SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-336
District Docket Nos. XIV-2011-0062E
and XIV-2011-0085E

IN THE MATTER OF	:
ANTHONY F. MALANGA, JR.	:
AN ATTORNEY AT LAW	:

Decision

Argued: April 21, 2016

Decided: August 3, 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 disbarment filed by a special ethics master, based on respondent's knowing misappropriation of client and law firm funds. The special master also found that, in a number of client matters, respondent engaged in gross neglect (RPC 1.1(a)) pattern of neglect (RPC 1.1(b)), and a lack of diligence (RPC 1.3); failed to communicate with his clients (RPC 1.4(b) and

(c)); engaged in a concurrent conflict of interest (RPC 1.7(a)(1)); entered into an improper business transaction with a client (RPC 1.8(a)(1)-(3)); provided financial assistance to clients in connection with pending or contemplated litigation (RPC 1.8(e)); failed to safeguard funds (RPC 1.15(a)); failed to keep disputed property separate and intact until the dispute was resolved (RPC 1.15(c)); failed to expedite litigation (RPC 3.2); knowingly made a false statement of material fact or law to a tribunal (RPC 3.3(a)(1)); committed a criminal act that reflected adversely on his honesty, trustworthiness, and fitness as a lawyer (RPC 8.4(b)); engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation (RPC 8.4(c)); and engaged in conduct prejudicial to the administration of justice (RPC 8.4(d)).

For the reasons set forth below, we accept most of the special master's findings and recommend respondent's disbarment for the knowing misappropriation of client and law firm funds.

Respondent was admitted to the New Jersey bar in 1982. At the relevant times, he was a shareholder in a Belleville law firm currently known as Gaccione & Pomaco (the Gaccione firm). As of the filing of the formal ethics complaint, respondent maintained a solo practice in Mountainside.

Respondent has no history of discipline.

On May 3, 2010, at the behest of his partners, respondent self-reported a potential ethics violation to the Office of Attorney Ethics (OAE). On February 7, 2011, the Gaccione firm reported to the OAE that respondent might have committed unethical conduct in other matters. On February 11, 2011, the Gaccione firm terminated its relationship with respondent. Thereafter, the firm provided the OAE with more detailed information regarding respondent's conduct, as recounted below.

By way of background, respondent was an attorney with the Gaccione firm from 1993 until his separation in February 2011. His primary area of practice was plaintiff personal injury and commercial litigation. At the time of his separation from the firm, respondent had been an equity partner for thirteen years and was in charge of the litigation department.

As a shareholder, respondent was a signatory to the Gaccione firm's trust and business accounts, two of which were maintained at Investors Savings Bank (ISB). Respondent also held several personal accounts at ISB.

The most significant aspect of this case involves claims that respondent knowingly misappropriated both client trust funds and law firm funds. Generally, he did so by attributing various disbursements to client matters unrelated to the particular disbursement. Thus, to explain the mechanics of

respondent's misconduct, we find it necessary to provide details about the Gaccione firm's accounting and recordkeeping practices.

Barbara Fleming, the Gaccione firm's longtime bookkeeper, testified that she was not authorized to direct the deposit or the disbursement of funds in and out of the firm's attorney trust and business accounts, but, rather, did so as instructed by an attorney or a secretary, acting on the attorney's behalf. With respect to deposits, the instruction took the form of a "disbursement sheet," which reflected the client's name and the matter number, contained a "receipts" section, and allowed each client's trust account funds to be tracked in journal form.

Fleming issued trust account checks, also upon presentation of a disbursement sheet, which reflected the client's name and matter number, the date, the payee, the amount, and an explanation for the check. The matter number was placed on the check, and the memo line identified the purpose of the disbursement. Only partners with signatory authority were authorized to sign trust account checks.

Fleming testified that respondent never requested a trust account check that she could not issue, due to a lack of sufficient funds because, she explained, "I never have insufficient funds." Respondent confirmed Fleming's testimony.

Moreover, he was not aware of a single instance in which the trust account balance was below the amount that the account should have held on behalf of all clients. Thus, respondent contends, a forensic accounting was required to establish whether the trust account ever had a shortage or whether he had knowingly misappropriated funds.

According to respondent, business account funds belonged to the partners. He claimed that the firm had "no written or oral understanding as to any protocols or procedures" regarding the use of business account funds and expense accounts. Similarly, Gaccione shareholder Aldo DiTrolio, also a signatory to the firm's trust and business accounts, could not recall receiving any specific instructions with respect to the use of those funds. Nevertheless, Fleming and respondent testified that completed disbursement sheets also were required for business account deposits and disbursements.

Gaccione, who signed most of the business account checks, acknowledged that there was no written procedure regarding the use of the business account. He explained that the purpose of the business account was to pay firm bills and that no signatory was authorized to pay a client's personal expenses with another client's retainer or with firm funds. Thus, neither Gaccione nor

Frank Pomaco, the other name partner in the Gaccione firm, would authorize such a disbursement.

Non-contingent fee cases represented about fifty percent of the firm's annual caseload. Respondent estimated that, during his last five years or so with the firm, forty percent of his work was "retainer generated." At the time, his caseload averaged about 150 matters. Thus, respondent claimed that, at any given time, the trust account held legal fees totaling "north of $100,000, in the six figure range."

As shown below, respondent's claim that the trust account held an "equity cushion" was the primary basis underlying his defense to the knowing misappropriation charges. In addition, he claimed that, although he requested the issuance of checks in connection with various client matters, his references to those client matters were a necessary expedient to gain access to the firm funds in the "equity cushion." Respondent, thus, asserted that the particular client matters were selected, based on his knowledge that funds were available to that client's credit, but he insisted that the funds that were disbursed belonged to the firm, not the client. Finally, respondent maintained that, as an equity partner, he was authorized to use firm funds for his own purposes.

We now turn to the facts underlying each client matter.

MICHAEL GARRONE (XIV-2011-0062E)

On December 6, 1996, Garrone retained respondent to represent him in a personal injury action, arising out of a September 12, 1996 work-site accident. On September 4, 1998, respondent filed a complaint against a number of defendants, including Fairchild Construction Co., Inc. After Fairchild defaulted, the court entered a November 5, 2001 judgment against the company for $151,031.26, plus interest and costs.

Respondent was unable to enforce the judgment because he could not locate the insurance carrier that had bonded the job. He claimed that, from the moment the judgment was obtained, Garrone was made aware of the difficulty in collecting on it. Nevertheless, respondent eventually told Garrone that he had been successful. Respondent fabricated several motions, orders, and other pleadings demonstrating both his efforts and his success in collecting on the judgment.

Respondent acknowledged having created several documents that, purportedly, were either submitted to, or generated by, the court in the Garrone matter, between March 2009 and March 2010. He explained that he did so because Garrone had expressed impatience, and respondent needed "to buy some time," by showing Garrone that he was trying to obtain the money.

Some of the documents were purportedly stamped with an official Superior Court clerk stamp, which respondent stated he had found in an office desk drawer. He admitted using the stamp on the documents identified.

Two of the fictitious documents that respondent created purported to be prepared, signed, and filed by Wilentz, Goldman & Spitzer attorney Gregory J. Castano. These documents were a purported motion by one of the defendants to stay payment of the judgment pending an "appeal" and a certification in support of the motion. Castano denied ever having been employed by the Wilentz firm, or signing any document relating to, or even having any knowledge of, the Garrone matter. Respondent admitted that he, not Castano, had drafted the documents and that he had signed Castano's name.

Respondent provided copies of the phony documents to Garrone only, and did not intend for them to be distributed to anyone else. None of the documents was filed with the court.

Respondent prepared two other fake documents: a calculation on the $151,031.26 judgment obtained in Garrone's favor, reflecting an additional $103,317.78 in accrued interest, and a "closing statement," dated March 30, 2010, reflecting a $254,619.11 gross recovery, with a net amount of $169,311.02 due to Garrone. He denied giving the closing statement to Garrone.

In addition, on August 21, 2009, a $775 trust account check was issued to Garrone, containing the matter number for Infinity Mortgage Corporation (Infinity Mortgage) and the notation "INTEREST." This disbursement was unrelated to the Infinity Mortgage matter, however. According to respondent, the purpose of the $775 trust account check was to demonstrate to Garrone that some interest had been collected on the judgment.

Respondent explained that the Infinity matter number was inserted on the trust account check to Garrone because "the most expedient way" to access the "substantial amount of firm fees" in the trust account was to "write a matter number which would have funds available" on the disbursement sheet. As shown below, respondent used this same method to obtain trust account checks in other matters.

Embarrassed by his failure to collect on the judgment, respondent decided to pay Garrone's share of the judgment with his own funds. Notwithstanding the $169,300.32 net amount shown on the closing statement, respondent asserted that Garrone's net recovery was "something in the neighborhood of 50,000 plus." Respondent then obtained a bank check, from one of his personal accounts, signed a transmittal letter to Garrone, and arranged for its delivery to him. DiTrolio, who had overheard conversations that included Garrone's name and references to

"money coming in . . . soon" intercepted the check, and asked respondent for an explanation.

Respondent misrepresented to DiTrolio that Garrone's case had been dismissed. Thus, respondent wanted to pay Garrone the recovery that respondent understood he would have received if that had not happened. DiTrolio told respondent that he did not think respondent "should continue on that path," and they agreed that "this check shouldn't leave the office." DiTrolio encouraged respondent to bring the matter to the partnership's attention.

Thereafter, respondent explained the situation to the shareholders, who replied that respondent should report the matter to the firm's malpractice carrier. They agreed that the check would not be given to Garrone, that they had to "straighten out" the record with him, and that respondent would self-report his actions to the OAE.

A couple of days later, respondent, in the presence of Gaccione, confessed his actions to Garrone, advised him that he had a cause of action against the firm, and suggested that he seek counsel. At this meeting, Garrone confronted respondent about the previous nine-and-a-half years, asking "[w]as it all just lies," to which respondent replied "yes."

In the fall of 2010, Garrone filed a malpractice action against respondent "and others." The matter was settled, with respondent paying $62,500 toward the settlement, plus $7,500, representing half of the amount of the firm's malpractice insurance policy deductible. In addition, he reimbursed the firm the $775 that had been paid to Garrone as "interest," but charged to the Infinity Mortgage matter.

The Gaccione firm did not learn of respondent's fabrication of documents in the Garrone matter until after it had been served with Garrone's malpractice complaint. DiTrolio, who reviewed the Garrone file in connection with the litigation, uncovered the fictitious documents, which he concluded were "not authentic," based on their appearance. According to DiTrolio, when respondent was questioned about the documents, "there was a lot of silence."

After respondent's misconduct had come to light, in May 2010, the firm removed his signatory authority on the trust and business accounts, as a stopgap measure. The shareholders also decided to terminate their relationship with respondent, but deferred the effective date until February 2011 to accommodate respondent's mother's illness and death, and to afford him the opportunity to "control the message."

In the Garrone matter, the complaint charged respondent with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), RPC 3.2, and RPC 8.4(b), (c), and (d). Respondent admitted to having violated RPC 1.4(b), by "not giving [Garrone] the true facts concerning the ability to collect that judgment," and RPC 8.4(c), by fabricating the documents, except for the interest calculation and closing statement, which he claimed were for "informational purposes" only. He denied the other charges.

MICHAEL GRUCHACZ (XIV-2011-0062E)

On an unidentified date, Michael Gruchacz retained respondent to represent him in a personal injury action. The matter eventually settled for $295,000, which was deposited in the Gaccione firm's ISB attorney trust account in late April 2009.

At the time, Gruchacz was confined to a physical rehabilitation center and, according to respondent, was not "in a position to take possession of his net proceeds." Accordingly, on May 7, 2009, $195,444.40, representing two-thirds of the settlement, was removed from the firm's ISB trust account and deposited into a separate ISB interest-bearing trust account opened for Gruchacz (Gruchacz ISB account). Respondent was a signatory to the Gruchacz ISB account.

About six months later, on October 31, 2009, when Gruchacz was able to take possession of his funds, respondent disbursed to him $115,491.23, representing principal and interest. After Gruchacz received the check, he informed respondent that it was $30,000 short.[1]

Respondent requested a client ledger report, which showed that $30,000 had mistakenly been removed from the Gruchacz ISB account two months earlier, in August 2009. Respondent then realized that a $30,000 withdrawal, in August 2009, which he had intended to take from his personal ISB money market account, had been taken from Gruchacz's ISB account instead. Respondent went to ISB immediately, withdrew $30,000 from his personal account, as he had first intended, deposited the funds in the firm's trust account, and wired the monies to Gruchacz the following day. His explanation, that the withdrawal was the result of a bank teller's mistake, was not rebutted.

Respondent had not noticed that the $30,000 had remained in his personal ISB account, despite the August 2009 withdrawal, because he was not in the habit of reviewing those statements at the time. In addition, the Gaccione firm did not distribute

---

[1] The record does not explain the $49,953.17 difference between the $195,444.40 placed into the Gruchacz ISB account and the $145,491.23 ultimately disbursed to the client.

monthly reports for the Gruchacz ISB account. Moreover, prior to the October 31, 2009 disbursement to Gruchacz, respondent had simply asked for the balance held in the trust account on the client's behalf. He acknowledged that, had he actually reviewed Gruchacz's ledger card, he would have noticed that $30,000 was missing, and he would have rectified the problem immediately.

The complaint charged respondent with negligent misappropriation of client funds and failure to safeguard funds (RPC 1.15(a)). Respondent denied the charges, claiming that the $30,000 was "always available and maintained in the same bank." Further, he claimed that the Gaccione firm's accountant should have uncovered the bank's error earlier as part of the monthly reconciliation process.

