SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-018
District Docket No. XIV-2010-0600E

IN THE MATTER OF	:
VICTOR K. RABBAT	:
AN ATTORNEY AT LAW	:

Decision

Argued: May 19, 2016

Decided: December 8, 2016

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

Bernard K. Freamon 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 Special Ethics Master Kevin P. Kelly based on his finding that respondent knowingly misappropriated client funds, a violation of RPC 1.15(a), RPC 8.4(c), and the principles set forth in In re Wilson, 81 N.J. 451 (1979). For the reasons set forth below, we recommend respondent's disbarment for knowing misappropriation.

Respondent was admitted to the New Jersey bar in 1984. At the relevant times, he maintained an office for the practice of law in Totowa. On March 22, 2012, he received an admonition for gross neglect and lack of diligence, after he failed to serve a complaint on the defendant within the time prescribed by the court. In the Matter of Victor K. Rabbat, DRB 11-437 (March 22, 2012).

On June 27, 2007, Office of Attorney Ethics (OAE) Random Compliance Auditor, Joseph Strieffler, conducted a random audit of the trust account and business account records for Rabbat & Rabbat (the Firm). The Firm was composed of partners William Rabbat and respondent, his son, as well as an associate, Natalie Esposito Capano (Capano). After completing law school, respondent served a clerkship, and then joined his father as a partner in the Firm. Capano was hired in 2004.

Respondent and his father attended the audit, which covered the period June 2005 through June 2007. Strieffler completed the "Random Audit Questionnaire," with respondent. In reply to questioning at the audit, respondent asserted that legal fees were withdrawn from the trust account when earned.

Strieffler noted significant inactive balances in the trust account, some dating back as far as ten years. Respondent admitted disbursing approximately $80,000 to clients just prior

to the random audit, based on old outstanding balances reflected on client ledger cards that the Firm had reviewed in anticipation of the audit.

The Firm also produced a current reconciliation at the audit. Although R. 1:21-6 requires a three-way reconciliation, including the bank balance, adjusted checkbook balance, and client ledger card balance, the Firm had been reconciling only the checkbook balance to the bank balance. Strieffler concluded that the Firm historically had been preparing only two-way reconciliations. These reconciliations reflected outstanding checks totaling $82,618.49, representing funds belonging to clients or third parties. Specifically, the Firm indicated that, as of April 30, 2007, the following checks were outstanding:

Check No.	Amount	Check No.	Amount
8974	$34.60	11529	$4,668.70
9623	$180.00	11700	$48.00
9314	$2.72	12170	$5,000.00
9498	$1,000.00	12573	$5,000.00
9651	$89.85	12687	$7,000.00
9652	$567.84	12738	$1,025.64
9795	$7,353.08	12744	$9,563.00
9982	$42.12	12747	$115.00
10499	$12,011.94	12754	$3,023.00
10564	$100.00	12771	$11,300.00
11238	$1,400.00	12778	$13,093.00
TOTAL	**$82,618.49**		

Using information provided by the Firm, Strieffler conducted a three-way reconciliation. He identified all of the funds in the account except for $1,822.16. Although throughout the hearing, respondent referred to this amount as a "surplus," Strieffler explained it was more accurately described as "unaccounted for funds" because they could not be identified to one or more client ledger cards. He also found several recordkeeping violations.

In a deficiency letter, dated July 20, 2007, Strieffler directed the Firm to resolve "old outstanding checks." He explained that "old" checks included those written prior to 2006. Shortly after receiving the letter, respondent and William signed acknowledgements and committed to resolving the enumerated deficiencies within forty-five days.

Subsequently, by letter dated January 30, 2008, respondent explained to Strieffler that, after the audit, the Firm disbursed a majority of the outstanding ledger card balances; that, in January 2008, the Firm began conducting monthly reconciliations; and that the Firm attempted to communicate with the clients holding outstanding checks, but received few responses. The Firm also represented that it would maintain only $600 in the trust account to cover bank charges. Strieffler explained that this amount was too high and directed the Firm to reduce it to $250.

Respondent acknowledged and certified compliance with Strieffler's directive.

Strieffler was concerned that the Firm had waited until January 2008 to implement three-way reconciliations, instead of doing so immediately after the June 2007 audit. As a result, he requested additional information from the Firm. In reply, respondent prepared a certification, on a form provided by the OAE, stating that, as of January 31, 2008, the Firm had a $73,307.37 "surplus" that "accumulated in [the] trust account prior to 1998," which could not be explained. Respondent maintained that it was William who had told him that the unaccounted for funds amounted to more than $73,000.

Subsequently, on March 11, 2008, in a letter to Strieffler, respondent claimed that the unidentified funds amounted to $18,806.01. Strieffler became concerned by the increasing and changing amounts of the unidentified funds, the Firm's inability to produce a proper reconciliation, and the Firm's failure to resolve all of the deficiencies identified during the audit within the forty-five day deadline. Thus, on April 3, 2008, he requested the Firm to provide reconciliations from May through December 2007, bank statements, a list of outstanding checks and deposits, and the schedule of open client balances.

