SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-353
District Docket Nos. XIV-2012-0590E
and XIV-2012-0591E

IN THE MATTER OF

JORDAN B. COMET

AN ATTORNEY AT LAW

Decision

Argued: March 15, 2018

Decided: June 8, 2018

Al Garcia 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 master. The three-count complaint[1] charged respondent with violations of RPC 1.5(a) (charging an unreasonable fee); RPC 1.5(b) (failing to provide a client with

[1] The Office of Attorney Ethics (OAE) moved to withdraw count three of the complaint, the Khen matter, because of Khen's unavailability. That count charged respondent with violations of RPC 1.5(a) and (b), and RPC 1.15(c) and (d).

a writing setting forth the basis or rate of the fee); RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985) (knowing misappropriation of client and escrow funds); RPC 1.15(c) (failing to keep separate property in which the lawyer and another have an interest until there is an accounting and severance of their interests); RPC 1.15(d) and R. 1:21-6 (recordkeeping violations); and RPC 8.4(c) (engaging in conduct involving, dishonesty, fraud, deceit or misrepresentation).

For the reasons expressed below, we disagree with the special master's finding that respondent knowingly misappropriated funds. Instead, we find that respondent mistakenly believed that he was entitled to funds that he negligently misappropriated and, therefore, determine to impose a censure.

Respondent was admitted to the New Jersey bar in 1992. He maintains a law office in Teaneck, New Jersey. He has no history of discipline.

The special master outlined the torturous procedural history of this matter. Briefly, respondent was selected for a random audit, which the OAE scheduled for July 7, 2008. Respondent requested a postponement, due to impending knee surgery. Thereafter, he requested postponements based on his

recuperation from surgery, and then on upcoming religious holidays. The audit, therefore, was rescheduled to October 28, 2008, almost four months after it was initially scheduled.

Following the audit, on August 19, 2011, the OAE filed an ethics complaint.[2] On February 14, 2012, six months after the complaint had been filed, respondent filed an answer. When discovery issues developed, the then special master struck respondent's answer and directed that the matter proceed as a default. The OAE certified the record to us for the imposition of discipline. Respondent then moved to reinstate his answer. Because of the gravity of the charges against him, we determined to give him an opportunity to address them, vacated the default, and directed that respondent produce missing information no later than November 20, 2012.

Almost one year later, on February 5, 2013, respondent's court-appointed counsel obtained an order relieving him from the case. Tamra Katcher was then appointed as counsel of record. After the original special master assigned to the case retired, another special master was appointed.

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[2] Respondent had been granted two extensions to file the answer. The OAE attorney then assigned to the case reminded respondent's counsel that the answer was overdue and cautioned that, if an answer were not filed, the matter would be certified to us as a default.

At a December 22, 2015 pre-hearing conference, the special master learned that, although respondent was represented by appointed counsel, he also had retained private counsel, Lee Gronikowski.[3] Both the OAE and respondent's counsel obtained discovery extensions. The special master granted the OAE's request to provide the newly assigned ethics counsel time to familiarize himself with the voluminous record.[4]

On May 24, 2016, Katcher requested an adjournment of the next day's conference for additional time to review discovery. After obtaining the attorneys' vacation schedules, the special master set July 19, 2016 for a conference. The special master then learned about respondent's vacation plans and rescheduled the conference. The parties all attended the August 4, 2016 conference, and the hearing was scheduled to start on October 26, 2016. On October 20, 2016, respondent sent the special master an ex parte adjournment request to accommodate one of his witnesses. The special master denied the request, but made arrangements to accommodate the witness.

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[3] The record does not explain why respondent retained Gronikowski when he was represented by court-appointed counsel. Gronikowski conducted only the direct examination of respondent on November 28, 2016. Gronikowski did not attend the last day of the hearing due to an injury.

[4] This matter was assigned to two other OAE attorneys before it was finally assigned to Deputy Ethics Counsel Al Garcia.

At the first day of hearing, the special master rebuked respondent for sending the ex parte fax and e-mail. The special master noted that, once he realized that the communications were ex parte, he stopped reading them, but had seen enough to glean that respondent sought an adjournment. According to the special master, the matter had been lingering for seven years by that point and, therefore, he did not consider the request.[5]

* * *

The OAE charged respondent with knowing misappropriation of client trust and escrow funds, based on his invasion of client funds for personal and business purposes. Respondent denied misappropriating the funds, asserting a belief that he had used funds from a retainer he had received in connection with services for Adam Technologies, LLC (Adam Tech). The client, however, never paid respondent the retainer. Therefore, over an eleven-month period, respondent drew approximately $49,707

[5] Katcher represented respondent at the DEC hearing, but, thereafter, obtained an order to be relieved as counsel. Respondent then retained John McGill, III, Esq. to represent him. McGill secured an adjournment of the hearing date. He subsequently realized that he might have had some involvement in respondent's case while he was employed by the OAE, and, therefore, withdrew as respondent's counsel. Chief Counsel then rescheduled oral argument to the March 15, 2018 calendar, as a peremptory date. Respondent subsequently retained Robyn M. Hill, Esq. to assume his representation.

against other client funds. When the OAE notified respondent of a random audit of his attorney records, he provided only copies, or recreated records, to the OAE.[6] The facts gleaned from six days of hearings, subpoenaed records, and recreated documents follow.