MARCO CISNEROS (XIV-2011-0062E)

After Marco Cisneros was injured in a March 25, 1999 automobile accident, he retained attorney Alan G. Merkin to represent him. When Cisneros grew dissatisfied with Merkin, "very close" to the trial date, he retained respondent. At that time, Merkin requested that he and respondent split the attorney fee. Although respondent was not adverse to giving Merkin one-third, if the matter settled without going to trial, he told Merkin that "we have to take a look at what needs to be done."

When respondent reviewed the Cisneros file, he discovered that, due to Merkin's failure to oppose a motion, Cisneros had been barred from pursuing a lost wage claim. Respondent's subsequent motion for reconsideration was denied.

The Cisneros case settled for $50,000 on the trial date. The Gaccione firm's closing statement reflected a $31,745.86 net recovery to Cisneros, $1,942.48 in expenses, and a $16,311.66 legal fee, to be divided as follows: $10,874.44 to the Gaccione firm and $5,437.22 to Merkin. Although respondent disbursed the above amounts to Cisneros and the firm, $7,379.70 remained in the Gaccione firm's trust account for the Cisneros matter, consisting of the $5,437.22 Merkin referral fee and expenses of $1,942.48.

Respondent sent a copy of the closing statement to Merkin, informing him that the Gaccione firm believed that he was not entitled to any of the referral fee because his malpractice had eliminated Cisneros's claim for economic loss. Thus, the funds remained in the trust account. According to respondent, Merkin took no action to assert his right to the referral fee. He neither sued for the referral fee nor counterclaimed for it in the subsequent malpractice actions that had been filed against him. The malpractice actions were settled on November 24, 2010,

with Merkin agreeing to waive the referral fee. As of that date, however, the balance in the Cisneros account was only $1,929.58.

As shown below, between October 25, 2002 and November 24, 2010, Merkin's $5,437.22 referral fee was used to fund loans to other clients of respondent.

A. Rebecca Celusak

On April 4, 2003, almost six months after the firm's receipt of the $50,000 Cisneros settlement monies, and well before the malpractice actions against Merkin were filed (in November 2005), respondent issued a $4,800 trust account check to his client, Rebecca Celusak, whose matter was unrelated to the Cisneros case. The check contained the Cisneros matter number (119706) and the notation "EXPERT FEES." Celusak was not an expert in the Cisneros matter.

Respondent acknowledged that the notation "expert fees" on the trust account check issued to Celusak was not accurate. Rather, the funds represented an advance to Celusak in anticipation of the settlement of her case. He surmised that the "expert fees" notation was placed there at his direction or at the direction of his secretary, upon respondent's instruction.

The $4,800 disbursement to Celusak reduced the Cisneros trust account balance to $2,579.70, which, according to respondent, represented the balance of the Gaccione firm's

attorney fee due in the Cisneros case. On October 3, 2003, the Celusak matter was settled, and respondent deposited the $5,000 Celusak settlement monies into the trust account, raising the Cisneros balance to $7,579.70.[2]

B. Sharon Saenz/Raymond McCoy

On October 9, 2003, just a week after the deposit of the $5,000 Celusak settlement monies, respondent issued a $5,069.26 trust account check to Raymond McCoy, the landlord of his client Sharon Saenz. The check contained the notation "LIEN" and the Cisneros matter number. Respondent acknowledged that there was no lien and that the disbursement had no connection to Cisneros's case. He claimed that the Cisneros matter number was used "[j]ust from an accounting standpoint," as explained below.

The purpose of the check was to satisfy a judgment that McCoy had obtained against Saenz in an eviction proceeding. Although the ethics complaint alleged that the disbursement to McCoy had reduced the balance in the Cisneros account to $2,510.44, respondent continued to claim that these monies were law firm fees, which he had used "with the understanding that when I settled the Saenz matter, that [sic] I would be able to

---

[2] The record does not explain why respondent returned $5,000, rather than $4,800.

recover that." He emphasized that, without a client matter number, he would not be able to have a check issued.

The complaint charged respondent with having violated RPC 1.8.(e) and RPC 8.4(c) in the Celusak and Saenz matters. Respondent admitted the RPC 1.8(e) violation in both cases, but denied that he had violated RPC 8.4(c) in either case because his conduct was "not intentional."

With respect to the disputed referral fee to Merkin, the complaint charged respondent with knowing misappropriation of "funds that are to be safeguarded" (RPC 1.15(a)), failure to keep disputed property separate until the dispute is resolved (RPC 1.15(c)), and conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). Respondent denied all charges because, he maintained, the monies were law firm fees, and his conduct was "not intentional."

Respondent denied that he was required to separate the amount of Merkin's fee until the dispute concerning it was resolved, claiming that "[t]here was no dispute" and that "Merkin did not take any affirmative action whatsoever" to lay claim to those funds.

KATHERINE BRUDER (XIV-2011-0062E)

On March 22, 1994, the Gaccione firm opened a file matter for Katherine Bruder, who had retained respondent to represent her in a personal injury action. Bruder had no health insurance.[3]

On June 23, 1997, after the Bruder case had been settled, an $11,500 check was deposited into the Gaccione firm's trust account. The July 14, 1997 closing statement reflected a net recovery to Bruder of $8,096.58, from which $676 was to be paid to two medical providers. Notwithstanding this net recovery entry on the closing statement, according to respondent, Bruder understood that she would not receive any proceeds from the settlement because the amount of medical providers' liens exceeded her net recovery. On July 15, 1997, respondent disbursed to the Gaccione firm a $3,000 legal fee and $403.38 in costs.

Respondent acknowledged that the closing statement did not reflect all the outstanding medical bills because they were subject to negotiation. If the providers had waived their right to payment, the monies would have been disbursed to Bruder.

---

[3] The Bruder file could not be located, presumably due to the passage of time. DiTrolio testified that he was able to retrieve only an unsigned release and closing statement from the firm's database.

The firm was not able to persuade all providers to compromise their bills. Thus, as of November 12, 1997, a net balance of $8,096.62 remained in the trust account for the payment of medical liens. As shown below, respondent disbursed those funds to other clients in unrelated matters.

A. Carl and Elva Arendt

Sometime in 1992, Carl and Elva Arendt retained respondent to represent them in a personal injury action arising out of a February 19, 1992 motor vehicle accident in New York City. On February 9, 1995, respondent filed a civil complaint on the Arendts' behalf.

On June 23, 1995, the court granted the defendants' unopposed summary judgment motion and dismissed the complaint on the ground that the action was time-barred by New Jersey's two-year statute of limitations. On May 23, 1996, the Appellate Division affirmed the dismissal, rejecting respondent's argument that New York's three-year statute of limitations applied to the Arendts' claims.

Respondent failed to inform his clients that their lawsuit had been dismissed in June 1995 and that he had filed an unsuccessful appeal. Instead, respondent misrepresented to them that their lawsuit remained pending.

Six years after the Appellate Division's decision, respondent misrepresented to the Arendts that he had settled their case for $7,000. On August 29, 2002, he prepared and forwarded a closing statement and a release to the Arendts for their signatures. The closing statement reflected $2,780 in deductions, with a net recovery of $4,220 to Carl Arendt. Six months later, on February 20, 2003, respondent sent a $4,220 trust account check to the Arendts, representing their net "settlement" proceeds.

Because there had been no settlement in the Arendt matter, respondent directed that the Bruder funds, which had remained in the trust account since 1997, be used to pay the Arendts. The $4,220 trust account check contained the Bruder matter number and the notation "MEDICAL SETTLEMENT." The $4,220 disbursement to the Arendts reduced the Bruder account balance to $3,876.62.

Respondent stated that he had used the Bruder number "[a]s a matter of convenience" because a number was required in order to obtain a check, and "that's the number [he] chose." At the time, he knew that the trust account still contained the Bruder funds because he had received a monthly statement showing the funds available for each matter number.

B. Michael Bucca #1

At an unidentified time, Michael Bucca retained respondent to represent him in a personal injury action against several defendants. Respondent obtained a judgment against only one of the defendants, but was not able to collect on it.

On May 21, 2003, respondent disbursed $3,100 to Bucca by way of a Gaccione firm trust account check containing the Bruder matter number (6739) and the notation "LIEN PAYMENT." Respondent admitted that the reference to a lien on the check was "inaccurate" and that Bucca's matter was unrelated to Bruder's. The disbursement reduced the Bruder funds to $776.62.

Upon the Gaccione firm's discovery of respondent's unauthorized disbursements to the Arendts and Bucca, and at the firm's request, respondent remitted $7,320 to the firm on March 9, 2011. DiTrolio testified that, despite numerous attempts, Bruder could not be located and, therefore, "at this point," the money had to be deposited with the State of New Jersey. DiTrolio testified that, according to the firm ledger for the Bruder matter, she was to receive $8,096.58. Although there were two outstanding medical bills, neither was ever paid.

In the Arendt matter, respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), and RPC 8.4(c). He admitted only the RPC 1.4(b) and RPC 8.4(c)

violations, conceding that, rather than disclose to the Arendts that their case had been dismissed and that the appeal was unsuccessful, he told them that the case had settled.

In the Bucca matter, respondent was charged with and admitted violating RPC 1.8(e).

In the Bruder matter, respondent was charged with the knowing misappropriation of client funds and RPC 8.4(c), which he denied. In addition to Bruder, respondent used other client monies for purposes unrelated to the client matter. In all cases, he asserted the same defense, which he summarized as follows:

> I don't believe I did so [knowingly misappropriated client funds] because there were sufficient funds that were the firm's funds that were in [sic] trust account at the time that I utilized it and I believed I was using firm funds.
>
> . . . .
>
> I needed to have a control number in order to get a check. And it was a matter of expedience to put down a number.
>
> [3T78-1 to 9.][4]

As stated previously, respondent claimed that firm funds held in the trust account constituted an "equity cushion,"

---

[4] "3T" refers to the transcript of the November 1, 2013 hearing before the special master.

which, as a shareholder, he could draw against and, essentially, use as he saw fit. He presented no evidence to support that claim.

Gaccione and DiTrolio testified that, generally, upon receipt of a non-contingent retainer fee, the monies were deposited in the trust account. Neither of them was asked whether the trust account contained an equity cushion. Indeed, DiTrolio testified:

> I mean if there's designated funds for a client in a particular trust account, those are that client's funds.
>
> Q Is it your understanding that client funds are not fungible?
>
> A If by fungible you mean in the accounting, move them around. My understanding is each trust account has an independent ledger, an accounting, and must be reconciled, independent of one another.
>
> Q So the monies in your attorney trust account is not just one great pot of money that then can be used for whichever client matter number is designated as -- I'm paraphrasing Mr. Malanga's testimony.
>
> A I understand. I don't think so. It doesn't -- it's not something that comes to my mind as a possibility.
>
> [5T65-14 to 5T66-6.][5]

[5] "5T" refers to the transcript of the December 5, 2013 hearing before the special master.

Further, respondent offered no documentary evidence establishing that earned fees were maintained in the trust account for any prolonged period of time. Respondent admitted that, although he was able to monitor the Gaccione firm's trust account balance on a daily basis, he did not know the balance for other attorneys' individual client matters. Yet, he also acknowledged that he received monthly statements identifying the funds held in trust for his individual clients. In addition, the funds on account for each client matter were recorded on the client's ledger card. He did not claim that the monthly reports differentiated between trust account funds belonging to clients and trust account funds belonging to the firm. Nor did he provide documents to support such an assertion.

Finally, the Gaccione firm had no procedure in place for its shareholders to access the so-called equity cushion. Rather, trust account funds could be disbursed only upon the presentation of a disbursement sheet identifying the client name, the matter number, and the purpose of the disbursement. This explains why, as a matter of "expedience," respondent claimed he was required to access the "equity cushion" by submitting disbursement sheets that misrepresented the client funds that were being disbursed and the purpose of those disbursements.

Thus, when respondent paid the "settlement" monies to the Arendts and lent money to Bucca, he used the Bruder matter number because the firm's policy required such detail, even though, he claimed, he used firm funds to pay the Arendts and Bucca. Indeed, respondent asserted that, if Bruder had demanded the $8,096.58 net recovery, "there would have been sufficient funds in the trust account to pay it." Because of the equity cushion, he denied that the funds would have been those of another client.

STEPHEN HORVATH (XIV-2011-0062E)

On an unidentified date, Stephen Horvath retained Gaccione firm attorney James Krupka to represent him in a personal injury action arising out of a July 2, 2001 motor vehicle accident in South Carolina. When Krupka left the firm, respondent assumed responsibility for the case.

On July 1, 2004, respondent filed a complaint in federal court in New Jersey on Horvath's behalf. Respondent failed to effect service on any of the defendants by the October 29, 2004 deadline. Thus, on December 2, 2004, the clerk's office notified respondent that the matter would be dismissed on December 27, 2004, unless he submitted proof of service prior to that date. According to the ethics complaint, respondent informed the court

that the litigation had been settled. Respondent, however, claimed to have no recollection of doing so. On December 28, 2004, the court dismissed the litigation. The dismissal order provided that the court had been informed that the matter had settled.

Despite the dismissal, respondent misrepresented to Horvath that his case had settled for $10,000, which was respondent's opinion of the case's value. Moreover, he caused a release to be prepared for Horvath's signature. Respondent intended to fund the "settlement" with monies from the firm's business account.

On January 27, 2005, respondent issued a $2,656.70 business account check to Horvath, claiming this sum represented the balance due after deducting $1,500, which respondent had loaned to Horvath in October 2004. The check contained the Horvath matter number and the notation "MEDICAL CLAIM." On that same date, respondent sent Horvath the check and a closing statement that reflected the $10,000 "settlement" and $7,343.30 in "disbursements."

On October 25, 2004, prior to the Horvath "settlement," respondent had disbursed $1,500 to Horvath from the business account. The check contained the Horvath file number and the notation "TRANSPORTATION COSTS."

