch claimed that, during that call, respondent represented that the $350,000 was still in his attorney trust account. Knoch informed respondent that he was "uncomfortable" with the transaction, was upset that his calls were not promptly returned, and "needed more assurances that [the Texas transaction] was really happening." In reply, respondent offered to double KWK-KASH's lending fee, from $28,000 to $56,000, if Knoch would give respondent and HMI until the end of the week, Friday, November 13, 2009, to close the Texas transaction.

Knoch agreed to this modification and, accordingly, 877-KWK-KASH, HMI, and respondent entered into the second escrow agreement, dated November 9, 2009. This escrow agreement stated that it "replaces any previous agreements," clarified that 877-KWK-KASH was the lender (not Bain, in any personal capacity), and recited that the $350,000 had been deposited into respondent's attorney trust account on November 5, 2009, for HMI's use for any "upfront fees" required to obtain the $1.2 million loan. Moreover, the second escrow agreement memorialized that, once the larger loan was procured, the $350,000 plus a $56,000 fee would be returned to KWK-KASH's account. The second agreement also confirmed that HMI and respondent were required to pay back the $350,000, plus the $56,000 fee, by November 13, 2009. The remainder of the language was identical to the first escrow agreement, including the provision that "the deposited funds plus the additional fee will be return [sic] to the above listed account of 877-KWK-KASH, LLC not later than 48 hours from the date of the deposit by the Escrow Agent unless otherwise instructed to return these sums anytime within the two day period."

Although the agreement was dated November 9, 2009, it was actually entered into on November 10 or 11, 2009. Knoch explained that the second escrow agreement was backdated to reflect the date the original payoff of $378,000 should have been satisfied by HMI.

Knoch, Holloway, and respondent all executed the second escrow agreement. Despite the additional time, neither respondent nor HMI returned the $350,000 plus the additional $56,000 fee to KWK-KASH by November 13, 2009.

When this second deadline had passed and the loan was not repaid, Knoch made more phone calls to respondent and HMI, and again sent e-mails threatening to involve law enforcement. According to Knoch, respondent returned his call on Monday or Tuesday of the following week with the "same story" – that the lender had required more documentation regarding the Texas transaction and that HMI needed more time to close and pay KWK-KASH off.

Knoch testified that, when he spoke with respondent on November 10 and November 17, 2009, respondent represented that the $350,000 was still escrowed in his attorney trust account. Communications from Bain, however, indicate that she may have been aware, by November 10, 2009, that the $350,000 had been released from the account. On that date, she sent an e-mail stating that she was awaiting proof that the $350,000 was back in escrow. Bain testified, nevertheless, that she assumed that the funds had remained in escrow, and that respondent "never told me otherwise." Bain acknowledged that, after HMI did not pay back the loan as

required, she assumed that respondent had disbursed the loan proceeds from his escrow account.

Respondent testified that Bain had been aware that the $350,000 had been disbursed from his escrow account and, further, that he had her permission to disburse it. He contended that the e-mails in the record established that no one ever challenged his disbursement of the funds.[7] Despite this assertion, respondent repeatedly maintained that certain conversations with KWK-KASH, including permission from Bain to disburse the $350,000, had occurred via telephone, rather than by e-mail.

Respondent claimed that the reason he sought the return of the $350,000 he had wired to Arntsen was Arntsen's refusal to fund the $1.2 million loan and complete the contemplated back-to-back loan closings; he refuted any suggestion that he had tried to recall the wire because KWK-KASH had not authorized disbursement of its funds. During the OAE interview, respondent offered that "maybe I was duped by Mr. Arntsen."

On or about November 17, 2009, HMI and KWK-KASH entered into the third, and final, escrow agreement, which again increased KWK-KASH's repayment fee, to $84,000, raising the total loan payoff from the original $378,000 to $434,000. This agreement was for yet

[7] It is clear that, by November 30, 2009, Knoch knew that respondent had disbursed the $350,000.

another forty-eight hour period, but HMI was specifically required to make the payment no later than November 20, 2009. The language in the remainder of the document was identical to the two prior versions. For reasons unknown, respondent did not sign this third escrow agreement.

Arntsen did not fund the $1.2 million loan by November 20, 2009, and HMI did not pay KWIK-KASH the $434,000 as required by the third escrow agreement. Knoch again telephoned and e-mailed respondent and officers of HMI; however, his calls and e-mails were not returned for three to four days. Eventually, Wade Thomas, the president of HMI, called Knoch, informing him that respondent would call him shortly. Respondent eventually called Knoch and told him that the Texas transaction was still moving forward and that the parties needed more time to close the deal. Knoch attempted to persuade respondent and HMI to enter into a fourth escrow agreement, but they refused. Rather, respondent told him that KWK-KASH just needed to "back off and be patient" and let the parties work out the deal.

During the relevant time frame, Knoch sent a number of e-mails to respondent, Holloway, and HMI's accountant, demanding the return of the loan plus the fee, and threatening to involve law enforcement and the bar association if not promptly repaid. Knoch asserted that respondent again assured him that he would

receive the loan proceeds, plus a significant sum, and told him that HMI was about to buy $1.2 million in gold from Africa, which would be such a lucrative investment that HMI could start funding KWK-KASH's transactions.[8] Knoch claimed that respondent even arranged for the "sale agent" for the African gold transaction to call him in an attempt to reassure him that he would be repaid.