Before the OAE audit, respondent maintained his attorney accounts at PNC Bank. Thereafter, he opened new attorney accounts at Capital One Bank.

Respondent, Kohlhagen, and Chris McKay, an accountant previously employed by the OAE, were present at the OAE audit. According to OAE Senior Auditor Mimi Lakind, Kohlhagen prepared respondent's taxes and, only after respondent received notice of the random audit, began reconciling respondent's attorney accounts.

At the audit, Lakind requested respondent's original records, including, among others, his reconciliations and receipts and disbursements journals. When she requested the original documents, she stated "they" refused to turn them over:

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[6] Respondent asserted that, before receiving notice of the audit, he had requested his accountant, Robert Kohlhagen, to reconcile his records because he recognized that there was "an issue" with his trust account. In that letter, dated May 12, 2008, respondent requested that Kohlhagen implement an accounting system to conform to the Court Rules and to perform an accounting on a monthly basis.

> Mr. Comet allowed Mr. Kohlhagen to speak, and Mr. Kohlhagen said that he took the original records and he made a set of records for me. And I said, okay, but I'd like to see the original records. And Mr. Kohlhagen said, we destroyed them.
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> [1T42;20-25.][7]

Respondent denied that Lakind was told that the records were destroyed or unavailable. Nevertheless, he submitted only copies of his trust account bank statements. Moreover, as of the date of the hearing, despite Lakind's repeated requests, respondent had not provided his original business account statements, source of deposit documentation for the business account, deposit slips, bank journals, receipts and disbursements journals, client ledgers, or reconciliations. Because much of the information Lakind received was deficient, in her view, he failed to cooperate fully. He provided business account records only for transactions generated after the dates of the random audit on accounts transferred to Capital One, as well as post-audit PNC records. Each time Lakind asked for pre-audit records, respondent and Kohlhagen requested extensions.

Kohlhagen provided Lakind with QuickBook re-creations, not the original documentation respondent was required to maintain.

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[7] 1T refers to the October 27, 2016 DEC hearing transcript.

Moreover, the records were not made contemporaneously, but, rather were recreated between July 2008 and October 2008, after respondent had received notice of the random audit. Respondent admitted to Lakind that he never even opened his bank statements, and that he had failed to perform monthly trust account reconciliations until Kohlhagen created them for the audit. Thus, he asserted, because he did not know that he was required to maintain certain information, he did not have it to turn over.

Respondent told Lakind that the withdrawals he had made against the Adam Tech ledger were based on work he had performed and fees he had billed against the Adam Tech retainer. Lakind, therefore, requested copies of the bills and the retainer agreement. According to Lakind, respondent provided only documents that predated the relevant time period, including retainer agreements for work performed in the previous four-and-a-half years.

By letter dated October 31, 2008, Lakind sent respondent an audit deficiency letter, informing him that his records were not in compliance with R. 1:21-6 (Ex.2). The letter summarized the deficiencies found to date. In part, it stated,

> you not only failed to reconcile your attorney trust account on a monthly basis, but you failed to even open your bank statements! In addition, you maintained your attorney business account with a consistently overdrawn balance, month after month. The

> audit also disclosed that client trust funds totaling $50,000 had been misappropriated, over a period of almost one year, before you took action to replace the monies.
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> [Ex.2;1T80.]

Lakind testified more specifically, that respondent (1) failed to identify the source of funds, clients credited, or the amount of each deposited item in the receipts journal (2) failed to maintain a descriptive trust disbursements book (he did not include all checks or identify which client ledger was charged); (3) failed to maintain a running checkbook balance; (4) failed to maintain a descriptive ledger for each client (the date of the check, check number, payee, reason for the check, or balance remaining on the ledger); (5) failed to prepare and reconcile, on a monthly basis, a schedule of client ledger accounts to the bank account statement; (6) kept inactive trust ledger balances in the trust account for extended periods, and, therefore, he did not make prompt payments to clients or third persons; (7) failed to maintain deposit slips; (8) failed to maintain a business receipts or disbursements journal; (9) maintained improper trust account and business account designations on bank statements, checks, and deposit slips;[8] (10) failed to maintain

[8] Respondent's business account was not designated as such, only "Law Offices of Jordan B. Comet."

proper bank imaged copies of trust and business account checks; (11) failed to identify the client on trust checks; (12) commingled trust and personal funds;[9] (13) failed to maintain professional liability insurance;[10] (14) conducted improper electronic transfers between accounts (trust account to business account); (15) maintained an "old" unresolved check; (16) failed to note which client was charged when withdrawing fees from the trust account; and (17) failed to maintain required information for amounts wired from the trust account.