Between September 2006 and February 2008, respondent issued three more business account checks, totaling $5,500, all referencing the Horvath matter number.[6] Two checks, totaling $4,000 were issued to Horvath. The third check, in the amount of $1,500 was issued to Bob Freeman.

Respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), RPC 1.8(e), RPC 1.15(a) (knowing misappropriation of law firm funds), RPC 3.2, RPC 3.3(a)(1), and RPC 8.4(c) and (d). Respondent admitted that he had violated RPC 1.3, RPC 1.4(b), RPC 1.8(e), and RPC 8.4(c), although the latter admission was limited to misrepresenting to the client the status of the case. He denied the remaining charges.

Respondent denied that he had knowingly misappropriated law firm funds when he used monies from the business account to fund the "settlement" of Horvath's case. According to respondent, "it was in the best interests of the firm that it be done that way" and the funds belonged to the partners. Here, too, his defense mirrored that asserted in the knowing misappropriation of client funds cases.

---

[6] Fleming explained that checks drawn against the business account represent the payment of expenses chargeable to that client matter.

Specifically, according to respondent, the funds in the business account belonged to the firm's partners; there were "no written guidelines or any protocol or policy invoked at the time" regarding that account; and therefore, he "had the authority to utilize the business account." Although Gaccione and DiTrolio agreed that there were no written policies, Gaccione asserted that business account funds were to be used to pay firm bills and to advance costs in contingent fee cases. DiTrolio testified that, although there was no written policy forbidding the use of business account funds in the manner used by respondent, he simply was "not aware of" any policy, discussion, practice, or course of dealing among the shareholders that would permit it. Further, according to DiTrolio, respondent never disclosed that he was using the business account monies in such a fashion. If he had, DiTrolio would have objected because, based on his knowledge, "we're not allowed to advance expenses to clients."

When asked whether the shareholders would have deducted these unorthodox disbursements from respondent's year-end distribution, DiTrolio answered:

> Well, I guess that assumes we would accept the practice. But accepting the practice, if the logic is that he's effectively taking advances on his interest in the firm, and by definition, before we would distribute at the end of the year that

money would have to be added back because we all have that piece. Otherwise we're splitting the net unaware of the fact that there's these deductions in advance.

[5T63-24 to 5T64-7.]

CHRISTINE MYRKALO (XIV-2011-0062E)

Christine Myrkalo retained respondent to represent her in a personal injury action arising from a 1998 assault. On August 7, 2000, respondent filed a complaint on Myrkalo's behalf.

The ethics complaint alleged that the court dismissed the matter on November 1, 2004. However, respondent claimed that he had settled the case with one defendant and obtained a default judgment against another. Although respondent recovered no monies on behalf of Myrkalo, he made a number of payments to her or on her behalf from the Gaccione firm's business account. The disbursements from the account were as follows:

Date	Payee	Notation	Amount
12/6/2001	Pressler & Pressler	Installment Payment	$150.00
12/9/2005	Christine Myrkalo	Expert reimbursement	$1,200.00
12/14/2005	American Express	Continental airline ticket from Nwk to Fla	$147.70
3/21/2006	Christine Myrkalo	Expense reimbursement	$500.00
4/12/2006	American Express	Corporate Account ****-******-*1005	$5.00
4/12/2006	American Express	Corporate Account ****-******-*1005	$154.30

Respondent stated that the payments were for certain expenses of Myrkalo, such as food and utilities, as well as air travel to Florida so that she could help her mother, who resided

there. He used his American Express corporate account to purchase the tickets because "it was just easier . . . to put on my credit card."

Respondent could not explain the purpose of the notations "expert reimbursement" and "expense reimbursement" on two of the checks. He conceded, however, that those explanations would have been placed on the disbursement sheet either by respondent or his assistant, at respondent's direction.

As to whether these disbursements were made without the Gaccione firm's knowledge or approval, respondent claimed that he had the implicit authority to disburse the monies and, therefore, no approval was necessary. More precisely, he testified: "I had the ability to issue checks and that's what I did."

The ethics complaint charged respondent with having violated RPC 1.8(e), RPC 1.15(a) (knowing misappropriation of law firm funds), and RPC 8.4(c). Respondent admitted to having violated RPC 1.8(e), but only in connection with the $150 payment to Pressler & Pressler. The other disbursements were made after Myrkalo's case was no longer pending.

Respondent denied that the disbursements represented the knowing misappropriation of law firm funds and further denied having violated RPC 8.4(c):

> Well, I don't believe I was dishonest or was fraudulent in any way, shape, or form. My intentions were to help a client, one see her ill mother in Florida, who she had no other means to get down there other than by me providing the funds to do so. And on two other occasions to give her money that she could live upon. That was my intention with regard to that.
>
> [3T93-13 to 20.]

TINA CALIA (XIV-2011-0062E)

On August 25, 2000, respondent was retained to represent Tina Calia, a minor, for injuries sustained in a motor vehicle accident. Respondent never filed a complaint on Calia's behalf and, at some point, her claims were time barred because he had "missed" the statute of limitations.

Although he recovered no monies for Calia, respondent told her that he had obtained a $50,000 settlement. On February 9, 2010, he drafted a release. On April 16, 2010, he prepared a closing statement, reflecting receipt of the $50,000 on that date and identifying $13,143.38 in disbursements. On April 27, 2010, respondent paid Calia the sum of $36,856.62 with his personal monies, claiming that this was the exact amount that she would have received had litigation ensued, because the defendant's insurance policy had a $50,000 limit.

Respondent stated that the Gaccione firm became aware of the Calia matter "when things started to be disclosed in 2010."

As had been the case with Garrone, Calia was called into the office, where respondent confessed his actions and advised her to seek counsel, which she did.

Calia sued the firm. Because the matter had not been reported previously to the Gaccione firm's malpractice carrier, there was no insurance coverage. Respondent paid the full $225,000 settlement, in addition to the $36,856.62 in "settlement" monies that he had already paid to Calia.

The ethics complaint charged respondent with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), and RPC 8.4(c). Respondent admitted that he had violated RPC 1.3, RPC 1.4(b), and RPC 8.4(c) because he had misrepresented to Calia that her case had settled. Respondent denied having violated RPC 1.1(a) and RPC 1.4(c).

CARLA PRICE (XIV-2011-0062E)

Carla Price retained respondent to represent her in a personal injury action arising out of injuries sustained in a July 1991 motor vehicle accident. On April 4, 1996, a settlement was reached with the Joint Underwriting Association/Market Transition Facility (the JUA/MTF), the insurer of the other driver. At the time, the JUA/MTF was deferring settlement payments for eighteen months, with accrued interest.

Price accepted a settlement of $5,995, but did not want to wait eighteen months for the payment of her settlement. She, thus, decided to assign her net settlement proceeds to respondent's grandfather.

Respondent denied that his grandfather was his client, stating that he had managed his grandfather's investments under the terms of a power of attorney for which he did not charge a fee. As part of his responsibilities under the power of attorney, respondent opened a brokerage account. Some cash was reserved so that it could be used to buy small judgments that generated good returns, such as those paid by the JUA/MTF.

On April 18, 1996, respondent confirmed, in writing, that Price was entitled to $3,070 in net proceeds from the $5,995 settlement, but, because she was selling her settlement at a five percent discount, she would receive a total recovery of $2,916.50, about $150 less. On April 22, 1996, Price assigned to respondent's grandfather her right to the settlement proceeds. Price, thus, received the funds much sooner than she would have if she had waited for the full JUA/MTF settlement. Respondent denied having derived any benefit from the assignment.

On April 26, 1996, respondent sent to Price a $2,916.50 check and a closing statement, which included a $1,775 legal fee to the Gaccione firm, and $480 to Dr. Steven Clarke.

More than three years later, on November 19, 1999, the MTF sent a $5,995 check to respondent, which was deposited into the trust account on that date. Despite the representations on Price's closing statement, respondent failed to disburse the funds to his grandfather, to the Gaccione firm, or to Dr. Clarke at that time. Instead, on May 30, 2001, $5,000 was disbursed to respondent's client, John Salvanto, with the notation "judgment." Respondent could not explain why the monies were not distributed to Price's creditors, although he acknowledged that they should have been. As shown below, respondent disbursed $5,000 to another client.

A. John Salvanto #1

On May 29, 2001, respondent issued a $5,000 manual trust account check to his client, John Salvanto, whose personal injury action was pending. Although the check did not reference a client matter number, it contained two handwritten notations: "Judgment" and "Price." Respondent denied that any of the writing on the check was his, other than the signature. He did not know why the word "judgment" was on it. He admitted that the Salvanto and Price matters were not related.

Respondent stated that the $5,000 was a loan to Salvanto, who was medically disabled "and in desperate need of funds in order to maintain his house." Respondent intended to recoup the

monies from the proceeds of the Salvanto matter, when it was resolved. Although respondent recovered approximately $100,000 for Salvanto, he had forgotten about the $5,000 loan, and, therefore, he did not refund the $5,000 "loan" to the Price account. In September 2011, he was confronted about the payment to Salvanto, at which point he remitted $5,000 to the Gaccione firm.

In the Price matter, the complaint charged that respondent's representation of his grandfather was directly adverse to his representation of Price, a violation of RPC 1.7(a)(1); that, by lending monies to Salvanto, respondent had entered into a business transaction with the client in the absence of "appropriate disclosures," a violation of RPC 1.8(a)(1)-(3); and that he had provided financial assistance to Salvanto in connection with pending or contemplated litigation, a violation of RPC 1.8(e). Further, respondent was charged with knowingly misappropriating both client and law firm funds and having engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

Respondent admitted to having violated only RPC 1.8(e). He denied that he had knowingly misappropriated client or law firm funds. Rather, respondent asserted, there was plenty of money in the trust account, representing fees, which he used to help

Salvanto meet his living expenses and which he intended to replenish from Salvanto's settlement.

INFINITY MORTGAGE CORPORATION (XIV-2011-0062E)

Nicholas Mastrandrea, an officer of Infinity Mortgage Corporation (Infinity), retained respondent to (1) pursue an action on the company's behalf against Banco Popular and (2) defend Infinity's interests in an employee action filed in federal court.

Respondent filed a complaint against Banco Popular, and the matter settled for $750,000. Another matter settled, prior to the filing of a complaint, for almost $250,000.

Shortly thereafter, respondent defended Infinity in a lawsuit alleging violations of the federal wage and hourly rate act. The case was settled, and, as of October 13, 2008, a $37,817.32 balance remained in the Infinity matter for any additional employee claims. Yet, instead of maintaining the Infinity funds intact, respondent disbursed them to two other clients.

A. John and Marianna Valli

John and Marianna Valli retained respondent to represent them for injuries they had sustained in a pedestrian accident on August 10, 2000. On August 9, 2002, respondent filed a complaint

in federal court in New Jersey against the driver of the car, but he was unable to serve it within the period for doing so.

On December 16, 2002, the court issued a notice stating that, at a December 30, 2002 hearing, it would determine whether to dismiss the matter. Respondent failed to appear at the hearing, denying that he had received notice of it. Accordingly, the court dismissed the Valli matter. Respondent did not recall having received the dismissal order.

Respondent did not tell his clients that their case had been dismissed. Instead, he told them that the matter had settled for $40,000, which was his assessment of the case's value.

Respondent prepared a release for the Vallis' signatures. On May 27, 2009, a $30,000 trust account check was issued to the Vallis. The check contained the Infinity client matter number and the notation "PROCEEDS FROM SETTLEMENT." The Vallis had no connection to the Infinity matter.

As with all other cases, respondent testified that he had used the Infinity matter number because that was the only way of gaining access to the funds in the trust account, which, he insisted, were firm funds representing legal fees that had not been disbursed.

The $30,000 disbursement to the Vallis reduced the balance in the Infinity matter to $7,817.32.

B. Michael Garrone

As previously stated, more than three months later, in August 2009, respondent disbursed $775 of the Infinity funds to his client, Garrone. The trust account check contained the Infinity matter number and the notation "INTEREST." Respondent conceded that he did not have Infinity's permission to pay its funds to Garrone. The $775 disbursement reduced the balance in the Infinity matter to $7,042.

At some point, the Gaccione firm learned of the use of the Infinity funds to pay the Vallis and Garrone. DiTrolio so informed respondent, who complied with DiTrolio's request that he reimburse the firm.

As to Infinity, respondent was charged with the knowing misappropriation of client funds and RPC 8.4(c). He denied the knowing misappropriation charge because, he claimed, the firm had always maintained more than $100,000 in fees in the trust account and he had used the Infinity matter number simply "to expedite" access to the trust account monies. Although respondent had admitted, in his answer to the complaint, that he had violated RPC 8.4(c), he summarily denied the charge at the hearing.

With respect to the Valli matter, respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), RPC 3.2, and RPC 8.4(c). He admitted having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), and RPC 8.4(c), by deceiving the Vallis about the status of their case. Although respondent had admitted to gross neglect in his answer to the complaint, he testified that he was "not so sure" because he had filed the Vallis' complaint in a timely fashion. He was simply unable to serve the defendants.

APPLIED CREATIVE TECHNOLOGIES (XIV-2011-0085E)

The second count of the ethics complaint focused on (1) respondent's representation of Applied Creative Technologies, S.A. (ACT) and Calibration Certification & Testing, S.A. (CCT) (collectively ACT), in litigation against two companies identified as ETI and TTI, and (2) his alleged unauthorized use of ACT's $20,000 retainer.

On April 17, 2001, Dr. George Passalidis retained respondent to represent ACT and him, individually, in litigation against ETI and TTI and their officers. Passalidis paid only $15,000 of the $20,000 retainer required by the firm. Although Passalidis acknowledged that he and respondent had never discussed into which account the $15,000 retainer would be

placed, he understood, based on his "experience," that the $15,000 retainer would be kept in the Gaccione firm's trust account and used to fund the lawsuit.