By late 2009 or early 2010, Bain had resigned as CFO of KWK-KASH, but was still assisting Knoch in his attempts to recoup the $350,000 loan plus the $84,000 fee. Bain explained that her resignation was the result of the failed HMI loan, plus the downturn in the real estate market, which, in combination, meant that KWK-KASH was going to "shut down" and could no longer afford to keep her as an employee.

By the time the ethics hearing was held, KWK-KASH had gone out of business. Knoch clearly blamed the failure of KWK-KASH on the HMI loan transaction, stating that, when the $350,000 loan was not paid back, he lost his investors, and the business "was effectively dead." Knoch also claimed that he had suffered personal bankruptcy as a consequence.

---

[8] During his testimony, Arntsen corroborated the African gold investment, stating that his clients and HMI were involved in gold refinery deals in Africa. Arntsen added that HMI actually sent more than $100,000 to Africa, but the funds were stolen on arrival.

In December 2009, Knoch retained counsel to assist KWK-KASH with the recovery of the funds loaned to HMI. The attorney sent respondent a letter, demanding the return of the principal of the loan plus a $100,000 fee, for a total of $450,000. On December 4, 2009, respondent replied to Knoch's attorney, informing him that "an unforeseen circumstance has arisen which has delayed the performance of HMI." Respondent also stated that HMI was committed to the agreement between the parties, which would be honored in due course. The letter did not reveal that HMI had used the loan proceeds to satisfy the two prior Doina Capital loans, or that the ultimate goal of the $1.2 million loan was to fund the Missouri transaction.

On or about December 9, 2009, HMI, its partner Lindner, and respondent satisfied Arntsen's requests for the collateral that he required to fund the $1.2 million loan. Specifically, Arntsen was sent an appraisal of the Missouri property (presumably showing equity), was given a pledge of equity interest from Lindner, and was granted a second mortgage on another property in Missouri in which Lindner had an ownership interest.

Also on December 9, 2009, respondent drafted an opinion letter to Doina Capital, on behalf of HMI, in connection with the Missouri transaction, which provided assurances regarding HMI, the borrower, and Lindner pertaining to the $1.2 million loan. This

letter referenced only the Missouri property, which was to become part of a residential development known as "Providence Farms." When confronted with the opinion letter, during his May 2, 2013 OAE interview, respondent was evasive, claiming that the letter was not on his stationery. Although he eventually conceded that he had signed the letter, he denied recalling drafting it, but later admitted that he "may have."

On December 10, 2009, respondent e-mailed wiring instructions for his attorney trust account to Arntsen, in anticipation of the funding of the loan. On December 11, 2009, Arntsen, purportedly acting on behalf of Doina Capital, funded the $1.2 million loan by four wire transfers: $1,000,000 to Jose Lindner; $1,499.38 to First American Title Insurance Company; $29,860.00 to Boone Central Title Company; and $168,640.62 to respondent's attorney trust account.

Arntsen subsequently became concerned about recovering the unauthorized funds. By December 2009, he had arranged for HMI to work closely with existing clients of Arntsen - the principals of Atlas Investment Group - in connection with real estate transactions, apparently to generate funds for HMI that could be used to satisfy the unauthorized $1.2 million loan. Arntsen also began "informally" representing HMI, as well as his clients, explaining that he "was up against the wall" and had become worried

about the potential discovery of his criminal activity and "was doing everything I can to see if I can get this money back" and "save [my] neck." Arntsen recounted that he and respondent had discussions over lunch, at the Trump Bar and Grill in New York City, about the money HMI owed to Arntsen (Doina Capital). HMI, however, never paid off the $1.2 million loan.

Respondent admitted that he had not informed Knoch, Bain, or anyone at KWK-KASH that this $1.2 million loan had been funded, or that he had received $168,640.62 from the proceeds, maintaining that the funds were in connection with a different loan. In fact, and with respect to the funding of the $1.2 million loan, Arntsen reiterated that he knew only about the Missouri transaction. Arntsen was unequivocal, stating that he, respondent, and HMI had discussed only one $1.2 million loan, and that there were never negotiations for a separate loan of the same, or similar, amount.

On December 21, 2009, the Texas deal was cancelled. Terry Douglas, the attorney representing the seller in HMI's Texas transaction, sent HMI and respondent a letter terminating the sale, due to lack of consideration.

During the ethics proceedings, respondent's positions on various issues were inconsistent. At the hearing, he repeatedly asserted that the $168,640.62 that Arntsen wired into his account was related to a different transaction in which he was not

involved, and that the funds he received were not related to the $1.2 million loan and the Texas transaction referenced in the KWK-KASH escrow agreements. However, during a September 21, 2011 deposition in connection with a lawsuit filed by KWK-KASH, respondent had initially taken the position that the $1.2 million loan from Arntsen did relate to the KWK-KASH loan. He initially took this same position during his May 2, 2013 interview with the OAE, which is replete with references by respondent to a large loan, funded on December 11, 2009, including his statement "[e]ventually, approximately five weeks later, Mr. Arntsen did provide a loan to Mr. Holloway in the amount of . . . approximately 1.5 million dollars." When asked about the opinion letter for a $1.2 million loan during the OAE interview, respondent stated "[t]hat's the loan that was supposed to have taken place."

Despite these representations during the OAE interview, and the opinion letter he had drafted and signed, respondent denied, at the ethics hearing, that he had performed any work with respect to this purported "second deal" in Missouri or that he had acted "as counsel to Mr. Holloway and [sic] during that particular period of time." He also claimed that he had disbursed to his firm, at his client's direction, $5,000 of the $168,640.62 he received for "legal fees" for "prior work." During the OAE interview, respondent

had claimed "I did not represent Rory Holloway in this transaction. Quite frankly, I really acted as just an escrow agent."