On May 30, 2008, the Firm provided what it described as reconciliations, but failed to include client ledger cards, making it impossible for the OAE to conduct a three-way reconciliation. In a June 4, 2008 letter to the Firm, Strieffler explained the deficiency and enclosed a reconciliation that he had prepared, as of January 31, 2008, which included $19,830.81 in unidentified funds.

On July 30, 2008, Strieffler returned to the Firm to attempt to reconcile the accounts and determine the ownership of the funds. Only respondent participated in this meeting. Strieffler was still unable to rectify the issue. By letter dated September 18, 2008, Strieffler requested reconciliations for February 2008 through August 2008. Whether the Firm provided a response to the September letter is unclear, but the OAE did not pursue the matter further. Strieffler explained that he did not continue the random audit because the Firm represented that it would resolve the issues.

On July 28, 2009, William passed away after battling lung cancer for several years. During his illness, he had continued to oversee the handling of the trust account and the reconciliations. After William's death, respondent became solely responsible for handling the managerial and financial aspects of the Firm.

On October 7, 2010, Wachovia Bank notified the OAE that trust account check number 13806 in the amount of $20,055 was returned for insufficient funds. The OAE sent a letter to respondent, on October 13, 2010, requesting, within ten days, a written response and supporting documentation explaining the trust account overdraft. By letter dated October 20, 2010, respondent stated that the Firm had hired an accountant to audit its trust account in an attempt to provide an explanation for the overdraft.

Having heard nothing further from respondent, the OAE scheduled a demand audit of the Firm's trust account for January 11, 2011. Barbara Galati, OAE Assistant Chief of Investigations, testified that the demand audit was scheduled because "we didn't get a satisfactory explanation of the overdraft."

On January 5, 2011, respondent wrote to the OAE to provide the "status" of the accountant's review of the Firm's trust account. The letter explained that the overdraft was caused by the return of funds after a failed real estate transaction and the simultaneous payment of $20,055 to client Lorraine Hayek. Respondent further stated, "[i]t should also be noted that in June 2007 there was a random compliance audit performed at our office which raised the question of the old deposit amounts, when in reality that money had been forwarded to clients and was not

in the trust account although it appeared so." He further explained that, after William passed away, "I wrote checks totaling the amount of the older checks on deposit, believing the funds to be in the account, which checks were then deposited into our business account." Respondent gave no further detail regarding those checks.

Galati conducted her own investigation into the overdraft, and determined that a $55,000 deposit was made on June 12, 2006 on behalf of clients Montalto-Perri for a real estate transaction. Because the transaction was not consummated, on September 20, 2010, respondent returned $55,000, presumably to the buyer's attorney.

Galati also discovered that respondent represented Lorraine Hayek in a personal injury matter against Brothers Produce. On September 21, 2010, the Firm deposited settlement proceeds in the amount of $30,000 into the trust account on behalf of Hayek. The following day, the Firm disbursed its fees in the amount of $9,945. Six days later, on September 28, 2010, the Firm issued a $20,055 check to Hayek, representing her portion of the settlement proceeds. The check to Hayek was returned for insufficient funds. The balance in the trust account before Hayek presented her check was $15,335.86.

Capano testified that Hayek's husband notified the Firm of the overdraft and that this information was relayed to respondent. Capano conducted her own independent investigation of the trust account records to ensure that she had not made any errors that caused the overdraft. Her review disclosed several unexplained payments to the Firm that prompted her to contact the ethics authorities. These concerns arose at a time when she believed the Firm was experiencing financial difficulties.

Galati's review of the trust account revealed that the overdraft had not been caused by the return of the $55,000 real estate deposit, but rather by seven trust account checks respondent had issued to himself and/or the Firm. Respondent later described them as "replacement checks." For the first time, at the demand audit, respondent gave Galati the list of "replacement checks" and claimed that he had issued those checks and deposited them in the business account at William's direction, after William determined that those funds represented earned legal fees and costs. The replacement checks were detailed as follows:

Check #	Date	Old Ck	Amount	Payee	Processed	Note
13586	12/23	9498	$1,000.00	Firm	Cashed	None
13625	2/9	9652	$567.84	VR	Cashed	Montalto
13496	9/9	9795	$7,353.08	Firm	Deposit ABA	Est.Simonome
13498	9/11	10499	$12,011.94	Firm	Deposit ABA	Flowrite/Loiker
13624	2/8	11238	$1,400.00	VR	Cashed	Guy's Gym
13499	9/29	12170	$5,000.00	Firm	Deposit ABA	Reliable Guido
13560	11/17	12573	$5,000.00	Firm	Deposit ABA	Ideal Fish

Respondent explained that, based on information from William, he took only the largest of the outstanding checks, previously identified at the 2007 audit, and deposited them in the business account.

Respondent also revealed that, on the day before the demand audit, he had deposited $32,332.86 in the trust account using funds from the business account. Respondent said he did so because he recently had learned, at a Continuing Legal Education class, that those funds should have been turned over to the Superior Court Trust Fund and not deposited in the Firm's business account. The Firm had paid routine business expenses from the funds that had been deposited into the firm's business account.