Respondent disputed the reasonableness of Passalidis's understanding. He pointed out that the firm's non-contingent fee retainer agreement was silent with respect to the identity of the account into which the retainer fee would be deposited. Additionally, as Passalidis had conceded, they had never discussed the disposition of the retainer.

As shown below, although ACT's retainer was deposited in the trust account, the funds did not remain intact and were not used for the ACT litigation. Rather, the funds were lent to other clients.

A. Barbara Bucca

On December 17, 2001, respondent issued to Barbara Bucca a $5,000 business account check containing the ACT matter number and the notation "EXPERT FEE." At the time, the business account held no funds belonging to ACT, although, according to respondent, it contained the shareholders' monies. Respondent claimed to have no idea why the ACT matter number was on the check to Bucca.

Barbara Bucca (Mrs. Bucca) was not an expert in the ACT litigation. Rather, she was the mother of Michael Bucca (Bucca),

another client of respondent, as noted above. According to respondent, while he was representing Bucca in his personal injury action, Mrs. Bucca had informed respondent that Bucca had been arrested on criminal charges. Because Mrs. Bucca did not have the resources to hire a criminal lawyer for Bucca, respondent disbursed $5,000 to her for that purpose.

Respondent thought it important that Bucca be neither incarcerated nor convicted of a crime, so that he would be available to testify at the civil trial and his credibility would not be impugned by the criminal matter.

On November 13, 2009, the $5,000 payment to Mrs. Bucca was written off by someone at the firm. Respondent denied that he was the shareholder who had taken that action. When the Gaccione firm brought the loan to respondent's attention, he remembered the disbursement and repaid the $5,000 to the firm within a day or two, on March 9, 2011.

The OAE charged respondent with having violated RPC 1.8(e), by providing financial assistance to Bucca while his case was pending, and knowingly misappropriating law firm funds.

At the hearing, respondent admitted that he had violated RPC 1.8(e). He denied that the $5,000 loan was a knowing misappropriation of law firm funds, however, because his intention was to avoid Bucca's incarceration and/or conviction,

in order to maximize the client's recovery in the personal injury case.

IRREGULARITIES WITH THE ACT RETAINER (XIV-2011-0085E)

As previously noted, on July 16, 2001, the $15,000 ACT retainer was deposited into the Gaccione firm's trust account. As of November 30, 2001, the retainer balance was $12,235, after proper disbursements had been made for legal fees and costs. The complaint alleged that, thereafter, respondent used the ACT retainer to make unauthorized payments to three other clients, namely, Lee Nilsen, the Estate of Frank Malanga (respondent's grandfather), and John Stanford.

A. Lee Nilsen #1

On March 14, 2002, respondent issued to his client, Lee Nilsen, a $10,000 trust account check containing the ACT matter number and the notation "EXPERT FEE." The disbursement reduced the ACT trust account balance to $2,235.

Nilsen was not an expert in the ACT matter. Rather, he was another client of respondent, whose matter was unrelated to ACT's. Respondent explained that a settlement of Nilsen's matter was imminent, but, in the meantime, Nilsen, who was disabled, needed funds to pay his "living expenses," including a mortgage. Thus, respondent decided to advance funds to Nilsen, from the

ACT funds, as he could recoup that amount from Nilsen's anticipated settlement.

Thereafter, respondent obtained a $360,000 settlement for Nilsen. Of that amount, $12,000 was deposited into the trust account and credited to the ACT matter. Although respondent had loaned $10,000 to Nilsen, respondent replaced $12,000 in ACT's account. As seen below, the additional $2,000 was attributable to yet another client, Frank Galante. This deposit raised the ACT balance to $12,235.

B. Estate of Frank Malanga

On September 25, 2002, a month after returning $12,000 to the ACT account, respondent issued a $10,000 trust account check to the estate of Frank Malanga (his grandfather's estate). The check bore the notation "PURCHASE OF JUDGMENT" and the ACT matter number. According to respondent, this check "indicate[d] that there was a purchase of the judgment for $10,000 and then placed into the estate . . . account . . ., and then disbursed to the four beneficiaries of the estate." Respondent had "no recollection about this particular account and why it would be drawn from that particular account."

According to the ethics complaint, the disbursement of $10,000 to the grandfather's estate reduced the ACT funds to

$2,235. Respondent denied the allegation, asserting, instead, that the funds were not trust funds.

C. Lee Nilsen #2

On January 17, 2003, respondent issued to Lee Nilsen a $1,835 trust account check, which contained the ACT matter number and the notation "EXPERT FEE."

Nilsen was not an expert in the ACT matter, but rather was respondent's client. As before, respondent testified that the disbursement was for the purpose of providing his "totally disabled" client with funds and, further, that the presence of the ACT matter number on the check was due to the firm's requirement that a trust account check could issue only against a specific matter number.

The disbursement to Nilsen reduced the ACT balance to $400.

D. John Stanford

On July 30, 2003, respondent issued a $343 business account check to his client, John Stanford, whose matter was unrelated to ACT. The check contained the ACT matter number and the notation "JUDGMENT."

Respondent believed that the $343 check represented the balance due and owing to Stanford from the settlement of his case. As with the $1,835 trust account check to Nilsen, respondent testified that the ACT matter number may have been

placed on the check because a matter number was required on the control sheet in order to obtain it.

It was not until February 7, 2011, almost eight years later, and only after respondent was confronted by the Gaccione firm, that he remitted the sum of $11,835 to the Gaccione firm to replenish the ACT funds. The following week, the Gaccione firm returned the unbilled retainer, in the amount of $12,235, to ACT.

In respect of his handling of the ACT funds, respondent was charged with having violated RPC 1.8(e), for providing financial assistance to Nilsen and Stanford. He admitted that violation as to Nilsen, but claimed that the funds to Stanford may have actually been due to the client.

Respondent testified that the $10,000 represented firm funds, notwithstanding the presence of the ACT matter number on the check:

> First of all, there was no requirement that the ACT retainer be placed in trust. And number two, a substantial amount of work had been performed on the ACT file. And so it was my understanding that those were firm funds.
>
> [3T130-12 to 17.]

In short, respondent could not recall why the check reflected the ACT matter number. Nevertheless, when he was "alerted" by the firm, he repaid the $10,000, although he

stated, at the time, that he had no recollection "of this" and that he did not believe the amount "was something that should be reimbursed." He refunded the money because he "didn't want to have any outstanding issues with the firm."

ACT LITIGATION (XIV-2011-0085E)

On August 29, 2001, respondent filed a complaint on ACT's behalf. On March 18, 2004, the case was dismissed on summary judgment, with prejudice, except for a breach of contract claim.

Respondent did not tell his clients about the dismissal. Instead, he informed them that he was engaged in active litigation, appeals, settlement negotiations, and bankruptcy proceedings against ETI and TTI. To support his misrepresentations, respondent fabricated an order for judgment, in favor of the clients, for the sum of $1,327,470, plus interest and taxed costs, and $300,000 in consequential damages.

On February 18, 2009, respondent filed another complaint on his clients' behalf, which was dismissed with prejudice, in May of that year. Respondent testified that the complaint was dismissed because he had miscalculated the expiration date of the statute of limitations.

Likewise, respondent failed to inform his clients of the second dismissal. Again, he fabricated two orders for judgment,

in favor of the clients, for the sum of $1,327,470 on the first count of the complaint and the sum of $1,347,265 on the second count.

The orders purportedly were signed by an unnamed judge of the Superior Court and were stamped as received and filed by the Deputy Clerk of the Superior Court. Specifically, respondent testified that he had fabricated the orders to "buy time" while he attempted to rectify the dismissal of the complaint. He emphasized that he had provided the orders only to his client, Passalidis.

In February 2010, respondent told his clients that he had levied on an ETI account and obtained just under $100,000; that he intended to apply for an order to turn over funds to the clients; and that he would continue to search for additional funding sources to satisfy the judgments.

On September 15, 2010, respondent informed his clients that he had been successful in establishing a "priority claim," presumably in the ETI bankruptcy case. In January 2011, an attorney contacted DiTrolio on behalf of ACT, stating that the client was awaiting payment on two judgments obtained by respondent. DiTrolio asked the attorney to send him the documents that he had received from ACT. When DiTrolio received copies of the judgments, he informed the attorney that he

believed they were not authentic, as he had searched the firm's accounting system and had not seen any receipt of proceeds for that client.

In August 2011, the clients filed a malpractice action against respondent and others, which settled for $1 million. The Gaccione firm's insurance carrier paid $650,000, and respondent paid $350,000.

For his handling of the ACT litigation, the complaint charged respondent with having violated RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(b) and (c), RPC 3.2, RPC 8.4(c), and RPC 8.4(d). Respondent admitted that he had violated RPC 1.3, by his "negligent" calculation of the statute of limitations expiration date, and RPC 1.4(b), by his failure to tell the clients immediately that the second complaint had been dismissed. He also admitted that he had violated RPC 8.4(c), by failing to tell his clients the "true nature of the dismissal of the complaint" and by fabricating the orders.

Respondent explained that he had created fictitious documents in both the Garrone and ACT matters because he was "trying to buy time to figure out a way to get [his] clients to be made whole."

According to respondent, none of the fake documents were either submitted, or even intended to be submitted, to anyone

other than the client. The signatures on the court orders were simply "scribbles." Respondent never signed the name of an actual judge or any other person involved with the administration of justice.

Respondent denied that he had violated RPC 8.4(d) because the fabricated documents were never presented to anyone other than the client. Respondent promised that he would never fabricate a document again.

FRANK GALANTE (XIV-2011-0085E)

The third and final count of the ethics complaint charged respondent with knowing misappropriation of client and law firm funds.

Frank Galante retained respondent to represent him in an action against a cruise line. On June 26, 2001, respondent obtained a $400,000 recovery for Galante.

As noted previously, the closing statement in the Nilsen matter had listed a $12,000 loan to Nilsen from the ACT matter, despite the fact that only $10,000 had been taken from ACT's funds. Respondent denied this allegation because he claimed that the $10,000 represented law firm funds, not client funds. When the Gaccione firm investigated the discrepancy, it discovered

that respondent had paid Nilsen the additional $2,000 from firm funds attributable to Galante, which respondent admitted.

A. Lee Nilsen #3

On April 19, 2001, two months before the deposit of the Galante settlement monies in the trust account, respondent issued to Nilsen a $2,000 business account check containing the notation "EXPERT FEE" and the Galante matter number. Nilsen was respondent's client, not an expert in the Galante matter.

Respondent advanced the funds to Nilsen because he needed money for expenses. Respondent did not know why the check bore the Galante matter number. In this case, he acknowledged that the funds paid to Nilsen belonged to the firm.

Also, on April 19, 2001, respondent prepared a promissory note, from Nilsen to Galante, providing for the repayment of the $2,000, at seven percent annual interest. Respondent testified that, typically, he would not generate a promissory note for a distribution from the business account.

Respondent admitted that, in total, Nilsen was paid $13,835, to which he was not entitled. He explained, however, that Nilsen was disabled at the time and, further, the firm was repaid from the proceeds of Nilsen's settlement.

B. John Salvanto #2

On July 23, 2001, prior to the disbursement of the $400,000 settlement to Galante, respondent issued to John Salvanto a $5,000 trust account check containing the Galante matter number and the notation "DISBURSEMENTS." Respondent testified that he had no idea why the Galante matter number appeared on the check, but claimed that the monies represented law firm funds that were in either the trust account or the "regular account."

Respondent claimed that, although the firm had been repaid the first $5,000 loan to Salvanto from Salvanto's settlement proceeds, he had forgotten about this second advance. However, as soon as he learned of the missing funds, he reimbursed the firm with personal monies.

According to respondent, the firm had requested reimbursement for six to nine matters, some of which were more than ten years old. He explained the process as follows:

> When I left the firm, the firm was doing some investigation of some of these files and some of the accounts. And when they would bring it to my attention that there was a discrepancy or an issue with regard to moneys that were not recouped, they would provide me with the documentation, I would review it, and if it was accurate, I immediately wrote a check to the firm. And I did that on every single occasion and every occasion but one it was clear that those moneys needed to be reimbursed. The one that I had testified to earlier that I wasn't clear about because of the way the checks

> were written, was the $10,000 check on the Estate of Malanga. But I did repay that, in any event. So I repaid every single penny that the firm had indicated to me in the course of their investigation that the moneys were not recouped.
>
> [4T32-5 to 22.][7]

Based on these facts, respondent was charged with having violated RPC 1.7(a)(1), because his representation of Nilsen was "directly adverse" to Galante; RPC 1.8(e), because he financially assisted Nilsen and Salvanto; RPC 1.15(a), because he knowingly misappropriated client and law firm funds; and RPC 8.4(c).

Respondent denied that he had engaged in a concurrent conflict of interest with Nilsen and Galante because he did not see how Nilsen's execution of a promissory note in favor of Galante would be adverse to the latter "who would then have a basis to be repaid moneys that were advanced to . . . [Nilsen]." Nevertheless, in respondent's view, the funds were not Galante's. Rather, they were firm funds with the "added protection" of a promissory note.

Respondent admitted having violated RPC 1.8(e) by providing financial assistance to Nilsen and Salvanto. He continued to

---

[7] "4T" refers to the transcript of the November 6, 2013 hearing before the special master.

deny that he had knowingly misappropriated client funds because the monies belonged to the firm and were located in either the trust or business accounts. He denied having knowingly misappropriated law firm funds because, "based upon [his] equity position in the firm," [he] had at any given time at least 20% of those firm funds."

Finally, respondent denied having violated RPC 8.4(c).