During the ethics hearing, respondent asserted that Arntsen never funded the $1.2 million loan for the Texas property transaction underlying the KWK-KASH escrow agreement, despite the fact that Arntsen did, on December 11, 2009, fund a $1.2 million loan. Respondent was adamant that this $1.2 million dollar loan from Arntsen was a second, $1.2 million loan, and was not associated with the KWK-KASH transaction. This different loan was for the Missouri deal, not the Texas deal, which respondent asserted was still alive until receipt of the December 21, 2009 seller termination letter.

Nevertheless, on January 7, 2010, approximately two weeks after receiving Terry Douglas' letter terminating the Contract of Sale for the Texas property, respondent sent a letter to Knoch's attorney, stating that "it is now expected that full payment [by HMI] will be made to your client within fourteen days from the date of this correspondence. My client is willing, but not legally bound to do so, [to] provide your client with some additional compensation relative to the default of its obligation." This letter did not refer to the cancellation of the Texas deal, the existence of the Missouri deal, or the funding of a $1.2 million loan by Doina Capital. Respondent's letter also requested that the

attorney direct Knoch and Knoch's wife to stop harassing and threatening him and HMI.

Moreover, respondent repeatedly took the position that Bain, in her personal capacity, had extended the loan to HMI, given the language of the original escrow agreement. During the hearing before the special master, respondent maintained this position, despite the evidence in the record, including the language in the subsequent escrow agreements, which he essentially argued were null and void, as they were executed by Knoch, when Bain's authorization was required.

Respondent persisted in his contention that the subsequent escrow agreements were null and void, despite having provided a copy of the second escrow agreement to the OAE with his March 17, 2010 reply to Knoch's grievance. In that reply, he had argued that this second escrow agreement was controlling, and allowed him to disburse the $350,000 to Arntsen. Furthermore, in reply to the grievance, respondent submitted a certification referring to a loan made by "877-KWK-KASH" and describing Knoch as "the lender's principal." Additionally, on November 9, 2009, respondent sent to Bain a fax captioned "HMI with KWK KASH," enclosing the November 9, 2009 second escrow agreement. Also, in his reply to the grievance, respondent described the loan transaction as "between 877-KWK-KASH, LLC. ("Lender") . . . and HMI MANAGEMENT, LLC."

Finally, respondent's December 4, 2009 reply to the demand letter that Knoch's attorney had sent bore the caption "HMI MANAGEMENT HOLDINGS, LLC with 877-KWIK-KASH, LLC," and stated, in pertinent part:

> "Please be advised that this office is acting as general counsel to [HMI] relative to certain aspects of the underlying financial transaction which involves both your client, 877-KWIK-KASH, LLC, and the undersigned's client, HMI. As you are aware, [HMI] entered into a certain loan transaction ("loan") with your client. The principal amount of the loan had been [$350,000]. At this time, as I must assume you are quite aware, there is a written agreement between the parties relative to this loan transaction . . . "
>
> [Ex. C-17.]

During his September 21, 2011 deposition in connection with the KWK-KASH litigation, respondent repeatedly stated that KWK-KASH had funded the $350,000 loan to HMI. He also acknowledged his fiduciary duty, as escrow agent, to KWK-KASH. At that deposition, he repeatedly objected to questions regarding the first escrow agreement, dated November 5, 2009, and signed by Bain, describing that agreement as "having no legal affect [sic]," as it had been superseded by the second and third escrow agreements, which were "fully integrated" and controlling. Additionally, at the OAE interview, respondent described the transaction as a loan from KWK-KASH. Despite such evidence, during the hearing, respondent

was reticent to even concede that he knew that the $350,000 loan had been made by KWK-KASH.

During the ethics hearing, respondent acknowledged that HMI had breached the loan agreement and escrow agreements by not repaying the loan to KWK-KASH. Knoch testified that, before litigation eventually ensued between KWK-KASH and HMI, both Wade Thomas and respondent had admitted to him that the purpose of the $350,000 loan was never for a Texas transaction, but rather was to pay off the original Doina Capital loans. Eventually, respondent and HMI settled the litigation by agreeing to be jointly and severally liable to KWK-KASH for the repayment of $340,000 (but not the loan fees).

Respondent stated that he settled the lawsuit, despite his contention that KWK-KASH's claim was legally flawed, only because Holloway had promised to indemnify him. According to Knoch, neither respondent nor the other defendants, which included both HMI entities, Holloway, Thomas, and respondent's law firm, had timely paid the settlement and, in 2012, KWK-KASH had obtained a $340,000 judgment against all defendants, including respondent. Respondent stated "I have not paid a penny based upon my conversation with Mr. Holloway whereas he would indemnify me because this was his

obligation." As of the date of the ethics hearing, KWK-KASH had not been repaid.[9]

In mitigation, respondent elicited the testimony of his former client, Suzanne Korn, who had been satisfied with respondent's legal services and was not aware of any negative comments made about him. Respondent's wife, a suspended attorney, also testified as a character witness and provided information about respondent's pro bono services.