Galati testified that, when the checks were deposited into the business account, it was facing a shortage. She maintained that these potential shortages prompted respondent to withdraw

money from the trust account and make deposits to the business account. Galati explained that, had the deposits not been made, the business account would have been overdrawn on presentation of certain checks. Respondent admitted that the Firm was experiencing financial difficulties, but claimed such difficulties also had occurred when William was alive.

During the demand audit, respondent represented that he planned to open a new trust account and turn the $32,332.86 over to the Superior Court Trust Fund. He asserted that he would "wind down" the existing trust account and open one in the new firm's name. He was delayed in doing so because he did not want to spend the time resolving the remaining fifteen outstanding checks on the list.

Although respondent claimed, in his answer, that the "replacement checks" constituted legal fees and unreimbursed expenses owed to the Firm, Galati asserted that he had never made such a statement during the demand audit. Similarly, Strieffler denied, during the 2007 random audit, that respondent or the Firm had claimed that the unaccounted funds represented legal fees or unreimbursed expenses. Rather, the correspondence and communications with respondent and the Firm consistently indicated that the funds belonged to clients or third-party payees.

Further, at the demand audit, respondent did not provide the client ledger cards that related to the replacement checks. It was not until the discovery exchange for the hearing that Galati was given those ledger cards. The ledger cards revealed the following:

Check No.	Amount	Client	Original Payee
9498	$1,000.00	Emmaus House	MGS Business Solutions
9651	$89.85	Ghahary from Gee	Mahwah Twp.
9652	$567.84	Ghahary from Gee	Mahwah Tax Collector
9795	$7,353.08	Simonome	First Card Visa
10499	$12,011.94	Hinton	William W. Hadley
11238	$1,400.00	Tawfellos	Palisades Oral Surgery
12170	$5,000.00	Tatros v May	Basking Ridge LLC
12573	$5,000.00	Davis from Barth	Parker & Imperial

Strieffler testified that these ledger cards raised issues as to the accuracy of the outstanding check list provided in 2007 and revealed that the Firm already had been paid its fees in those matters. Specifically, according to the Firm's ledger card for Emmaus House, check number 9498 was never cashed and, in December 2000, the Firm reissued check number 10238 to MGS Business Solutions. In the Simonome matter, respondent was the billing attorney, and the client ledger showed the Firm was paid $652 on August 16, 1999.

On the Hinton client ledger card, check number 10499 to William W. Hadley was voided, but on the same date, two checks

were issued to Hadley. The Firm was paid by check number 10493 in the amount of $1,491.00, on November 8, 2001. In the Davis from Barth purchase, the client ledger card showed that a stop payment was placed on check number 12573 on July 21, 2008, and the Firm reissued with check number 13216 on July 21, 2008. On the Tawfellos client ledger, check number 11238 was voided and, on September 29, 2004, the Firm replaced that check with check number 11511, payable to Basking Tawfellos, in the amount of $1,400. The note on the client ledger card stated "Replacing Ck #11238." The client ledger card also reflected three payments totaling $242,707.14 to the Firm. In the Tatros matter, the Firm was paid a total of $3,425 and, in Ghahary, the Firm was paid $543.74.

On cross-examination, Strieffler was questioned about the effect these client ledger cards would have had on his conclusion that the unidentified funds totaled $1,822.16. He was asked about the accuracy of the outstanding checks list, specifically as it related to the Hinton matter. He stated that, if he had been given the Hinton ledger card during his audit, which reflected the voided check, the check would not have appeared on the outstanding check list. The removal of that check would have increased the unidentified funds by $12,011.94. Similarly, Strieffler stated that, if he had seen the ledger card for Emmaus

House and Tawfellos, the same adjustments would have been made. The $1,000 and $1,400 checks would have been removed from the outstanding checks list, and the unidentified funds would have increased an additional $2,400. He agreed that, after adding back those amounts to his reconciliation and correcting a mathematical error identified by defense counsel, the unidentified funds would have exceeded $32,000.

Strieffler explained that, notwithstanding the amount, he had instructed respondent to turn over any unidentified funds to the Superior Court Trust Fund, in accordance with the Court Rules.

The discovery process and the exchange of documents prior to the hearing in this case also revealed information that Galati did not have during the demand audit. Specifically, check number 13560 indicated, in the memo line, that it related to the Ideal Fish and Seafood matter and that it replaced check number 12573. However, the corresponding ledger card for Ideal Fish reflected no such disbursement. Instead, check number 12573 related to the Davis from Barth purchase; the original check was payable to Parker Imperial.

Galati also analyzed how respondent rectified the overdraft involving Hayek. She testified that other clients' funds were used to satisfy respondent's obligation to Hayek. Specifically,

on October 14, 2010, a check in the amount of $18,000 was deposited in the trust account on behalf of Nieves Ret. On October 18, 2010, a check in the amount of $11,500 was deposited in the trust account on behalf of Gonzalez-Hernandez.[1] Prior to the Ret deposit, the trust account had a balance of $13,503.78. Consistent with Capano's testimony, respondent knew the account was short after Hayek's check was returned for insufficient funds. He, however, failed to make a deposit to cover the shortage. Instead, he allowed Hayek to re-present the check on October 18, 2010 and to invade other client funds.