MITIGATION

Respondent advanced several mitigating factors. First, his conduct occurred during the period encompassing his mother's diagnosis, treatment of, and death from cancer. During that time, he was his mother's caregiver. Second, he repaid all monies that had been misused, and contributed a substantial amount of personal funds toward the settlement of the malpractice actions that arose from his conduct. Third, he was of good character, as attested to by ten individuals who submitted character letters, describing respondent as dedicated, compassionate, generous, and helpful.

Respondent, a former member of the District VC Ethics Committee, testified that he had been a certified civil trial attorney since 1994. He was involved in the creation of the first Inn of Court in New Jersey in 1987 and had remained active

with the group. He was active in the Essex County Bar Association and served as the chair of the civil litigation committee for approximately eight years. Ten of his cases had resulted in published opinions, all of which he described as "precedent setting."

Respondent also was involved in "a lot of charity work" through the Montville UNICO, a service organization. He held various leadership positions in the organization over the years and had been its general counsel for "at least ten years."

Finally, respondent related events in his life between 2009 and 2010, when many of his unethical acts were committed:

> Sure. Actually I have to take it back to 2007. My -- my dad suffered a massive stroke. We were celebrating his birthday, ironically, and he died a few days later. And my mom was absolutely devastated and never recovered from that. And being that I'm the oldest son, I took it upon myself to make sure she was cared for. And in 2009 she was diagnosed with pancreatic cancer. And I was responsible for all of her medical care, taking her to various doctors, interviewing surgeons, taking her to Slone [sic] Kettering for her ultimate surgery, taking her to all the medical care facilities that she needed to go to for chemotherapy and the like. And although she was in remission for a while, she – she contracted it back again and it spread throughout all of her body and the last year it was not very good. And she wound up dying in January, late January of 2011, which was right in the middle of when I was transitioning from leaving the firm. So I had – I had a lot on my plate at that time. I was trying to maintain a practice. I

> was trying to deal with my mom. I was trying to deal with these — especially the ACT and the Garrone matters were just killing me. I mean they were just killing me. And so I started doing -- I was making not so good judgments. Again, not by way of an excuse but of an explanation. So that was -- that was what was going on in 2009 and 2010.
>
> [4T50-3 to 4T51-5.]

SPECIAL MASTER'S FINDINGS

The special master recommended respondent's disbarment for the knowing misappropriation of client and law firm funds. The special master found that respondent had committed numerous other ethics infractions as well.

To avoid unnecessary repetition, we summarize the special master's findings by category rather than on a case-by-case basis.

A. Loans to Clients and Others/Improper Business Transactions

The complaint alleged that respondent had made improper loans to his clients, a violation of RPC 1.8(e), and, in some cases, RPC 8.4(c). The special master accepted respondent's admission to having violated RPC 1.8(e) on ten occasions: loans to Celusak (from the disputed Merkin fee), Saenz (from the disputed Merkin fee), Bucca #1 (from Bruder's funds), Horvath (from the Gaccione firm's business account), Myrkalo (from the Gaccione firm's business account), Salvanto #1 (from funds

assigned by Price to respondent's grandfather), Nilsen #1 and #2 (from the ACT retainer), Nilsen #3 (from the Gaccione firm funds), and Salvanto #2 (from Galante's funds).

In connection with only the Salvanto #1 loan, respondent was charged with violating RPC 1.8(a), which prohibits a lawyer from acquiring "an ownership, possessory, security or other pecuniary interest adverse to a client," unless certain disclosures are made. The special master found that respondent violated this rule, reasoning that, even though the interest-free loan benefited Salvanto, the rule still required respondent to comply with disclosure requirements.

In addition, the special master found that, with respect to each of the ten loans identified above, respondent violated RPC 8.4(c) because, in order to obtain the checks, he intentionally misled others about the true nature of the payments.[8]

The special master rejected respondent's claim that, as a shareholder, he could use trust and business account monies as he saw fit. In this regard, she noted that Gaccione firm attorneys had no authority to provide financial assistance to a client, and there was no confusion about this fact, particularly in light of the clear language in RPC 1.8(e) itself. Further,

---

[8] The complaint did not charge respondent with having violated RPC 8.4(c) in connection with the Bucca #2 loan.

Gaccione and DiTrolio both testified that such acts would be objectionable and not approved.

The special master accepted DiTrolio's testimony that, prior to the hearing in this matter, respondent had never claimed that, due to his ownership interest in firm funds, he had a right to use them as he saw fit. She noted that, as a "seasoned practitioner" and a former DEC member, respondent understood his professional obligations and, further, the RPCs "apply regardless of whether a firm's policies or procedures expressly reiterate and encompass them."

The special master rejected respondent's argument that, because Mrs. Bucca was not his client, he did not violate RPC 1.8(e) by lending $5,000 to her (Bucca #2/ACT funds). First, the special master noted, the monies were paid to Mrs. Bucca only because Bucca was in jail. Second, the money was for Bucca's benefit, that is, to retain a criminal attorney for him.

Finally, with respect to the $343 alleged loan to Stanford, from the ACT retainer, the special master noted the inconsistency in respondent's answer to the complaint and his testimony at the hearing. Thus, she found that the record lacked clear and convincing evidence that the disbursement to Stanford was a loan, as respondent had admitted in his answer, rather

than the payment of a settlement or judgment due to Stanford, as respondent had testified at the hearing.

B. Conflict of Interest

The special master found that respondent violated RPC 1.7(a)(1) by his simultaneous representation of both Galante (the putative lender) and Nilsen (the putative borrower) in a loan transaction, without the disclosures and informed consent required by the Rule. Here, the special master noted that, although the loan was made to Nilsen from the firm's business account, respondent had characterized that disbursement as an expert fee and attributed that expense to the Galante matter, and, further, directed Nilsen to execute a promissory note in Galante's favor, thereby "making Mr. Galante responsible, or appear to be responsible, for the advancement of funds to Nilsen" when, in fact, Galante neither knew of nor authorized any such loan.

C. Mishandling Litigation

Respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b) and (c), and RPC 8.4(c) in the Garrone, Arendt, Horvath, Calia, Valli, and ACT matters; RPC 3.2 in the Garrone, Horvath, Valli, and ACT matters; RPC 3.3(a)(1) and RPC 8.4(d) in the Horvath matter; RPC 8.4(c) in the Bruder matter; and RPC 1.1(b) in the ACT matter.

In Garrone, the special master was unable to find that respondent violated RPC 1.1(a), RPC 1.3, or RPC 3.2, based on his failure to collect on the judgment. The special master observed that the record did not contain clear and convincing evidence that respondent's unsuccessful efforts "constituted more than perhaps negligence." Indeed, the OAE had presented "virtually no evidence . . . regarding the collectability of the *Garrone* judgment."

However, the special master found that, by failing to inform Garrone that he had not succeeded in his collection efforts, respondent had deprived his client "of input and control of his case," of "how collection efforts should proceed," and of "the opportunity to consider alternatives, such as taking the matter to another lawyer, selling his judgment, and/or using a collection service."

The special master's findings with respect to the RPC 8.4(c) charge are discussed below.

In Arendt, the special master found that the record lacked clear and convincing evidence of gross neglect, based on respondent's failure to file the complaint within the time afforded by New Jersey's statute of limitations and his failure to oppose the summary judgment motion in that case. Yet, the special master did find that he lacked diligence because he had

been retained in the same year that the accident had occurred and, therefore, had "sufficient time" within which to comply with the two-year period of limitation.

Further, the special master determined that, by failing to inform the Arendts that their complaint had been dismissed and that the dismissal had been affirmed on appeal, respondent had denied them the opportunity to discharge him and retain new counsel "and/or take other actions to explore their rights and remedies in the six (6) plus years . . . between their lost appeal and the fake settlement," a violation of RPC 1.4(c).

The special master did not address the RPC 8.4(c) charge in the Arendt matter.

In the Horvath matter, the special master acknowledged that respondent had admitted violating RPC 1.3, RPC 1.4(b), and RPC 8.4(c). In addition to RPC 8.4(c), the special master found that respondent violated RPC 3.3(a)(1) and RPC 8.4(d). She rejected his claimed lack of recollection of having told the federal court that the matter had been "settled." The special master described these infractions as a flagrant violation of "accepted professional norms."

Next, the special master found that, by leading Horvath to believe that the case had been settled rather than dismissed, respondent had violated RPC 1.4(c). Finally, the special master

found that the clear and convincing evidence did not support a finding that respondent's conduct had violated RPC 1.1(a) or RPC 3.2.

In the Calia matter, the special master accepted respondent's admission to the RPC 1.3, RPC 1.4(b), and RPC 8.4(c) violations. In addition, she found that he violated RPC 1.1(a) and RPC 1.4(c).

The special master determined that respondent exhibited gross neglect "because his misconduct amounted to more than not timely filing a complaint." Specifically, he hid the truth of his failures from the client "for years," and fabricated documents designed to mislead the client about the status of her case, which, when combined with similar conduct in other matters, demonstrated "a disturbing pattern of fabricating settlements and misleading clients, rather than advising them of the true status of their matters and facing any potential malpractice claims."

Finally, the special master found that respondent violated RPC 1.4(c), essentially for the same reasons noted in the other client matters.

In the Valli matter, respondent admitted having violated RPC 1.3, RPC 1.4(b), and RPC 8.4(c). In finding that respondent also violated RPC 1.1(a), the special master determined that "it

was gross neglect for him to ignore the matter, and fail to make inquiries about it and its status, when Respondent clearly knew whether or not he could effect, and had effected, service." Thus, he knew, or should have known, that the case had been, or would be, dismissed for failure to offer proof of service.

The special master found that respondent violated RPC 1.1(a) in another respect – by hiding the truth from his clients and fabricating documents. Further, as in the other client matters, the special master determined that respondent had violated RPC 1.4(c).

As to RPC 3.2, the special master concluded that no evidence established that matters were not expedited.

Finally, in the ACT matter, the special master accepted respondent's admitted violations of RPC 1.3 and RPC 1.4(b). She also found, as she had in Garrone, Calia, and Valli, that respondent's failure to tell the client the truth and his fabrication of documents to support his misrepresentations amounted to a violation of RPC 1.1(a) and (b).

The special master found that respondent also violated RPC 1.4(c) by failing to inform ACT about important events, such as the expiration of the statute of limitations and the dismissal of the second complaint.

Because the special master found that the OAE had failed to present "evidence suggesting the Respondent delayed the actual litigation, or improvidently filed the subsequent suit," she did not find respondent guilty of a violation of RPC 3.2.

In the Bruder matter, the special master found that respondent violated RPC 8.4(c) by telling Bruder that she would not receive any proceeds from the settlement of her case because the liens exceeded the recovery.

D. Fabrication of Documents

The special master determined that respondent violated RPC 8.4(c) and (d) based, in part, on his fabrication of documents, including court orders, to conceal his failure to collect on a judgment in Garrone, and the dismissal of two complaints in ACT. She also found that, by forging Castano's signature on some of the documents, he violated the forgery statute, N.J.S.A. 2C:21-1, and, thus, RPC 8.4(b).

Finally, the special master found that, in both the Garrone and the ACT matters, respondent violated RPC 8.4(d), when he "created and transmitted to his client fictitious orders and other documents purporting to bear a signature of a sitting Judge of the Superior Court and the Clerk's Office's "filed" stamp." She noted that, contrary to respondent's argument, the commission of an actual fraud on the court was not required to

sustain a violation of RPC 8.4(d). Further, respondent "could not control what Mr. Garrone might have done to use, enforce or publicize the fake court orders, warrant of arrest, and forged attorney certification".

With respect to the ACT matter, the special master rejected respondent's argument that, because he had already admitted violating RPC 8.4(c) by misusing ACT's funds, any additional RPC 8.4(c) charges were redundant. Rather, in the special master's view, respondent's admitted fabrication of orders, plus his failure to inform his client of "the true nature of" the complaint's dismissal, constituted a separate violation of the rule.

E. Negligent Misappropriation of Client Funds

The special master found in respondent's favor on the single violation charged in the Gruchacz matter, that is, the negligent misappropriation of client funds. Although she concluded that respondent had not negligently misappropriated Gruchacz's funds, she considered it "suspicious and troubling that the bank employee, when asked to withdraw money from a personal account, instead withdrew it from a law firm's account," and was disturbed by the firm's failure to detect the bank's error over a period of several months. However, she did

not attribute the invasion of Gruchacz's funds to respondent, for several reasons.

First, no evidence established that respondent had detected, or should have detected, the bank's error at the time of the disbursement to Gruchacz. Second, respondent did not receive or review the Gruchacz ISB account statements and, therefore, did not know what activity had occurred in the account after the transaction. Third, he did not review his personal money market account statements between August and October 2009, and, therefore, he did not know that the $30,000 had remained in the account. Fourth, the monthly reports circulated by the Gaccione firm reflected only the clients' trust account balances, not account activity. Finally, the special master noted that the OAE had accepted that the bank, not respondent, was responsible for the error.

F. Knowing Misappropriation of Client Funds

The ethics complaint charged respondent with the knowing misappropriation of client funds in the Bruder, Price, Infinity, and Galante matters. The special master found that respondent had done so in all cases except in respect of the grandfather's funds in the Price matter, as to which the record fell short.

In Bruder, the special master found that respondent knowingly invaded the $8,096.62 held in trust for the client,

using the money to fund the $4,220 "settlement" disbursement to the Arendts and the $3,100 "lien payment" disbursement (i.e., loan) to Michael Bucca. In Infinity, she determined that he knowingly invaded the $37,817.32, held in trust for the client, to fund the $30,000 "settlement" disbursement to the Vallis and the $775 "interest" disbursement to Garrone. In Galante, the special master found that respondent knowingly invaded the $47,577.69 held in trust for the client, using the money to fund the $5,000 "disbursement" (i.e., loan) to Salvanto.