* * *

The special master prefaced his findings by noting that the testimony was both confusing and contradictory and, further, that the documents in evidence were poorly drafted, confusing, and "did little to assist [him] in determining what really happened in this case." He further made specific observations in respect of Knoch's credibility, finding that Knoch clearly held respondent responsible for the flawed transaction, which he believed led to KWK-KASH's demise, as well as to his own personal bankruptcy. Thus, the special master observed that, consistent with his bias against respondent, Knoch appeared at times to exaggerate his testimony, perhaps with the belief that respondent would receive a harsher penalty. Therefore, the special master considered only

[9] It appears that, at some point prior to the settlement, Rory Holloway had repaid $10,000 to KWK-KASH.

the portions of Knoch's testimony that he found credible or that were corroborated by other evidence in the record.

The special master concluded that there was insufficient evidence to find that respondent violated RPC 1.15(a) or the principles of In re Hollendonner. Citing respondent's ledger sheet for HMI, the special master observed that, in connection with the KWK-KASH loan, respondent had recorded all of the deposits and disbursements relating to the KWK-KASH loan proceeds in his attorney ledger, and thus, had properly accounted for the funds. Moreover, he found that the escrow agreements did not expressly require the $350,000 to remain in respondent's trust account, but, rather, allowed HMI to use at least a portion of the loan proceeds for costs ("upfront fees") associated with the second ($1.2 million) loan. He additionally found that, as of November 11, 2009, Bain definitely knew that the funds had been disbursed, because she sent an e-mail stating "still waiting on [proof of funds] that our $350K is back in escrow."

The special master rejected respondent's assertion that there were actually two different $1.2 million dollar loans from Doina Capital to HMI, expressly finding that respondent's testimony to that effect was incredible. The special master further noted that, after HMI missed the first deadline to pay off the KWK-KASH loan, respondent made repeated representations to KWK-KASH that the

underlying Texas real estate deal would be closing soon, and that HMI would pay off the loan. In reliance on these representations, KWK-KASH agreed to modify the loan terms and extend the payment deadline multiple times, as confirmed by the series of escrow agreements.

Accordingly, the special master determined that, on December 11, 2009, when Doina Capital funded the $1.2 million loan, respondent, as escrow agent for both HMI and KWK-KASH, had a duty (1) to notify KWK-KASH that the loan had funded and (2) to keep the $168,640.62 in loan proceeds that had been wired into his attorney trust account separate until the dispute with KWK-KASH could be resolved. Thus, the special master concluded that respondent violated RPC 1.15(b) and (c).

The special master also determined that respondent violated RPC 8.4(c). Respondent knew, from the outset, that the purpose of the KWK-KASH loan was to repay the original Doina Capital loans, yet he failed to inform KWK-KASH of this material fact, allowed KWK-KASH to fund the loan based on the belief that the funds were being used to purchase real estate in Texas, and took steps to conceal the true purpose of the loan, including convincing Bain to fund the loan without satisfying certain conditions customarily required by KWK-KASH. Moreover, after the seller cancelled the Texas transaction, on December 21, 2009, respondent did not inform

KWK-KASH of this material development. Additionally, in a January 7, 2010 letter to KWK-KASH and its attorney, respondent did not reveal (1) the cancellation of the Texas transaction; (2) the existence of the Missouri deal; or (3) the funding of the $1.2 million loan. Instead, respondent provided further assurances that HMI would remit full payment to KWK-KASH "within fourteen days."

The special master summarized his findings:

> "I find that the transactions involved were bizarre, at best, ill-explained, and involved a dishonest lawyer, Mr. Arntsen. Respondent found himself entangled in a difficult web, albeit partially of his own making, and kept twisting and turning, thereby further entangling himself, instead of being honest and forthright with all parties when obtaining the $350,000 [from KWK-KASH] and then as the other deals either did or did not, take place."
>
> [SMR at 24.][10]

The special master gave no weight to the character testimony of respondent's wife, citing her "evident emotional and financial bias regarding the disposition of [respondent's] case." In aggravation, the special master considered respondent's disciplinary history.

Based on his findings of fact and conclusions of law, the special master recommended that a one-year suspension be imposed,

---

[10] SMR denotes the special master's report.

citing In re Alum, 162 N.J. 313 (2000) (one-year suspended suspension for attorney who participated in five real estate transactions involving "silent seconds" and "fictitious credits;" the attorney either failed to disclose to the primary lender the existence of secondary financing or prepared and signed false HUD-1 statements showing repair credits allegedly due to the buyers, allowing the clients to obtain one hundred percent financing from the lender; because the attorney's transgressions had occurred eleven years earlier and, in the intervening years, his record had remained unblemished, the one-year suspension was suspended).

* * *

On January 4, 2016, respondent filed a motion to supplement the record with documentation from the April 30, 2014 bankruptcy filing of Knoch, asserting that the representations made by Knoch in the filing are relevant and probative with respect to Knoch's credibility at the ethics hearing.

Specifically, respondent asserted that Knoch failed to disclose material assets to the bankruptcy court, including (1) his prior business interest in KWK-KASH and its subsidiary; (2) the fact that he had authored self-help books that were available for purchase on Amazon, the electronic commerce company; and (3) the fact that he had obtained a judgment against HMI and its subsidiary, Holloway, Thomas, respondent, and Franco & Franco.

Respondent also argued that, based on the bankruptcy filing, Knoch's testimony, that HMI's default on the KWK-KASH loan is what ended KWK-KASH and led to Knoch's personal financial demise, was self-serving and deceptive. Respondent cited the bankruptcy filing as evidence that Knoch was more than $16 million in debt and, consequently, the failed $350,000 loan to HMI was not the root cause of his bankruptcy filing, as Knoch had testified.