Galati admitted that she did not attempt to perform a three-way reconciliation because she was focused on determining the cause of the overdraft.

Michelle Damiano, the Firm's long-time legal secretary, also testified. Damiano explained that William was in charge of the books and made all decisions. She described William as a "control freak," who was not easy to get along with, and who expected a lot from people. Both Capano and Damiano testified that respondent had no involvement in the financial aspects of the

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[1] The HUD-1 lists the borrower as Antonio Hernandez but the transcript and related cashier's check refer to Lorraine/Loren Gonzalez-Hernandez.

Firm while William was alive. Damiano was the only employee to assist William; she prepared the bank balance to checkbook balance reconciliations and gave them to William. She explained that William would write "balanced" on the statements. This notation indicated that the reconciliation was complete, the checkbook balance matched the bank statement balance (less outstanding checks), and all funds were accounted for and they were always "tied to a particular client."

Additionally, according to both Damiano and Capano, the Firm's practice was to promptly remove earned legal fees from the trust account. Damiano could not recall an instance when legal fees were left in the account. She further testified that William dictated everything he wanted done within the office, including the drafting of trust account checks. Damiano stated that the open client ledgers were alphabetically maintained in a binder and, when the card was "zeroed out," it would be placed at the front of the book, and at the end of the year, they would be "put away."

Damiano testified that, after William passed away, the day-to-day operations started to deteriorate and "[a]ll hell broke loose." Respondent was depressed because of personal and professional stressors. She would give him the two-way

reconciliations, but he was very delayed in giving them back to her because he was handling other firm issues at the time.

In October 2009, Barbara Rabbat, respondent's mother, intervened in an attempt to reconcile the trust account; she implemented Quickbooks. During this time, respondent and Capano were writing checks. Upon reviewing bank statements after William's death, Damiano identified several checks that were written to respondent and to the Firm with various clients identified in the memo section of the check. Damiano did not recall, prior to William's death, ever seeing a check written directly to him and then cashed, but acknowledged that there were several checks written directly to respondent after William's death.

Respondent described his relationship with his father, William, as "extremely dysfunctional." William made all decisions, handled all the financial aspects of the Firm, and never taught respondent how to handle any such matters. Further, he explained that they each handled their own matters and William often would pass clients on to respondent whom he did not want to represent.

When questioned about the disbursements made on William's files the day before the 2007 random audit, respondent was not certain why the funds had been returned; he was able to explain

only the reason for the old balances on his own files. Respondent claimed that he relied on William to dictate how to handle the old outstanding checks on William's clients' cases. Respondent also explained that there was a misunderstanding reflected in the January 2008 letter to Strieffler regarding the deficiencies. He stated that the paragraph addressing outstanding checks actually related to outstanding balances and, therefore, the Firm had not written to the clients holding those outstanding checks, but only to those with outstanding balances on their client ledger cards. He claimed that all of these representations were based on information provided by William and not on any independent investigation on respondent's part.

Respondent explained that, when William was transitioning the Firm to him, the name of the firm was changed, along with the business account designation. He testified:

> as to the trust account, he basically had with him, when we were talking about the accounts, that small sheet of paper, the outstanding balances that were on — that we keep seeing attached to the bank statements. And attached to that, he had a sticky. And on the sticky were the names of clients and the amounts of checks off of that outstanding balances sheet and the check numbers. And he basically indicated to me that he had checked on this, on these checks. And there were seven of them and he had determined that they were, in

fact, fees and/or expenses that belonged to Rabbat and Rabbat.

[5T26-27][2]

Respondent indicated that he did not retain the "sticky note" from his father. He admitted that he did not verify any information provided by William on the "sticky note" before disbursing the seven "replacement checks" and he "[t]ook no independent steps whatsoever to verify that the money was in the account." He also admitted that this was contrary to his routine practice of making sure the deposit was available before making any disbursements. When questioned about how he blindly followed the "sticky note" without independent verification, he claimed those disbursements for fees were consistent with his knowledge of the particular clients. For example, in the Montalto matter he was "not surprised," because he knew there were outstanding fees and expenses on unrelated litigation; Ghahary's circumstances were the same because that client was involved with Montalto. Similarly, he asserted that the Firm's client, Ideal Fish, was involved in significant litigation and often owed fees.

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[2] 5T refers to the hearing transcript dated July 16, 2013.

Consistent with his statements to Galati, respondent testified that he returned the full amount of the seven checks to the trust account ($32,332.86) the day before the demand audit because he realized, after taking a CLE course, that he had made a mistake disbursing the money in that manner. He denied a connection between the timing of the audit and the deposit.

As to the remaining fifteen checks on the outstanding checks list, respondent claimed that William told him that respondent would need to research to whom the funds belonged. Respondent believed he would be required to engage an accountant to resolve these checks, but was trying to avoid doing so.