The special master reviewed the facts establishing the OAE's prima facie case of knowing misappropriation. She pointed out that respondent's "contemporaneous directions, as memorialized on the control sheets, indicate that Respondent knew about, and intended to invade, particular clients' trust funds." In support of this finding, she noted that, for respondent to access trust account funds, the disbursement sheet had to reflect a matter number as to which there existed sufficient trust account funds to cover the requested disbursement. Moreover, he knew that the bookkeeper could issue disbursements only against a specific client matter. Further, in all cases, respondent's disbursement requests were issued against client matters that had sufficient funds, in trust, to cover the disbursements. According to the special master, based

on monthly reports, respondent knew how much money was held in trust, in total, as well as for each of his individual clients. Thus, the disbursement sheets referenced specific client matters which held sufficient funds to support the requested disbursements. These facts, according to the special master, clearly and convincingly established that respondent "knew about, and intended to invade, particular clients' trust funds."

The special master rejected respondent's claim that his invasion of trust account funds was not for personal gain. She noted that respondent did not simply use trust account funds to assist needy clients, but that he had also intentionally used client trust funds for his own benefit. For example, she cited his use of Bruder's funds to pay the non-existent "settlement" to the Arendts, which respondent had "fake[d]" in order to cover up the dismissal of their case due to his miscalculation of the statute of limitations.

The special master did not accept respondent's claim that the invasion of client funds was only "on paper" because there always existed in the trust account an "equity cushion" of at least $100,000. Indeed, she did not accept the notion that respondent reasonably understood there to be an equity cushion in the trust account. Further, even if there had been an equity cushion, DiTrolio testified that no firm policy or practice

existed that would have authorized respondent to draw against it. As she had previously found, there was no basis for his assertion that, as a shareholder, he had an ownership interest in the trust and business account funds and, therefore, could access the funds and use them as he saw fit.

Moreover, the special master found that, despite respondent's understanding, there was no equity cushion. The special master accepted DiTrolio's testimony that retainer fees maintained in the trust account belonged to the client until earned and, further, that client funds were not fungible, but, rather, belonged to the client.

In addition, the special master accepted DiTrolio's testimony that, once retainer fees held in the trust account were earned, they were transferred to the business account. Indeed, DiTrolio had testified that he followed this practice.

In short, the special master found that the record supported the charges of knowing misappropriation of client funds in the Bruder, Infinity, and Galante matters and that it did not support respondent's "equity cushion" defense.

F. Knowing Misappropriation of Law Firm Funds

The complaint charged respondent with knowing misappropriation of law firm funds when he (1) lent money and paid a "fake" settlement to the client in the Horvath matter, by

disguising the payments as costs advanced in that matter; (2) advanced funds to the client in Myrkalo, by describing the payments as costs advanced in that matter; (3) lent $1,775 in earned legal fees to Salvanto, using the Price matter number, (4) lent $5,000 to Mrs. Bucca (Bucca #2 loan), by using the ACT matter number and describing the disbursement as payment of an expert fee, and (5) lent $2,000 to Nielsen, claiming it was an expense in the Galante matter. The special master found respondent guilty of knowingly misappropriating law firm's funds in all these cases.

In addition, in Horvath and Salvanto, the special master based her findings on respondent's knowledge that he could not use firm funds to pay a "fake settlement," finding that his knowledge was established by his false description of the nature of the payments on the disbursement sheets.

The special master rejected respondent's defense that his status as a shareholder in the Gaccione firm authorized him to use firm funds at his discretion. She noted respondent's attempt to conceal his misconduct, by misstating the nature of the payments on the disbursement sheets, which she found he had done precisely because he knew that he was not authorized to use the firm's funds in those manners. Thus, the invasions were not "only on paper."

These same facts supported her finding that respondent did not hold a reasonable belief as to his entitlement to the funds, which would preclude a finding of knowing misappropriation of law firm funds.

The special master also found that, even if respondent's invasions of firm funds had been for "altruistic" purposes, that fact would not negate a finding of knowing misappropriation of firm funds. The law applies to "any unauthorized use," she noted, and, therefore, the absence of personal gain is irrelevant. Moreover, some of the disbursements did serve to benefit respondent, that is, to protect his reputation and to forestall a malpractice claim.

H. Knowing Misappropriation of Escrow Funds

The complaint charged respondent with the knowing misappropriation of disputed funds that is, the Merkin fee, which, under RPC 1.15(c), were to be segregated. The special master found that respondent had committed this violation when he disbursed the disputed funds to Celusak and to Saenz's landlord.

According to the special master, the closing statement for the Cisneros settlement identified the $5,437.22 referral fee that was to be paid to Merkin out of the $16,311.66 total fee to the Gaccione firm. Moreover, when the Gaccione firm's fee was

transferred from the trust account to the business account, the Merkin fee remained, signifying respondent's acknowledgment that the fee was in dispute. For these reasons, the special master rejected respondent's claim that there was no dispute.

Other evidence supported her finding. For example, it mattered not that Merkin did not take affirmative steps to collect the fee. In addition, there was no evidence that, prior to the settlement of the litigation against Merkin, he had been asked to waive his fee. Moreover, Merkin's entitlement to the fee was at issue in the malpractice action.

The special master also made some findings that were universal to all knowing misappropriation counts in the complaint. For example, she cited N.J.S.A. 42:1A-11 for the proposition that property acquired by a partnership is the property of the partnership, not the individual partners. Further, that respondent repaid the monies he had misappropriated did not save him from a finding of knowing misappropriation.

Finally, the special master considered irrelevant respondent's assertion that a forensic accounting was required to prove his knowing misappropriation of any funds. The allegations had already been established based on the records.

MITIGATION

The special master listed the following mitigating factors: (1) respondent's cooperation with disciplinary investigators; (2) his initial self-report to the OAE; (3) the personal difficulties he was undergoing during the 2009-2010 period; (4) his repayment of all funds; (5) his heavy caseload; (6) his desire to assist his financially-struggling clients; (7) his previously unblemished disciplinary history; (8) his reputation, which was praised by those who had submitted character letters; and (9) his involvement in the community and his accomplishments.

The special master did not accept that the mitigating factors negated the need for disbarment. She reasoned:

> 496. This is not a case of negligent misappropriation. Respondent used various ruses to conceal his knowing misappropriation of his firm's and his client's funds.
>
> 497. Respondent displayed a stunning lack of candor to his law firm and to his clients. He made repeated misstatements to clients and partners, and prepared false control sheets, Closing Statements, and Releases. He created fictitious court orders and other legal documents. He also forged the signature of another member of the bar on an Attorney Certification.
>
> [SMR94¶496-¶497.][9]

[9] SMR refers to the Special Master's report, dated August 24, 2015.

Based on respondent's knowing misappropriation of client and law firm funds, and the "other serious misconduct" he committed, the special master recommended his disbarment.

* * *

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

Our analysis follows the structure used to summarize the special master's report. As shown below, we adopt most of the special master's findings and conclusions.

A. Loans to Clients and Others/Improper Business Transaction

With some exceptions not applicable here, RPC 1.8(e) prohibits an attorney from providing "financial assistance to a client in connection with pending or contemplated litigation." Respondent admitted, the special master found, and the clear and convincing evidence established, that respondent violated RPC 1.8(e) by advancing funds to the following clients: Celusak ($4,800), Saenz ($5,069.26 to her landlord), Bucca ($3,100), Horvath (four payments totaling $7,000) Myrkalo (six payments totaling $2,157), Nilsen (three payments totaling $13,835), and Salvanto (two payments totaling $10,000). As noted in respondent's brief, he concedes this rule violation in all cases.

In addition, as the special master correctly concluded, the $5,000 disbursement to Mrs. Bucca violated RPC 1.8(e). It matters not that she was not respondent's client. The funds were advanced to her for his benefit, just as funds were advanced to Saenz's landlord for her benefit.

Moreover, the special master accurately assessed the record when she determined that there was no clear and convincing evidence to find that the $343 disbursement to Stanford constituted a loan. Respondent could not recall why the disbursement was made, but surmised that it represented the balance due to Stanford from the settlement of his case. Nothing in the record refuted his supposition.

Respondent also violated RPC 8.4(c) each time he advanced funds to or on behalf of his clients because he accessed the funds by submitting a disbursement sheet misrepresenting the purpose of the disbursement. Although the record failed to establish that the $343 disbursement to Stanford was a loan, respondent violated RPC 8.4(c) when he accessed the funds in the business account by submitting a disbursement sheet that charged the ACT matter for the disbursement and characterized it as the payment of a judgment.

Although the complaint alleged that respondent also violated RPC 1.8(a) (business transaction with a client) by

lending money to Salvanto, we dismiss this charge as duplicative of the RPC 1.8(e) charge and finding.

Thus, respondent violated RPC 1.8(e) and RPC 8.4(c), by making improper loans to Celusak, Saenz, Bucca, Horvath, Myrkalo, Nilsen, and Salvanto. In addition, respondent violated RPC 8.4(c) when he submitted a fraudulent disbursement sheet to obtain the $343 for Stanford.

B. Conflict of Interest

In the absence of certain disclosures, RPC 1.7(a)(1) prohibits an attorney from engaging in a concurrent conflict of interest, which occurs when the representation of one client is directly adverse to another client. Respondent was charged with violating RPC 1.7(a)(1) in the Price and Galante matters.

The OAE alleged that the conflict arose when respondent advised and arranged for Price to assign her JUA/MTF judgment to respondent's grandfather, both of whom he represented. Although it is not clear from the record who drafted the assignment, it likely was respondent. He arranged for the transaction, and he sent the assignment document to Price for her signature. The clients' interests clearly were adverse. Respondent represented both the buyer of a judgment (his grandfather) and the seller of that judgment (Price). Just as an attorney may represent both the buyer and seller in a real estate transaction, so long as

the attorney is not involved in the negotiation phase and so long as the attorney obtains consent of both clients after full disclosure,[10] respondent was required to fully disclose all aspects of the dual representation and obtain both clients' consents. He did neither. We, thus, find that respondent violated RPC 1.7(a)(1).

In the Galante matter, the special master found that respondent violated RPC 1.7(a)(1) when he lent $2,000 to Nilsen, using business account funds and charging it to the Galante matter number as an expert fee, and when he prepared a promissory note from Nilsen to Galante. In her view, respondent had acted as the attorney for both the borrower (Nilsen) and the lender (Galante) in a commercial loan transaction.

We are not able to agree with the special master's finding that respondent violated RPC 1.7(a)(1) when he lent $2,000 to Nilsen (Nilsen #3). There was no loan from Galante to Nilsen. Rather, as discussed below, respondent knowingly misappropriated the law firm funds that he then lent to Nilsen. Thus, respondent could not have represented the lender and the borrower in a loan transaction.

---

[10] See Advisory Committee on Professional Ethics Op. 243, 95 N.J.L.J. 1145 (1972).

The promissory note from Nilsen to Galante is troubling, however, because it suggests the existence of a loan, and Nilsen signed it, arguably rendering the note enforceable by Galante. On the surface, respondent's preparation of a promissory note, given by one client to another, appears to support an RPC 1.7(a)(1) violation. The "conflict" was not genuine, however, because the note was a fiction, and the record lacked any evidence that Galante had been given a copy of the note or that he had even known about it. The real infraction was respondent's knowing misappropriation of law firm funds, which he was able to disguise and carry out through an act of fraud.

We, thus, find that respondent violated RPC 1.7(a)(1) in the Price matter but dismiss the RPC 1.7(a)(1) charge in the Galante matter.

C. Mishandling Litigation

As stated previously, respondent was charged with having violated RPC 1.1(a), RPC 1.3, RPC 1.4(b), RPC 1.4(c), and RPC 8.4(c) in the Garrone, Arendt, Horvath, Calia, Valli, and ACT matters; RPC 3.2 in the Garrone, Horvath, Valli, and ACT matters; and RPC 1.1(b) in the ACT matter, although it is not clear whether that charge was based on multiple acts of neglect in that single case or his neglect in all client matters.

We first address the failure-to-communicate charges. In the Garrone matter, respondent failed to inform his client that he had been unable to collect on the judgment. In the Arendt, Horvath, Valli, and ACT cases, respondent failed to inform his clients of the dismissal of their complaints. In the Calia matter, he failed to inform his client that a complaint had never been filed prior to the expiration of the statute of limitations. Accordingly, respondent violated RPC 1.4(b) in all six cases.

In addition, in all six client matters, respondent violated RPC 1.4(c). As the special master observed, due to his non-disclosure of his lack of success in each matter, sometimes for years, respondent's clients were prevented from accepting the adverse events or working with him, or seeking new counsel, to overcome them.

Respondent also violated RPC 8.4(c) in each case by telling his clients that their cases had settled or that he had succeeded in collecting on the judgments obtained in their favor. Moreover, he violated the rule by fabricating documents and orders in support of his misrepresentations.

In Garrone, the record does not support findings of gross neglect, lack of diligence, or failure to expedite litigation. As to the first two charges, there was no evidence that

respondent's failure to collect on the judgment was the result of delay, inattention, incompetence, or more than simple negligence on his part. The record reflects only that he was unable to collect because he could not locate the insurance carrier. There was no evidence pertaining to what he should have done, under those circumstances, and that he failed to do it. As to the alleged violation of RPC 3.2, this rule does not apply because the litigation had been brought to a successful conclusion by the entry of a default judgment in Garrone's favor.

In the Arendt matter, there is no clear basis on which to conclude that respondent did not file opposition to the motion for summary judgment or that his failure to file the complaint within the New Jersey period of limitation, rather than New York's, was more than simple neglect.

As the special master recognized, there was some evidence, albeit equivocal, suggesting that respondent had filed opposition to the motion. Moreover, there was no basis upon which to conclude that respondent's choice in statute of limitations was the product of anything other than a reasonable mistake in the sometimes confusing realm of conflict of laws analysis. Thus, we dismiss the RPC 1.1(a) and RPC 1.3 charges.