Accordingly, respondent suggested we find (1) that the testimony of Knoch, the OAE's "chief witness" was intentionally false and deceptive, and thus, must be disregarded; and (2) that, after excising Knoch's testimony, the ethics case "must fail as a matter of law" since the OAE cannot prove its case by clear and convincing evidence. As to the latter point, respondent concluded "[i]t is reasonable to submit that the chief witness' false [bankruptcy filing] would have been given great weight in formulating a Special Master Report." Finally, respondent asserted that, had they known of Knoch's false filings with the bankruptcy court, both the OAE presenter and the special master would have had a duty to report Knoch's crimes, and that, in light of Knoch's deceitfulness, the OAE's motivation to prosecute him was "questionable."

On January 7, 2016, respondent submitted a letter brief in support of his position that no discipline is warranted. Respondent

asserted that: (1) he represented Holloway, HMI, and its subsidiary in only a "limited fashion;" (2) the $350,000 loan to HMI was from Bain, in her personal capacity, not from KWK-KASH, making the second and third escrow agreements null, and, therefore, vitiating any argument that he had fiduciary or ethical duties to KWK-KASH; (3) the disciplinary action against him has an inherent standing defect, because Bain was not the grievant; (4) the $1.2 million eventually funded by Arntsen was for a new, second loan (secured versus unsecured), and not the loan referenced in the escrow agreement between KWK-KASH and HMI;[11] (5) Arntsen is to blame because if he had funded the $1.2 million loan as originally expected, HMI would have promptly repaid the KWK-KASH loan; (6) Knoch is completely incredible, as evidenced by his misleading bankruptcy filing and, although the OAE knew of his "bankruptcy crimes" upon hearing his testimony, the OAE, nevertheless, "championed" him as its "chief witness;" and (7) he agreed to settle with KWK-KASH only because Holloway verbally promised to indemnify him; thus, the settlement is not evidence of an admission of wrongdoing or liability on his part.

Based on the above arguments, respondent argued that the special master's findings and determinations were fatally flawed

[11] This contention cannot be fully examined because the loan documents for the Arntsen loan are not part of the record. It cannot be determined, thus, whether either loan was secured.

and, thus, no discipline is warranted. In the alternative, he suggested that the improper release of escrow funds is deserving only of an admonition or a reprimand, citing case law he contended supports that position.

Finally, respondent asserted that the Lawyer's Fund for Client Protection's prior rejections of Knoch's claims against respondent, under a preponderance of the evidence standard, should be evidential in the disciplinary matter. Respondent stated that the special master's "disregard of these 'arm of the Supreme Court' decisions is gross error that demonstrates a concern for the Special Master's impartiality in this matter."

* * *

Before addressing the merits of this case, we will first address respondent's motion to supplement the record. The documents that respondent seeks to submit consist of bankruptcy disclosures and records supporting Knoch's personal bankruptcy, filed approximately six months prior to the disciplinary hearing. These documents are germane to an assessment of Knoch's credibility. We, therefore, determined to grant respondent's motion.

We find, however, that the net effect of the documents is negligible in deciding this matter. Respondent contends that the special master's credibility determination regarding Knoch's

testimony would have been "significantly different" had he seen the bankruptcy documentation and that his findings of fact and conclusions of law, therefore, would have been different. However, as previously noted, the special master found only portions of Knoch's testimony credible, due to his clear bias against respondent. Essentially, the only testimony by Knoch credited by the special master related to the factual context in which KWK-KASH made the loan to HMI, and the reasons that the payoff deadline was extended multiple times. The special master's findings, thus, would not have been affected by the additional evidence respondent seeks to include in the record.

* * *

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The facts of this matter were aptly described by the special master as "confusing and contradictory." Despite the inherent and competing biases and interests of the two main stakeholders in this case – Knoch, the former CEO of KWK-KASH, and respondent – sufficient facts are corroborated by other evidence in the record to permit us to make the necessary findings in respect of respondent's misconduct.

The most serious allegation against respondent is that he knowingly misappropriated the escrow funds of KWK-KASH, which should have been held, inviolate, in his attorney trust account, until they were returned to KWK-KASH. Specifically, count one of the formal ethics complaint charged respondent with knowing misappropriation of escrow funds by disbursing KWK-KASH's loan proceeds to Arntsen, on November 6, 2009, without KWK-KASH's permission, and in violation of the November 5, 2009 escrow agreement between KWK-KASH, HMI, and respondent. The complaint contends that respondent could disburse KWK-KASH's funds only after the proceeds of the $1.2 million dollar loan from Doina Capital were deposited into respondent's escrow account, and even then, he could disburse the funds only back to KWK-KASH. In support of its allegation that respondent was guilty of knowing misappropriation, the OAE relied on specific provisions of the escrow agreement, together with the absence of any evidence that KWK-KASH expressly authorized the disbursement of its funds to Doina Capital (Arntsen). As correctly determined by the special master, however, the escrow agreement was so poorly written, ambiguous, and internally contradictory, that such a charge cannot be sustained.