With regard to the overdraft, respondent testified that the Hayek check bounced because the bank held the settlement check for an additional time. He admitted that the settlement check was deposited on September 21, 2010, and the check was not returned until October 5, 2010. Respondent disputed Galati's testimony that the Ret and Hernandez deposits were used to "cover" the overdraft; he claimed there was no relationship between the timing of those two deposits and Hayek's cashing of her check. Acknowledging that the check was not cashed until October 18, 2010, respondent emphasized that Hayek had determined when to re-present the check for payment.

Samuel Fischer, CPA, testified as a forensic accounting expert in respondent's behalf. He explained that, contrary to Strieffler's original reconciliation, the unidentified funds were much greater than $1,822.16, because checks that the Firm had told Strieffler were outstanding, were not, in fact, outstanding. Admittedly, Fischer did not conduct any analysis or reconciliation to determine to whom the money belonged. He concluded that the issuance of the seven "replacement checks" and the failure to keep the Ret and Hernandez funds intact caused negligent misappropriations. He explained that respondent's belief that the funds belonged to him and/or the Firm removed the case from the realm of knowing misappropriation. Specifically, he maintained that respondent had no way of knowing who owned the $32,000 "without doing a lot more accounting investigation work and analysis" and, therefore, respondent was negligent in not having conducted this analysis.

He also opined that respondent's behaviors were not consistent with an attorney who knowingly misappropriated client funds; for example, he believed that if respondent had knowingly misappropriated client funds, he would not have hired an accountant to review his records.

* * *

The special master found that respondent knowingly misappropriated client funds by issuing seven checks to himself or to the Firm, in violation of RPC 1.15(a), In re Wilson, 81 N.J. 451 (1979), and RPC 8.4(c). He further found that respondent knowingly misappropriated client funds when he allowed Hayek to re-present her settlement proceeds check, knowing that the payment of that check would impact the Ret and Hernandez funds on deposit.

As to the checks that respondent issued after William passed away, the special master accepted Galati's testimony that these "replacement" checks were either deposited into the business account or cashed, and that she accurately testified about the original payees on each of the checks. The special master also concluded that the client ledger cards in the Estate of Simonome, Hinton from Hadley, Tawfellos, and Ghahary from Gee matters reflected that the Firm had been paid before respondent issued replacement checks and that no funds, therefore, were due the Firm.

The special master found that respondent had been aware that the original checks were identified during the 2007 audit as outstanding. Yet, respondent never reviewed the corresponding ledger cards before issuing the replacement checks to himself and/or the Firm. The special master also found that the Estate of

Simonome and the Davis from Barth matters were respondent's cases. As to each of the seven checks, the special master stated: "I find it clear and convincing that this was not to reimburse attorney fees or disbursements."

The special master declined to accept the OAE's position that the business account shortages motivated respondent's misappropriation of client funds. He stated that,

> I do not find that there is clear and convincing evidence that this would have been the case. There was no investigation as to whether any other source of funds would have been available for business . . . . However, this is of [sic] not material in terms of my decision.
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> [SMR 19.][3]

The special master accepted Galati's testimony relating to the Hayek check, noting that the Firm's fee was disbursed before the client signed the closing statement and before the distribution to the client was made. He concluded that, when Hayek presented the $20,055 check and it was dishonored because of insufficient funds, the trust account was "clearly and unequivocally" overdrawn and the account was "out of trust at this point in time." As to the subsequent deposits that allowed

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[3] SMR refers to the undated hearing report filed by the special master.

the Hayek check to be paid, the special master stated: "I find it clear and convincing . . . that respondent knew about the overdraft and did not thereafter deposit funds to cover the check. I find it clear and convincing that the Respondent allowed the client funds [to be] deposited for the Ret and Loraine [sic] Gonzalez Hernandez to cover the amount of the dishonored check."

Further, the special master noted that respondent's return of the $32,332.86 on the day before the demand audit "demonstrates that Respondent, with knowledge of having invaded Ms. Hayek's client funds, waited until the last possible moment to repay same," and that it was of no consequence whether respondent had the financial ability to immediately replace those funds. The special master found that respondent's issuance of seven individual checks, rather than removing funds in one lump sum, was inexplicable and contradicted respondent's claim that he would not issue a check, unless he knew there was sufficient money in the account. Rather, the special master found, "[the] checks being issued over time leads one to the logical and reasonable inference that they were issued when the money was needed or wanted."

The special master also determined that Damiano's testimony regarding William's procedures was significant. Specifically,

the fact that William was controlling and dictated all of his instructions to staff made clear how carefully William had handled trust account records. Although the special master accepted that respondent was not involved in the monthly reconciliations before William's death, he concluded that the correspondence with the OAE, during the 2007 audit, "clearly indicate[d] knowledge and involvement regarding the attorney trust account" deficiencies and office practices and established that respondent was not simply "parroting" William's instruction. Additionally, the special master found not credible respondent's claim that he had no knowledge of the trust account and that his father was not being cooperative with the random audit. Not only had respondent never relayed this issue to the OAE, but also his interactions with the OAE during the random audit suggested that respondent himself was responsive and knowledgeable in respect of the Firm's accounts.