In Horvath, the record does not support findings that respondent lacked diligence, exhibited gross neglect, or failed to expedite the litigation. The complaint alleged nothing more than that respondent was unable to serve the complaint, and the record was devoid of any evidence demonstrating that his lack of success was due to unethical conduct on his part. Thus, although respondent admitted having violated RPC 1.3, we dismiss that charge as well.

As to the RPC 1.1(a) and RPC 1.3 charges in Calia, respondent's failure to file the complaint violated both rules. In Valli, respondent failed to serve the complaint within the required time, thereby violating RPC 1.1(a) and RPC 1.3. Contrary to the special master's finding, however, respondent's failure to serve the complaint was indeed a violation of RPC 3.2 because, having filed the complaint, respondent then failed to take the steps necessary to effect service.

Finally, in the ACT matter, respondent violated RPC 1.1(a) and RPC 1.3 by failing to file the complaint within the time prescribed by the statute of limitations, which was the result of his miscalculation of that deadline.

Three acts of neglect constitute a pattern of neglect, which is proscribed by RPC 1.1(b). In re Rohan, 184 N.J. 287 (2005). Because respondent is guilty of gross neglect in only

two matters, Calia and ACT, we cannot find a violation of that Rule.

To conclude, respondent violated RPC 1.4(b), RPC 1.4(c), and RPC 8.4(c) in all six matters. He violated RPC 1.1(a) and RPC 1.3 in the Calia, Valli, and ACT matters but not in the Garrone, Horvath, and Arendt matters. Respondent also violated RPC 3.2 in the Valli matter.

D. Fabrication of Documents

The complaint charged respondent with having violated RPC 8.4(c) based, in part, on his fabrication of documents, including court orders, to conceal his failure to collect on a judgment, in Garrone, and the dismissal of two complaints, in ACT. In both matters, the special master found respondent guilty of that violation. We agree.

In Garrone, the facts clearly and convincingly support respondent's admission of that violation. Specifically, respondent created phony documents to mislead Garrone to believe that he had successfully collected on the judgment that he had obtained in his client's favor. Some of those documents gave the appearance of having been generated by the court and bore the stamp of the court clerk. Thus, respondent's acts clearly establish his violation of RPC 8.4(c) in this matter.

The complaint also charged respondent with having violated RPC 8.4(b) in the Garrone matter, based on his having forged the name of attorney Gregory J. Castano on certain documents. As the special master observed, such a violation is based on the nature of the conduct and does not require a conviction.

N.J.S.A. 2C:21-1a provides, in pertinent part:

> a. Forgery. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> . . . .
>
> (2) Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act or of a fictitious person, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed . . . . (emphasis added)

Respondent asserts that he did not violate the statute because he lacked the scienter required, that is, he did not intend to defraud anyone but, rather, to "buy time" with Garrone, who was pressing him for details. Citing State v. Schultz, 71 N.J. 590 (1976), respondent asserts that the false document had to have the capacity to be relied upon in a legally significant manner. He argues that, because the documents "did not impact on the legitimate judgment obtained by Mr. Malanga in

Garrone, nor did they have any effect on the collectability of the judgment at the time they were created," there was no violation.

Assuming, arguendo, the validity of respondent's analysis of Schultz, particularly as it relates to the current version of the forgery statute, his argument misses the mark. Although respondent may have been seeking to "buy time" for himself by misleading Garrone into believing that he was taking steps to collect on the judgment, his actions resulted in a loss to Garrone, who was deprived of the opportunity to find another way to collect on a substantial judgment, such as hiring a different lawyer. Certainly, such reliance and loss were legally sufficient. Thus, respondent violated RPC 8.4(b).

Finally, respondent violated RPC 8.4(d), when he created and transmitted to his client fictitious orders and other documents purporting to bear the signature of a judge and an official "filed" stamp notation. Despite respondent's attempts to thwart the conclusion, such corruption, by an officer of the court, can be considered nothing less than prejudicial to the administration of justice. As the special master observed, even though respondent never submitted the documents to the court, he "could not control what Mr. Garrone might have done to use,

enforce or publicize the fake court orders, warrant of arrest, and forged attorney certifications."

As to the ACT matter, we reject respondent's argument that, because he had already admitted violating RPC 8.4(c) in respect of his misuse of ACT's funds, any additional RPC 8.4(c) charges would be redundant. The separate charges are based on different conduct. Thus, additional violations may be found for respondent's creation of fictitious court documents to conceal the dismissal of his client's litigation.

Further, as stated above, the fact that the fictitious orders were never submitted to the court has no bearing on the RPC 8.4(d) violation. For the same reasons, respondent violated the Rule when he created fictitious court orders and gave them to his client.

E. Negligent Misappropriation of Client Funds

We agree with the special master's finding that respondent did not negligently misappropriate client funds in the Gruchacz matter because the bank – not respondent – erroneously took the Gruchacz funds from the trust account instead of from respondent's personal account. Moreover, although respondent failed to discover the error because he did not reconcile the trust account and did not review his own money market account statements, those after-the-fact failures cannot convert the

original bank error to a negligent misappropriation on respondent's part. Thus, we determine to dismiss the negligent misappropriation charge.

F. Knowing Misappropration of Client Funds

Respondent was charged with the knowing misappropriation of client funds in the Bruder, Infinity, and Galante matters. Specifically, he used monies belonging to Bruder to pay the Arendts the "proceeds" from the "settlement" of their personal injury case and to make a loan to his client, Michael Bucca. He used funds belonging to Infinity Mortgage to pay the Vallis the "proceeds" from their "settlement" and to pay Garrone some "interest" that he had "collected" on a judgment in Garrone's favor. Finally, respondent used Galante's monies to fund a loan to John Salvanto, another client. In each case, respondent knowingly misappropriated Bruder's, Infinity's, and Galante's funds when he used them for these purposes.

In In re Wilson, 81 N.J. 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. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" — all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since Wilson, it has been invariable.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the OAE must prove, by clear and convincing evidence, that respondent

deliberately took his clients' funds and used them, knowing that the clients had not authorized him to do so.

Although the clients in Bruder, Infinity, and Galante did not testify that they had not given respondent permission to use their funds, respondent admitted, during his OAE interview, that he did not ask and, therefore, did not have the permission of his clients when he disbursed their funds to others.

In Bruder, on July 15, 1997, a few weeks after the client's $11,500 settlement was deposited in the Gaccione firm's trust account and credited to her matter number, respondent disbursed to the Gaccione firm $3,403.38 in legal fees and costs, leaving a balance of $8,096.62. According to respondent, Bruder was not entitled to any of those funds because her medical providers' liens exceeded that amount. Yet, respondent never satisfied those so-called liens, and, therefore, the $8,096.62 remained in the trust account.

Five-and-a-half years later, on February 20, 2003, respondent directed the disbursement of $4,220 to the Arendts, ostensibly representing their portion of a $7,000 "settlement" of their personal injury case. The trust account check contained the Bruder matter number and the notation "MEDICAL SETTLEMENT." Respondent requested the check to mislead the Arendts into believing that their case had settled when, to the contrary, it

had been dismissed. This disbursement to the Arendts reduced the Bruder funds to $3,876.62.

A few months later, on May 21, 2003, respondent lent Bucca $3,100 by means of a trust account check containing the Bruder matter number and the notation "LIEN PAYMENT." This disbursement further reduced the Bruder funds to $776.62.

Respondent did not replenish the $7,320 that he had removed from the trust account until March 9, 2011, after the Gaccione firm had discovered his defalcation and requested reimbursement.

In Infinity Mortgage, as of October 13, 2008, the trust account held $37,817.32, which represented the balance of a settlement that respondent had obtained for the client, after the payment of authorized expenses. Yet, just over seven months later, on May 27, 2009, respondent directed the disbursement of $30,000 from the trust account to the Vallis, ostensibly representing their portion of the "proceeds" from the "settlement" of their case. The trust account check contained the Infinity Mortgage matter number and the notation "PROCEEDS FROM SETTLEMENT." Respondent requested the check to mislead the Vallis into believing that their case had settled when, in fact, it had been dismissed. This disbursement reduced the trust account balance for Infinity Mortgage to $7,817.32.

Finally, three months after the disbursement to the Vallis, respondent directed the disbursement of $775 to Garrone, ostensibly representing partial "interest" paid on a judgment that respondent had obtained in Garrone's favor. The check contained the Infinity Mortgage matter number and the notation "INTEREST." Respondent requested the check to mislead Garrone into believing that he had been successful in his collection efforts on Garrone's behalf. This disbursement reduced the Infinity Mortgage balance to $7,042.

Respondent did not replenish the $30,775 taken from the Infinity Mortgage trust account funds until after the Gaccione firm had audited that account and discovered that the monies were missing. At that point, he replaced the funds with his own money.

In the Galante matter, on July 23, 2001, about a month after the deposit of the client's $400,000 settlement in the trust account, but before any of those funds were disbursed to the client, respondent directed the removal of $5,000 to fund a loan to his client Salvanto, to whom he had already loaned $5,000 two months earlier. The check contained the Galante matter number and the notation "DISBURSEMENTS." Although respondent had repaid the earlier loan from the proceeds of Salvanto's settlement, he had forgotten about this second loan.

When the firm brought it to respondent's attention, he replenished the funds with his personal money.

Respondent's actions in each of these matters demonstrate that he knowingly invaded the clients' funds. As respondent proudly noted, the firm's trust account was never out of trust. Yet, this fact demonstrates, rather than disproves, respondent's knowing invasion of trust account funds.

First, despite his use of client names and matter numbers to procure trust account checks, respondent's claim that he actually was accessing the equity cushion proves that he did not seek his individual clients' permission to use their monies. Indeed, if true, why would he?

Second, respondent did not invade client funds generally. Instead, he knowingly invaded the funds of specific clients, all of whom just happened to be his. No funds belonging to his partners' clients were ever invaded. The reason is clear.

The firm circulated to all shareholders a monthly report showing the total trust account balance. Individual client balances, within the trust account, were detailed on a separate report. Even then, these reports were individualized per partner such that each partner received information only for his or her own clients. The partners were not privy to the balances of other partners' clients.

Armed with this information, respondent knew the balance of funds held in the trust account on behalf of his clients. By checking the client ledger card, he would be able to reconcile the balance reflected on the monthly report against the card and determined, to the penny, the amount available to each client. Accordingly, each disbursement request was tied to a specific client matter with sufficient funds available in the trust account to cover the disbursement. Thus, as respondent proudly and accurately proclaimed, the trust account was never out of trust.

These facts clearly and convincingly establish that, with respect to each and every disbursement at issue, respondent knew that the funds belonged to specific clients and that he did not have — indeed had never sought — those clients' permission to use their funds in the manner he did.

There is, however, respondent's defense to consider. Respondent maintained that he did not knowingly misappropriate client funds because the trust account held tens of thousands of dollars in firm fees at any given time and that it was those fees that he used, or intended to use, when requesting the disbursements at issue. Further, the only way he could access those funds was to submit a check request charging the disbursement to a particular client matter and misrepresenting

both the nature of the payment and its relation to the client matter. Thus, for example, in order to obtain $4,800 to lend to Celusak, respondent was "required" to submit a disbursement sheet, in the Cisneros matter (which held more than $7,000), that requested a disbursement in that amount for the payment of an "expert fee," even though Celusak was not an expert in that case and, therefore, was not entitled to a "fee."

The "equity cushion" defense fails for several reasons. First, the bizarre manner by which respondent accessed that cushion undercuts the truth of his assertion. Essentially, respondent took the illogical position that, in order to access funds to which he was entitled, he was required to commit a fraud against the client and the firm.

Second, there simply was no equity cushion. Although both Gaccione and DiTrolio testified, respondent asked neither of them to corroborate his claim. Indeed, respondent's partner, DiTrolio, testified that once fees on deposit in the trust account were earned, it was expected that they would be billed and then transferred to the firm's business account. In addition, respondent submitted no records either to support the claim that a cushion existed or to establish that the trust account balance, at any time, exceeded the amount held on behalf of clients.

Third, even if respondent believed that an equity cushion existed, that belief, of itself, does not protect him from a finding of knowing misappropriation. Rather, respondent would need to establish that his belief of the availability of non-trust funds was reasonable or justifiable. See, e.g. In re Mininsohn, 162 N.J. 62 (1999).

In Mininsohn, the attorney was charged with the knowing misappropriation of trust and escrow funds and recordkeeping violations. Some of the knowing misappropriation charges arose from nine real estate transactions where the attorney represented the seller and, as escrow agent, was required to hold the buyers' deposits intact. Instead, he removed all or part of his fee from the escrow funds before the closing of title. In six other real estate transactions, he advanced to himself legal fees from the funds of other clients, before the real estate transaction took place. Unlike this case, Mininsohn's disbursements created a negative balance in the trust account.

Mininsohn defended the knowing misappropriation charge on the ground that, at the time of the disbursements, he had believed there to be "a cushion" in his trust account against which he could draw funds. He argued that his mistaken belief

removed his conduct from the realm of knowing misappropriation. The Court disagreed.

Given the notations on the memo lines of the trust account checks, the Court found that the attorney "was fully aware that he was disbursing fees to himself before he had fully earned them." Thus, the Court concluded that the attorney's "erroneous belief that he had an equity cushion was unfounded," and, further, he had "failed to offer evidence to sustain the contention that his belief in the existence of an adequate cushion was reasonable or justifiable." Id. at 74. Mininsohn was disbarred. We conclude from Mininsohn that it was respondent's burden to sustain his defense that either an adequate "cushion" existed or that his belief that it existed was reasonable. He did not do so.