First, contrary to the complaint's view of the limitations on respondent's right to disburse the $350,000, every iteration

of the escrow agreement stated that the KWK-KASH loan proceeds could be used "by HMI for any 'upfront fees' required by a third party in order to obtain a larger loan in the amount of [$1.2 million] to be used for the related expenses associated with acquiring certain real property located in Colleyville, Texas." The escrow agreement did not define the term "upfront fees." Knoch, Bain, and respondent offered conflicting testimony regarding the parties' understanding of the meaning of this term and, consequently, HMI's right to disburse the KWK-KASH loan proceeds to third parties. If it was KWK-KASH's intent to restrict disbursement of the $350,000 only back to KWK-KASH on receipt of the larger $1.2 million loan, and not to allow disbursement of those funds to third parties, the escrow agreement it prepared did not clearly articulate that limitation. Thus, as the special master noted, in New Jersey, "where an ambiguity appears in a written agreement, the writing is to be strictly construed against the party preparing it." City of Orange Twp. v. Empire Mortgage Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001).

Second, based on e-mails, dated November 11 and November 30, 2009, respectively, Bain and Knoch were aware that respondent had disbursed the escrow funds. Yet, the record is devoid of any evidence that KWK-KASH immediately claimed that respondent's disbursement to Arntsen, on November 6, 2009, had breached the

escrow agreement. KWK-KASH did not characterize respondent's disbursement as improper until after it became clear that HMI had breached the third and final escrow agreement, and would not be timely repaying the KWK-KASH loan.

Given the "upfront fees" provision and other ambiguous language in the escrow agreement, there are insufficient facts to conclude that, on November 6, 2009, when respondent wired the $350,000 to Arntsen, the disbursement was unauthorized or that the disbursement was made in furtherance of the Missouri transaction, rather than the Texas transaction. Thus, the OAE's theory that respondent knowingly misappropriated KWK-KASH's escrow funds by wiring the $350,000 payoff to Arntsen must fail.

We find, however, that respondent's conduct in connection with the eventual funding of the $1.2 million Doina Capital loan violated both RPC 1.15(b) and (c). After HMI had missed the first deadline to repay the KWK-KASH loan, respondent became HMI's instrument of delay and diversion, making multiple representations regarding the Texas transaction that Knoch and KWK-KASH, desperate to get back their $350,000, detrimentally relied on in granting multiple extensions of time for HMI to repay the loan. Eventually, despite his obfuscation during the ethics hearing, respondent became aware that HMI had substituted the Missouri transaction for the Texas transaction. Respondent was intimately involved in that

transaction, as evidenced by his issuance of the December 9, 2011 opinion letter to Doina Capital, a critical element in a commercial loan transaction, offered on behalf of his clients and their business partners, the borrowers.

Apparently desperate for an infusion of cash, HMI had depended on back-to-back loan closings with KWK-KASH and Doina Capital. Arntsen, a sophisticated attorney turned criminal, was anxiously seeking repayment of the original $350,000 from HMI before he would consider funding a significantly larger loan. Using his leverage, Arntsen dangled the $1.2 million loan to HMI to ensure that the original loans, which were already delinquent, would be satisfied. Soon after he received respondent's $350,000 wire, on December 6, 2009, he pulled the string, delaying funding of the $1.2 million loan, and informing HMI that he would not make the larger loan without additional collateral.

In response to this perceived breach of trust, respondent futilely tried to recall the wire, but Arntsen defeated the attempt. Regrouping, HMI sought to secure the Doina Capital loan through the Missouri deal, where its business partner, Lindner, could provide the collateral required to satisfy Arntsen. By December 11, 2009, HMI and Lindner had pledged the necessary security and satisfied Arntsen's loan conditions, with respondent's legal opinion playing its critical role. In turn,

Arntsen finally funded the $1.2 million loan. It is an inescapable conclusion that, but for HMI's use of the $350,000 in KWK-KASH funds to satisfy the prior two Doina Capital loans, HMI would not have secured the funding of the larger Doina Capital loan. This very concept was expressly built into each of the escrow agreements with KWK-KASH.

These facts are corroborated by evidence in the record, without reliance on Knoch as the OAE's "chief witness." First, of the fact witnesses who testified, Arntsen was the most credible. He openly admitted his criminal conduct, explaining that he was serving a prison sentence for making unauthorized loans and stealing from his wealthy clients, including Doina Capital. He admitted that he had made these unauthorized loans to profit from the interest. He was caught, entered a plea of guilty, and was sentenced to prison. His reputation sullied, and disbarred in every jurisdiction in which he had once enjoyed the privilege to practice law, he had the least motive to lie about the facts underlying this case. He simply had nothing to gain from false testimony.

Arntsen's recall of facts was precise, detailed, and unequivocal. He remembered where he and respondent had eaten lunch, years before, to discuss HMI's mounting debts. He was unaware of any Texas deal, let alone KWK-KASH, in November and December of

2009. All of his interaction with HMI and respondent regarding the $1.2 million loan centered on the Missouri deal. He was unwilling to fund the $1.2 million until HMI met certain conditions, including repayment of the original $350,000 in loans, and the pledge of satisfactory collateral. Accordingly, when Arntsen funded the $1.2 million dollar loan, it was directly related to the KWK-KASH funds, which had been used to satisfy the first condition that Arntsen imposed. Unbeknownst to both KWK-KASH and Arntsen, HMI and respondent had unilaterally replaced the Texas deal with the Missouri deal to secure the $1.2 million loan.