Further, the special master found that, based on William's methods, "it would be uncharacteristic for William Rabbat to have given instructions regarding the replacement issuance of the replacement [sic] on a handwritten "post-it" or "sticky" note." Rather, the special master found respondent's testimony as to the note not credible, especially in light of Damiano's

testimony that fees were promptly removed and that some of the cases allegedly listed on the note were respondent's own files.

As to Fischer, respondent's expert, the special master accepted his testimony that no one had determined to whom the excess funds belonged, but rejected Fischer's conclusion that respondent had engaged only in a negligent misappropriation.

In conclusion, the special master found that respondent, William, and the Firm failed to follow the trust accounting rules. He further found that respondent "unequivocally" knew about the problems with the outstanding checks and that the trust account was not reconciled. The special master found that respondent's labeling of the seven checks as "replacement checks" violated RPC 8.4(c) because he knew those funds were payable to clients and/or third parties, rather than fees owed to the Firm. Here, he noted that the alleged fees were not substantiated by a bill, memo, or any other documentation. In this regard, the special master remarked that it "strains credulity that William Rabbat would direct the Respondent to issue replacement checks on a 'post it'." The special master concluded that:

> Respondent transferred the sum of $32,332.86 from trust. These were client funds entrusted to Respondent to pay third parties. These funds were not due the firm for fees and expenses. At no time did Respondent receive authorization from the owners of the funds to use same. The funds were spent by Respondent for

> personal or firm expenses, and Respondent knew these were client funds. I find it clear and convincing that the Respondent knowingly violated RPC 1.15.
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> [SMR45-46].

Likewise, the special master found that respondent knew that he was out of trust in the Hayek matter and, rather than correct the shortage, he allowed the Ret and Hernandez funds to be invaded, without the clients' consent, and replaced the misappropriated funds on the day before the demand audit.

Thus, based on the principles set forth in Wilson, supra, the special master recommended respondent's disbarment.

* * *

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

Pursuant to R. 1:20-6(c)(2)(C), "the burden of proof in proceedings seeking discipline . . . is on the presenter. The burden of going forward regarding defenses . . . shall be on the respondent." This burden must be satisfied by clear and convincing evidence. R. 1:20-6(c)(2)(B). Here, respondent has been charged with knowing misappropriation, in violation of RPC 1.15(a) and the principles set forth in Wilson. The OAE has satisfied its burden of proof.

In In re Lawrence, 206 N.J. 190 (2011), the Court addressed the issue of burden-shifting with regard to proving ownership of funds in an attorney trust account. In Lawrence, the attorney was charged with failure to safeguard client funds, negligent misappropriation, and recordkeeping violations. Id. In the Order, the Court stated that the OAE had the burden to prove the failure to safeguard. Id. The Court found that the burden shifted when the OAE proved that the attorney accessed his trust account when he was not permitted to do so because of his suspension status; the attorney failed to maintain records that he had earned the fees he alleged he was owed; and he transferred the funds to his personal account instead of the Superior Court Trust Fund. Id. Based on these factors, the attorney was found to have negligently misappropriated client funds. Id.

The Court has described knowing misappropriation as "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." In re Wilson, 81 N.J. 451, 455 n.1 (1979). Six years later, the Court elaborated:

> 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).]

The knowing element of misappropriation can also be satisfied through a finding of willful blindness. In re Skevin, 104 N.J. 476 (1986). In Skevin, the Court declined to extend the knowing element to inadvertent or unintentional misuse of client funds but, instead, found that knowledge can be established "where a party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist." Id. at 485-86.

Later, in In re Johnson, 105 N.J. 249, 260 (1987), the Court expounded on "willful blindness," noting that it would "view 'defensive ignorance' with a jaundiced eye" and that

"[t]he intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation.'" Ibid. The Court was careful to distinguish between "intentional ignorance" and "legitimate lack of knowledge." Ibid.

Recently, in In re Weil, 224 N.J. 269 (2016), a similar case, an attorney was disbarred for taking, as his fee, funds previously identified as escrow funds. During a prior investigation by the OAE, the attorney identified a list of outstanding client balances. In the Matter of Roger J. Weil, DRB 15-097 (November 13, 2015) (slip op. at 4). In a subsequent investigation, the bank records revealed that the attorney had disbursed a portion of those funds to himself in the exact amount previously identified. Id. at 6. The attorney claimed that the disbursements were made because those funds were owed to him for legal fees and/or unreimbursed expenses. Id. at 7. He was, however, unable to produce any records supporting his conclusion. Id. at 7. We found that the attorney disbursed escrow funds to himself and possessed the requisite knowledge that "he was taking funds that did not belong to him." The attorney was disbarred.

In the case now before us, on June 27, 2007, Strieffler conducted a random audit of the Firm. The Firm provided to Strieffler a list of twenty-two outstanding checks totaling $82,618.49. Strieffler concluded that the Firm had been improperly preparing its reconciliations because it was completing only two-way reconciliations, rather than the required three-way reconciliations. Based on the limited documentation respondent provided, Strieffler prepared a three-way reconciliation that accounted for all funds in the account except for $1,822.16. By letter dated July 20, 2007, Strieffler outlined the deficiencies revealed by the audit. The Firm was given forty-five days to correct these deficiencies.