To the contrary, respondent knew he was invading the funds of clients without their knowledge or permission. His claim that he was actually accessing an equity cushion of funds and that submitting fraudulent disbursements sheets was the only method of doing so is not supported. Finally, his claim that an equity cushion even existed was unsubstantiated. We, thus, find that respondent knowingly misappropriated client funds in the Bruder, Infinity Mortgage, and Galante matters.

In addition to the above matters, the complaint charged respondent with the knowing misappropriation of client funds in the Price matter. Specifically, after respondent had received $5,995 due to his grandfather, as the result of the Price assignment, he lent $5,000 to Salvanto, instead of disbursing $3,070 to his grandfather, $480 to "Dr. Clarke," and $1,775 to the Gaccione firm.

At the time the funds were received, however, respondent's grandfather had passed away, and the firm represented his estate. The estate, thus, was a client. As such, respondent knowingly misappropriated client funds when he used the $3,070 due to his grandfather's estate to fund a loan to Salvanto.

To conclude, respondent knowingly misappropriated client funds in the Bruder, Infinity Mortgage, Price, and Galante matters.

G. Knowing Misappropriation of Law Firm Funds

Respondent was charged with the knowing misappropriation of law firm funds in the Horvath, Myrkalo, Price, ACT, and Galante matters arising out of certain disbursements made from the attorney business account. Specifically, in the Horvath matter, four disbursements, totaling $9,656.70, represented the payment of a false settlement, a loan, and two payments to a third party. In the Myrkalo matter, respondent directed eight

disbursements, totaling $2,525.60, for the payment of various expenses on behalf of Myrkalo, who, like many of respondent's clients, was struggling financially.

In the Price matter, respondent used the firm's $1,775 fee to fund the loan to Salvanto. In ACT, he used $5,000 to fund the loan to Mrs. Bucca, representing the payment as an expert fee in that matter. At the time, the business account held no funds corresponding to the ACT matter. Later, the disbursement was inexplicably written off.

Finally, in the Galante matter, respondent lent $2,000 in business account funds to Nilsen, linking the payment to the Galante matter number for the payment of an expert fee.

In 1993, the Court extended the Wilson rule to theft of law firm's funds. In re Siegel, 133 N.J. 162 (1993). In Siegel, during a three-year period, the attorney converted more than $25,000 in law firm's funds by submitting false disbursement requests to the firm's bookkeeper. The disbursements were drawn against "unapplied retainers" (monies collected and owned by the firm as legal fees, but not yet transferred from the clients' files to the firm's account). Although the disbursement requests listed ostensibly legitimate purposes for the funds to be disbursed, they represented actual expenses incurred by either Siegel personally (landscaping services, tennis club fees,

theatre tickets, dental expenses, sports memorabilia, etc.) or by others (his mother-in-law's mortgage service fee). Although the payees were not fictitious, the stated purpose of the expenses was illegitimate.

The Court concluded that knowing misappropriation from one's partners is just as wrong as knowing misappropriation from one's clients. Id. at 168. Siegel was disbarred. Ibid.

A reasonable belief that the attorney is entitled to the funds will save the attorney from disbarment. See, e.g., In re Bromberg, 152 N.J. 382 (1998), In re Paragano, 157 N.J. 628 (1999), In re Glick, 172 N.J. 319 (2002), In re Spector, 178 N.J. 161 (2004), and In re Nelson, 181 N.J. 323 (2004). These cases do not save respondent from the ultimate penalty for his actions because respondent had no reasonable belief that he was entitled to the monies.

Respondent admitted that he directed the disbursement of the business account funds without the firm's knowledge or approval. Only his defense is at issue.

Similar to the equity cushion defense that respondent asserted in the client funds knowing misappropriation cases, he argued that he was permitted to use business account funds, without approval because, as a partner, he had implicit

authority to use the funds. The special master rightly rejected this argument.

First, Gaccione and DiTrolio testified that the business account was to be used only for the payment of bills and, of course, to advance costs in contingency cases. Although they agreed that the firm did not have a written policy to this effect, DiTrolio testified that he was unaware of any policy, discussion, practice, or course of dealing among the shareholders that would permit it. Further, according to DiTrolio, respondent never revealed that he was using the business account monies in such a fashion and that, if he had, DiTrolio "would have expressed an objection."

Second, the manner in which respondent accessed the funds demonstrates his knowledge of this unwritten policy and his fellow shareholders' understanding of the purpose of the business account. Specifically, in each and every case, respondent obtained monies from the business account by charging the disbursements to a client matter in which it was proper to advance costs. In each and every case, the nature of the disbursement was identified as the payment of an expense in that client matter.

Third, respondent's claim that, as a shareholder, he was permitted to take funds from the business account as he pleased,

is inconsistent with the law governing partnerships and firm practice. As the special master noted, under New Jersey law, partnership funds belong to the partnership as a whole, not to the individuals. In this regard, DiTrolio testified that, unless respondent had made the firm aware of those advances, its determination of year-end distributions would be inaccurate.

In short, respondent was unable to prove, clearly and convincingly, that, as a shareholder, he had carte blanche to use the funds maintained in the business account.

Respondent's claim that he had some kind of right to the funds misses the mark. The cases cited by his counsel in the brief apply to situations in which an attorney takes law firm funds as a form of "self help," when the attorney believes that the firm is withholding monies which are due to him or her. Respondent made no such claim, and no evidence points to his entitlement to the funds in any respect.

To conclude, respondent knowingly misappropriated law firm funds in all cases cited above.

H. Knowing Misappropriation of Escrow Funds

Finally, respondent was charged with both the failure to keep separate disputed funds and the knowing misappropriation of funds that were to be safeguarded, that is, escrow funds. Under

In re Hollendonner, 102 N.J. 21 (1985), attorneys who knowingly misappropriate escrow funds are subject to disbarment.

The disputed funds at issue consist of the $5,437.22 referral fee that was not paid to Merkin out of the $16,311.66 fee due to the Gaccione firm in the Cisneros matter. The funds were identified as payable to Merkin on the closing statement prepared by respondent and given to Cisneros on disbursement of the settlement proceeds to him. Yet, when respondent sent the closing statement to Merkin, he informed Merkin that the monies would not be forthcoming because he was not entitled to the fee. At this point, the parties' claim to the $5,400+ was in dispute.

Thus, the funds should have been segregated, that is, escrowed because they were in dispute. Respondent's claim that Merkin's failure to assert his right to the fee equated to a waiver of his right to the fee was insufficient to justify his unilateral decision to use that fee for other purposes. Nevertheless, his conduct did not amount to knowing misappropriation of those monies, but, rather, the breach of an escrow agreement. See, e.g., In re Spizz, 140 N.J. 38 (1995) (admonition for attorney who, against a court order, released to the client funds escrowed for a former attorney's fees and misrepresented to the court and to the former attorney that the funds remained in escrow; the attorney relied on a legal theory

to argue that the former attorney had either waived or forfeited her claim for the fee), and In re Holland, 164 N.J. 246 (2000) (reprimand for attorney who was required to hold in trust a fee in which she and another attorney had an interest; instead, the attorney took the fee, in violation of a court order). Thus, respondent's use of the disputed Merkin fee constituted a breach of an escrow agreement rather than the knowing misappropriation of escrow funds. He is, therefore, guilty only of the charged violation of RPC 1.15(c).

One final point must be addressed, as it applies to all knowing misappropriation counts. Respondent insists that the OAE failed to meet its burden of proving that he knowingly misappropriated either client or law firm funds because it did not conduct a forensic audit and, therefore, did not prove that "one dime of client funds was missing from the Gaccione firm's trust account, or that Mr. Malanga ever knowingly misappropriated either client or law firm funds." The argument is a red herring.

The records in evidence clearly established the OAE's case. Due to the Gaccione firm's accounting protocols, procedures, and practices, the funds removed by respondent from the trust account were always traceable to a client matter. Respondent took full advantage of that when he deliberately and methodically removed

funds credited to his client matters that held sufficient funds, which prevented any trust account check from bouncing. Under these circumstances, it was not necessary for a check to bounce to establish that respondent knowingly misappropriated his clients' funds.

Indeed, had respondent died suddenly, and, the next day, Bruder, Infinity Mortgage, or Galante inquired about their funds, each of those clients would have been told that they had on account the difference between the balance before respondent made the fraudulent disbursements and the balance after he made those disbursements. Respondent's cavalier claim that those clients simply would have been paid out of the equity cushion ignores the realities of firm recordkeeping and accounting practices and is simply unrealistic.

First, there was no equity cushion. Second, the Gaccione firm would have had only the ledgers to inform its shareholders of the amounts the clients were due, and those ledgers would have reflected respondent's disbursements from those funds.

Further, respondent's argument that a forensic accounting was necessary to disprove his "equity cushion" defense, too, falls. Respondent asked neither DiTrolio nor Gaccione whether an equity cushion existed, and neither offered testimony to that effect. Indeed, respondent never made such a claim to his partners, after

his defalcations were discovered, and he never made such a claim to the OAE during his interviews. In fact, as noted by the special master, DiTrolio first learned of this defense on reading respondent's hearing testimony.

To conclude, independent of a forensic audit, the record contained clear and convincing evidence that respondent knowingly, and deliberately, misappropriated client and law firm funds through a methodical course of action designed to render his invasion of funds undetectable. Thus, he must be disbarred for knowingly misappropriating client and law firm funds. Wilson, supra, 81 N.J. at 455 n.1, 461, and Siegel, supra, 133 N.J. 162.

Although, in light of our determination, we need not consider the appropriate quantum of discipline for respondent's other ethics infractions, we note that respondent's serial acts of dishonesty, alone, would warrant disbarment, as shown below.

In addition to creating phony documents, such as releases and closing statements, to support his claims that client cases had been concluded in the clients' favor, respondent fabricated documents intended to convey that they were submitted to, and issued by, the courts. In so doing, he went so far as to forge the signature of another lawyer, who had nothing to do with any of respondent's cases, and, worse, the signatures of judges who purportedly signed the orders. He even used a purported official

"filed" stamp. All of respondent's deceit was calculated to conceal from his clients that he had mishandled their cases. His deception did not end there, however.

Respondent also engaged in a course of conduct involving misrepresentations on disbursement sheets made for the sole purpose of accessing client and law firm funds for purposes wholly unrelated to the client matter designated or the stated purpose of the disbursement. Respondent did not engage in the above conduct only one time or even a few times. He engaged in the above conduct repeatedly in several client matters over the course of years. Although respondent asserted, in mitigation, that his misconduct was precipitated by his father's death, in 2007, and then his mother's illness and subsequent death, in 2011, we note that, as early as February 2003, respondent used the funds of one client (Bruder) to pay another client (the Arendts) their portion of a non-existent settlement, which he misrepresented had taken place, in order to cover up the dismissal of their case. He engaged in similar conduct in April 2003, when he issued a $4,800 trust account check to Celusak using Cisneros funds.

Behavior such as respondent's has resulted in the disbarment of other attorneys. See, e.g., In re Morell, 184 N.J. 299 (2005).

In Morell, a particularly egregious case of neglect and misrepresentation, which proceeded by way of default, the Court

disbarred an attorney who failed to file a medical malpractice action in his client's behalf and, instead, allowed the statute of limitations to expire. There, the attorney misrepresented to his client that he had filed suit in his behalf and then, for approximately four years thereafter, continued to misrepresent to him the status of his case, engaging in an elaborate series of lies to conceal his neglect. Specifically, knowing that he had not even filed suit, the attorney told his client that he had retained expert witnesses in his behalf, discussed settlement with representatives of one of the defendant's carriers, and had rejected a $250,000 and then a $700,000 settlement offer.

Ultimately, long after the statute of limitations had expired, the attorney told his client that he had received an offer of $1.1 million, which the client accepted, and then directed the client to sign a release for the non-existent settlement. Relying on the attorney's advice that he could go ahead and purchase the "car of his dreams," the client borrowed funds from his father and purchased an expensive automobile. Thereafter, the attorney continued his misrepresentations, telling his client on two occasions that he had received the settlement funds and would be wiring them to him shortly.

The attorney failed to appear in response to the Court's order to show cause, despite several notices and opportunities to

do so. The Court noted that the attorney's failure to appear and to offer any defense or mitigation "openly displays his unfitness to continue to practice law." Id. At 304 (citing In re Kantor, 180 N.J. 226 (2004)).

In determining to disbar Morell, the Court stated, "attorney misconduct that undermines the integrity of the administration of justice" may warrant disbarment. Ibid. (citing In re Kornreich, 149 N.J. 346, 365 (1997). The Court continued:

> [T]he undisputed evidence demonstrates that respondent continually fabricated a story to his client to make it appear that the client's interests were protected and that the client would receive a substantial recovery. Respondent's conduct displayed a total disregard for an attorney's responsibility to "serve [his] clients and the administration of justice honorably and responsibly."
>
> [In re Morell, supra, 184 N.J. at 305-306 (citing In re Matthews, 94 N.J. 59, 77 (1983).]

Here, unlike the attorney in Morell, who had defaulted and then ignored the Court's Order to Show Cause, respondent vigorously defended the claims against him in this disciplinary matter. However, the Court's disbarment of Morell did not turn solely on his recalcitrance, but rather, on his "total disregard" of his duty to "serve [his] clients and the administration of justice honorably and responsibly."

Respondent should meet the same fate as Morell. His lies, defalcations, and cover ups were calculated and longstanding. He is, in a word, unsalvageable.

Member Gallipoli 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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony F. Malanga, Jr.
Docket No. DRB 15-336

Argued: April 21, 2016

Decided: August 3, 2016

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost	X					
Baugh	X					
Boyer	X					
Clark	X					
Gallipoli						X
Hoberman	X					
Rivera	X					
Singer	X					
Zmirich	X					
Total:	8					1

Ellen A. Brodsky
Chief Counsel