This factual determination is bolstered by respondent's contradictory statements regarding the nature of the Missouri transaction and his conduct, in December of 2009 and January of 2010, to hide the existence of that deal. First, respondent admitted that he never mentioned the Missouri deal to KWK-KASH, and, second, in his January 2010 response to the demand letter from Knoch's attorney, respondent mentioned neither the $1.2 million loan closing nor the recent cancellation of the Texas deal by the seller. Why would respondent omit such material facts in discussions of his client's duty to repay KWK-KASH? We conclude that at least part of the reason he was hiding the Missouri transaction was his knowledge that a portion of the $1.2 million loan, contemplated in the escrow agreement, had been disbursed to

him on December 11, 2009, and he had forsaken his fiduciary responsibility, as escrow agent, to KWK-KASH.

As the special master determined, respondent's conduct in this matter was an egregious violation of RPC 8.4(c). Respondent admitted that, from the beginning, he knew that the purpose of KWK-KASH's loan was to repay the two prior loans funded by Arntsen/Doina Capital. Yet, he failed to inform KWK-KASH of this material fact, claiming he did not negotiate the loan and was a limited participant in the transaction. He convinced KWK-KASH to fund the loan, refusing to provide Bain with the proof of liability insurance she had requested and claiming that his malpractice insurance, which he did not even have at the time, would not cover KWK-KASH in the transaction. He never informed KWK-KASH that HMI's efforts regarding the $1.2 million loan had shifted from the Texas deal to the Missouri deal. Moreover, he never disclosed that the seller had cancelled the Texas deal, but continued communicating with KWK-KASH and its lawyer, in December 2009 and January 2010, providing KWK-KASH with hollow assurances that the Texas deal was still ongoing, and that HMI would repay the loan "soon." All of these misrepresentations by omission violated RPC 8.4(c).

Respondent's conduct in all facets of this case, culminating in his misrepresentations during the disciplinary proceeding, not only renders his testimony incredible, but also weighs heavily in

aggravation. Despite knowing that the KWK-KASH funds were to be used to pay off the prior Doina Capital loans, respondent never disclosed that information to KWK-KASH, instead accepting the vague, "upfront fees" language as a means to conceal this material fact. Further, he convinced Bain and KWK-KASH to fund the loan outside of their normal protocols.

Respondent made statements, at every level of this disciplinary matter and the companion civil litigation, that were evasive, self-serving, contradictory, and incredible. His motivation for doing so was clear: to limit his exposure in this matter – both financially and with respect to his future ability to practice law.

Notwithstanding respondent's attempts to spin one of the most important issues of this case, it is a factual certainty that, after Arntsen refused to fund the $1.2 million loan on or about November 6, 2009, HMI's efforts to obtain those funds shifted from the Texas transaction to the Missouri transaction. Hoping to hold KWK-KASH and Knoch at bay while respondent and HMI scrambled to secure the $1.2 million loan, respondent and HMI twice offered them additional fees in return for more time to repay the loan. During these negotiations, neither HMI nor respondent apprised KWK-KASH of the material change to the underpinnings of the transaction – HMI's switch to the Missouri deal. The omission was

a strategic decision on the part of both respondent and HMI. They knew that KWK-KASH had loaned the $350,000 based on the due diligence, albeit minimal, it had done on the Texas deal and that disclosure of the failure of the Texas transaction (and substitution of the Missouri transaction) might cause Knoch, who was already "uncomfortable" with the transaction, to call the loan, without any further pay-off extensions.

Making matters worse, respondent sometimes evaded or obfuscated the facts of the underlying transaction, in both the disciplinary and civil proceedings. Most offensive are his duplicitous positions regarding (1) Cammie Bain versus KWK-KASH as the lender in the transaction, and (2) the enforceability of the first versus the enforceability of the second and third escrow agreements.

As set forth above, during the hearing before the special master, and now in his brief to us, respondent repeatedly took the position that Bain, and not KWK-KASH, loaned the money to HMI, and, accordingly, only the original escrow agreement was legally enforceable. Respondent's motive in this regard appears two-fold: first, he erroneously believed he was raising a cognizable standing argument, whereby the disciplinary matter was fundamentally flawed because Knoch and KWK-KASH, and not Bain, had filed the ethics

grievance and, consequently, he could not be disciplined;[12] and second, he believed that if Bain were found to be the lender, he would have a more compelling argument that she verbally authorized him to disburse the $350,000 to Arntsen, outside of the four corners of the first escrow agreement.

During the ethics hearing, while under oath, respondent contended that the second and third escrow agreements were nullities, because they had not been executed by Bain, but rather were signed by Knoch, her boss. He repeated this argument in his brief to us. Respondent offered this nullity argument despite having previously provided the second agreement to the OAE, as part of his reply to Knoch's grievance, wherein he argued that the second escrow agreement was controlling, but was vague, and gave him authority to disburse the $350,000 to Arntsen. In support of the same reply, respondent submitted a certification, wherein he referenced the loan as made by "877-KWK-KASH" and described Knoch as "the lender's principal." On November 9, 2009, respondent sent a facsimile captioned "HMI with KWK KASH" to Bain, enclosing the November 9 revised escrow agreement. On December 4, 2009, he captioned his reply to Knoch's demand letter as "HMI MANAGEMENT

[12] There is no standing requirement for grievances in the New Jersey disciplinary system. Anyone who believes an attorney acted unethically may file a grievance.

HOLDINGS, LLC with 877-KWIK-KASH, LLC," and characterized the transaction as one between HMI and KWK-KASH.