The Firm failed to satisfy the OAE of its efforts to correct the deficiencies within the forty-five days. Thus, the audit continued for more than a year through various letters, e-mails, and personal communications. During that time, respondent never indicated that any of the twenty-two outstanding checks represented funds owed to the Firm. Instead, all communications established that those checks had been made payable to clients and/or third parties on behalf of clients. Ultimately, Strieffler directed the Firm to deposit the unidentified funds with the Superior Court Trust Fund.

The OAE's last communication with the Firm regarding the audit was in September 2008. At that time, the Firm trust account contained unidentified funds in amounts unknown and the twenty-two checks remained outstanding. Strieffler testified that, although he never received a proper reconciliation or proof that the unidentified funds had been deposited with the Superior Court Trust Fund, he ended communications with the Firm based on its representation that the outstanding balances would be resolved or deposited with the Trust Fund.

After William passed away, the financial management of the Firm became respondent's responsibility. Despite his active participation in the 2007 audit, respondent denied having any knowledge of how to handle finances. Notwithstanding respondent's claim that he had no familiarity with the trust account, between September 2009 and February 2010, he issued seven checks payable to the Firm and to himself, totaling $32,332.86 and deposited four of those checks into the business account. In this instance, we part company with the special master and find that respondent made or directed these deposits at a time when the account was facing shortages, a conclusion supported by Galati's specific testimony that, but for these deposits, respondent's business account would have been overdrawn on presentation of various checks. None of the funds

funds were disbursed to clients. On each of the seven checks, however, respondent made reference to checks that appeared on the outstanding check list he had produced during the 2007 audit, indicating that the new checks payable to respondent or the Firm, now replaced the original outstanding checks.

Thereafter, on October 7, 2010, the OAE was notified that respondent had overdrawn his trust account by the presentment of a $20,055 check written to his client, Hayek. The OAE requested a written explanation from the Firm within ten days. Hayek re-presented her check on October 18, 2010. By that point, respondent had deposited the settlement checks for two unrelated matters, Ret and Hernandez. Respondent had been aware of the insufficient funds in the account prior to the deposits but made no effort to replenish the account. Thus, respondent allowed the Ret and Hernandez funds to be used to pay Hayek.

On October 20, 2010, respondent informed the OAE that he hired an accountant to review the cause of the overdraft. Because he failed to provide a reasonable explanation for the overdraft, the OAE scheduled a demand audit on January 11, 2011.

On January 5, 2011, respondent submitted a written explanation for the overdraft to the OAE. In it, he claimed that the return of $55,000 in a failed real estate transaction and Hayek's presentment of the check simultaneously caused the

overdraft. He further stated that, after William passed away, he wrote trust account checks and deposited them into the Firm's business account, based on his belief that those funds, previously identified during the 2007 random audit as outstanding checks, already had been paid to the clients and/or third parties. However, he did not produce any documentation or other proof to establish that the funds already had been paid to the clients or third parties. Moreover, in his written response to the trust overdraft, he neither detailed the "replacement checks" nor revealed that they were made payable to him and/or the Firm, three of which he cashed. Rather, Galati learned that respondent had either deposited the funds into his business account or cashed them only when she received discovery.

Galati determined that a $30,000 check for Hayek's settlement had been deposited on September 21, 2010, and that the following day, the Firm disbursed its fee related to that matter. On September 28, 2010, respondent issued the $20,055 check to Hayek; the balance in the trust account prior to the presentation of Hayek's check was only $15,335.86. Galati concluded that the seven checks respondent issued between September 2009 and December 2010 had caused the overdraft.

The day before the demand audit, respondent deposited the full amount of the "replacement checks" ($32,332.86) back into

the trust account. He claimed that he did so because of information he learned during a recent CLE class that suggested that the funds should have been deposited with the Superior Court Trust Fund. At no time did he mention that those "replacement checks" represented legal fees and/or unreimbursed expenses; nor did he provide client ledger cards related to "replacement checks" during the demand audit.

As to the first instance of knowing misappropriation, the facts are not in dispute. Respondent admitted issuing the seven checks to himself and/or the Firm and using the funds for business expenses. He also agreed that the outstanding checks he "replaced" represented funds owed to clients and/or third parties. He claims, however, that when he issued the replacement checks, he was not aware that he was invading client funds at that time. Instead, he asserted that he issued the checks based on a "sticky note" William left for him prior to his death. Respondent claimed that, based on his knowledge of the clients' matters handled by the Firm, he believed that they owed the Firm legal fees. He undertook no investigation or inquiry to confirm that belief.

As the special master so carefully analyzed and determined, respondent's explanation of blind reliance on a "sticky note" is not credible. He reasoned that, based on William's controlling

nature and his use of dictation, it was improbable that he would have given respondent such direction in this manner. Further, the special master found that if the "sticky note" actually existed and respondent truly believed fees were owed to the Firm, he would have disbursed those funds at once and not as needed over time. Respondent never told the OAE about the "sticky note" because, as the special master found, it did not exist.