During a September 21, 2011 deposition related to litigation initiated by KWK-KASH, respondent repeatedly stated that the loan to HMI was funded by KWK-KASH, and acknowledged his fiduciary duty, as escrow agent, to KWK-KASH. At that deposition, he also described the first escrow agreement, dated November 5, 2009, as "having no legal affect [sic]" in connection with the transaction between HMI and KWK-KASH, as it had been succeeded by the other escrow agreements, which were "fully integrated" and controlling. On May 2, 2013, during his interview with the OAE, respondent described the transaction as a loan with KWK-KASH. Despite these prior writings, statements, and assertions, respondent claimed, at the ethics hearing, that Bain was the lender and barely conceded that he knew that KWK-KASH had provided the funds of $350,000. By attempting to argue these issues both ways, respondent undermined his own credibility and enhanced, by aggravation, the discipline to be imposed.

The only issue left for determination, thus, is the appropriate discipline for respondent's misconduct. Failure to promptly deliver funds to clients or third persons, and failure to keep separate funds in which the attorney and another person claim an interest, even where accompanied by other ethics

violations, typically results in an admonition. See, e.g., In the Matters of Raymond Armour, DRB 11-451, DRB 11-452, and DRB 11-453 (March 19, 2012) (in three personal injury matters, attorney did not promptly notify his clients of his receipt of settlement funds and did not promptly disburse their share of the funds; the attorney also failed to properly communicate with the clients; mitigation considered, including attorney's unblemished record since 1994 admission); In the Matter of Gary T. Steele, DRB 10-433 (March 29, 2011) (following a real estate closing, attorney paid himself a $49,500 fee from the closing proceeds, knowing that the client had not authorized that disbursement, and did not promptly turn over the balance of the funds to the client; the attorney also did not return the file to the client, as had been requested); and In the Matter of Joel C. Seltzer, DRB 09-009 (June 11, 2009) (attorney failed to promptly deliver funds to a third party; he also failed to memorialize the rate or basis of his fee; attorney had unblemished record since 1980 admission).

In addition, cases involving egregious violations of RPC 8.4(c), even where the attorney has a non-serious ethics history, have resulted in the imposition of terms of suspension. See, e.g., In re Steiert, 220 N.J. 103 (2014) and In re Carmel, 219 N.J. 539 (2014).

In Steiert, a six-month suspension was imposed on the attorney for serious misconduct, in violation of RPC 8.4(c) and (d). Through coercion, the attorney had attempted to convince his former client, who had been a witness in the attorney's prior disciplinary proceeding, to execute false statements. The attorney intended to use the former client's false statements to exonerate himself with regard to the prior discipline. In aggravation, the attorney's conduct was found to amount to witness tampering, a criminal offense. Additionally, the attorney exhibited neither acceptance of his wrongdoing nor remorse. Finally, he had a prior reprimand, in 2010, for practicing law while ineligible and making misrepresentations in an estate matter. Proof of fitness was required as a condition to the attorney's reinstatement.

In Carmel, a three-month suspension was imposed on the attorney for his "egregious misconduct," in violation of RPC 8.4(c). The attorney had represented a bank in a successful real estate foreclosure proceeding against a borrower. To avoid duplicate transfer taxes, the attorney and bank chose not to immediately record the bank's deed in lieu of foreclosure. When a subsequent buyer for the property was under contract, the attorney discovered that, in the interim, an Internal Revenue Service (IRS) lien had been filed against the property. Because the IRS lien was superior of record to the bank's interest, the IRS would levy

against the bank's proceeds from the intended sale of the property. Rather than disclose the prior IRS lien to his client, respondent fabricated a lis pendens for the foreclosure action, which was intended to deceive the IRS into believing that its lien was junior to the bank's interest. The attorney then sent the false lis pendens to the IRS, represented that it had been filed prior to the IRS lien, and attempted to engage the IRS in settlement discussions. Rather than settle, the IRS referred the matter to the U.S. Attorney's Office. The attorney finally admitted his misconduct. In mitigation, the attorney had an unblemished disciplinary history and paid off the IRS lien with his own funds, in the amount of $14,186 plus interest, in order to make both his client and the government whole.

Here, like the attorneys in Steiert and Carmel, respondent's brazen deception, as revealed by the record, can be regarded as nothing less than serious. In an effort to avoid any discipline, respondent has taken contrary positions during the civil and disciplinary proceedings, including making statements, while under oath, that were in complete opposition to prior sworn statements he had made. His unyielding attempts to place himself above reproach, despite his settlement with KWK-KASH and the significant evidence to the contrary in the record, illustrates that

respondent, like Steiert, shows no remorse, and refuses to accept responsibility for his misconduct.

There is additional aggravation that must be weighed. Respondent has been previously suspended for prior significant, but unrelated misconduct. Apart from the limited character testimony of one client, there is no mitigation to consider.

Respondent's pervasive duplicity and blatant denials of wrongdoing convince us that he presents a more substantial danger to the public than did the attorneys in Steiert and Carmel. Accordingly, we determine that his serious misconduct is deserving of the one-year suspension recommended by the special master. We so determine.

Vice-Chair Baugh voted to impose a two-year suspension. Member Gallipoli recused himself. Members Boyer and Singer abstained.

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert A. Franco
Docket No. DRB 15-327

Argued: January 28, 2016

Decided: July 11, 2016

Disposition: One-year suspension

Members	Disbar	One-year Suspension	Two-year Suspension	Abstained	Recused	Did not participate
Frost		X				
Baugh			X			
Boyer				X		
Clark		X				
Gallipoli					X	
Hoberman		X				
Rivera		X				
Singer				X		
Yamner						
Zmirich		X				
Total:		5	1	2	1	

Ellen A. Brodsky
Chief Counsel