The special master further found incredible respondent's claim of complete ignorance in respect of management of the financial aspects of the Firm. He noted that respondent actively participated in the 2007 audit and never exhibited to the OAE an inability to understand the requirements of handling a trust account.

The special master also unequivocally found that respondent knew the checks were outstanding but made no attempt to review the client ledger cards or otherwise investigate the status of the funds before issuing the "replacement" checks to himself or to the Firm. It was not logical, he found, that those funds represented fees owed because the Firm took its fees promptly. Moreover, respondent provided no bills or documentation to establish that these amounts, indeed, were owed to the Firm.

Many of the special master's determinations involved his assessment of the witnesses' credibility – and particularly respondent's credibility. Consistent with established case law, we defer to the special master's credibility assessments and recognize that he had the unique opportunity to observe the demeanor of the witnesses. See, Dolson v. Anastasia, 55 N.J. 2 (1969). Moreover, we agree with those assessments in the context of the established evidence. To us, the evidence clearly established that respondent knew he was using funds that belonged to clients and other third parties, without their consent.

The OAE proved respondent knew about the outstanding checks from the 2007 audit and that they represented funds owed to clients. That notwithstanding, he later distributed those funds to himself and/or the Firm. The burden then shifted to respondent to prove that the funds belonged to the Firm. He failed to do so. Thus, similar to the attorney in Weil, respondent is guilty of knowing misappropriation of client funds.

Moreover, even if the "sticky note" existed, respondent's own admissions establish knowing misappropriation. He admitted that he took the funds without any independent verification. He, thus, issued checks without confirming whether sufficient funds

to cover those checks were on deposit in the trust account, and did so knowing that it was "highly probable" that those funds did not exist. Based on Skevin, supra, 104 N.J. 476, the knowing element has been satisfied by respondent's willful blindness.

As to the second instance of knowing misappropriation, the special master properly concluded that respondent violated the principles set forth in Wilson. Respondent knew that the Hayek check had been returned for insufficient funds, yet he did nothing to replenish the account. Instead, respondent deposited into the trust account funds for Ret and Hernandez. Then, knowing that payment of the Hayek check would impact those client funds, he directed Hayek to re-present the check. When she did so, Ret's and Hernandez's funds were invaded. Thus, the OAE has satisfied its burden that respondent knowingly misappropriated client funds.

Respondent heavily relied on the fact that the unidentified funds were much greater than the original $1,822.16 calculated. Respondent's expert concluded that the issuance of the seven "replacement checks" caused negligent misappropriations. He explained that respondent's belief that the funds belonged to him and/or the Firm removed the case from the realm of knowing misappropriation. This reasoning is flawed.

First, it was the Firm's own dereliction in not providing the appropriate ledger cards that prevented Strieffler from properly reconciling the account. Second, the total is insignificant. Any funds that were unidentified should have been turned over to the Superior Court Trust Fund. If respondent could not demonstrate that they represented his legal fees, then he was not entitled to disburse them as such. Third, the disbursements respondent took were in the exact amounts the Firm had previously and unequivocally identified as client funds via outstanding checks. At no time during the 2007 audit did respondent or the Firm claim those funds represented fees or expenses. Rather, he made that claim only in the face of a trust overdraft audit.

Respondent claims the burden rests on the OAE to prove those funds were client funds. The case law does not support this conclusion. Consistent with Lawrence, that burden shifted to respondent after the OAE established that respondent himself previously designated those funds as client funds during the 2007 audit.

Respondent's reliance on In re Wigenton, 210 N.J. 95 (2012), and In re Gallo, 117 N.J. 365 (1989), to support his conclusion that he engaged in a negligent, not knowing, misappropriation, is misplaced. Those cases are factually

distinguishable in that the misappropriations occurred as a result of improper recordkeeping. Here, the records were clear that, in 2007, the Firm identified the outstanding checks as client funds, which respondent later disbursed to himself in 2009 and 2010.

For these reasons, we find that respondent violated RPC 1.15(a), and RPC 8.4(c), and the principles set forth in In re Wilson, 81 N.J. 451 (1979) for his knowing misappropriation of client funds. Thus, we recommend that he be disbarred.

Vice-Chair Baugh and Member Zmirich did not participate.

One final point warrants mention. Respondent raised a due process issue after the OAE was permitted to amend the complaint, after the hearing had commenced, to allege additional facts in support of the knowing misappropriation charge. This issue, however, is preserved for the Supreme Court, pursuant to R. 1:20-16(f)(2). We note only that the OAE filed a formal amended complaint alleging the additional facts and that respondent filed a verified answer in response thereto. Thereafter, the additional facts alleged in the amended complaint were fully litigated by the parties.

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 Victor K. Rabbat
Docket No. DRB 16-018

Argued: May 19, 2016

Decided: December 8, 2016

Disposition: Disbar

Members	Disbar	Disqualified	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich			X
Total:	7		2

Ellen A. Brodsky
Chief Counsel