According to respondent, after the audit, he immediately attempted to correct the deficiencies, including switching his attorney accounts to another bank, and taking trust account courses through the Institute for Continuing Legal Education (ICLE). In addition, by letter dated November 20, 2011, he submitted to the OAE, his financial records and bank statements.

Lakind's audit revealed that, for several years, respondent provided legal services to Vincent DeVito and his several entities, including Adam Tech, and that he also represented DeVito on personal issues. In 2004, respondent offered to serve

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[9] Funds from respondent's father's estate were deposited in his trust account. As a beneficiary, he had a claim to some of the funds.

[10] Respondent dissolved his limited liability company to avoid the need for professional liability insurance.

as general counsel to DeVito and his companies, and provided him with a July 2, 2004 memorandum/fee proposal, which, among other things, provided respondent with a minimum guaranteed annual salary of $50,000, for the first 500 hours of services. His initial hourly rate, thus, was $100 per hour. Both parties' initials on the memorandum signified their assent to the terms.

The following year, a July 12, 2005 memorandum for legal employment required, among other things, that respondent provide DeVito with weekly or bi-weekly billing statements, that respondent's compensation was to be paid weekly via payroll direct deposits at a rate of $1,000 per week, and that the parties were to jointly review the billing statements each month. The agreement was to remain in effect for one year, unless cancelled. The document contained DeVito's signature, assenting to the terms. The "courtesy" reduced rate increased to $188 per hour.

Paragraph four of the agreement required respondent to act with diligence in DeVito's matters. DeVito testified that the language was included because of "issues" with respondent's

diligence, communication, and failure to work toward achieving DeVito's goals.[11]

According to DeVito, sometime in 2006 or 2007, he and respondent discussed respondent's continued conditions of service. DeVito had grown dissatisfied with respondent's services. Nevertheless, respondent wanted an "up front" $50,000 retainer and an increased hourly rate of $300. Respondent claimed that he had a very lengthy discussion with DeVito about payment of his fees. He testified, that, previously, he had sent DeVito a bill in early January 2007, but had not been paid for months. Respondent was "annoyed" because the bill for $5,000 or $7,000 was significant to him. He needed the funds. He, therefore, told DeVito that they would have to change their payment arrangement. DeVito was not "thrilled" about wiring a retainer, but his agreement to do so was documented by a March 5, 2007 letter. With the retainer in place, respondent would no longer be required to bill DeVito, but they would meet periodically to review respondent's work and time sheets. Respondent prepared a document to memorialize their agreement, which provided, in part:

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[11] DeVito, who suffered from an apparent hearing disability, had an interpreter present to assist him at the ethics hearing.

> Adam Tech will wire a retainer deposit in the amount of $50,000.00 into this firm's trust account. This amount will be used to pay for all invoiced time and expense for legal work performed by this office. I have enclosed our wiring instructions for your convenience.
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> [Ex.R-13.]

Neither party executed the agreement. In an August 23, 2011 letter to the OAE, DeVito stated that he had "not agreed to the proposed arrangement."

Both DeVito and respondent agreed, nevertheless, that, had the funds been wired, respondent could have used them at his discretion. DeVito never wired the retainer to respondent. Moreover, he maintained that his payroll department had made past fee payments to respondent via checks, which respondent usually collected from DeVito's office. DeVito was not aware that, previously, respondent had been paid via direct deposit.

DeVito testified that, although he intended to give respondent the $50,000 retainer, he never signed the fee agreement, never paid the retainer, and never notified respondent that he would not pay it. According to DeVito, after he received the retainer agreement, new issues arose over the next few months, during which time he retained new lawyers, and he began "separating" from respondent, and moving in a different direction. According to DeVito, respondent never asked him for the

retainer, and DeVito did not "chase people to pay them." DeVito maintained further that respondent never inquired whether the retainer had been paid.

Contrary to DeVito's testimony, respondent asserted that both DeVito and someone from DeVito's office assured him that the wire was being sent, possibly within a week of his drafting the agreement. He conceded that he never asked DeVito whether he had sent the retainer, but testified, at different times, that (1) DeVito's assistant assured him that the money was on its way; (2) it was being sent; or (3) it should be there. Later, respondent testified that he had contacted DeVito, who assured him that the money had been wired. Respondent also testified that he may have mistaken a different wire that he had received as the one from DeVito. Nevertheless, neither his business nor trust account showed a $50,000 wire for March 2007. There were no wire transfers into his trust account until April 26, 2007, and, by then, respondent already had wired funds out of his trust account. Respondent could not support his mistaken belief that he had obtained the Adam Tech retainer.

Respondent acknowledged, with respect to thirteen distributions earmarked by Lakind and set forth below, that he had not verified whether he had obtained $50,000 from DeVito, before charging the distributions against the Adam Tech client ledger.

Respondent admitted that he had not asked DeVito for permission to transfer any of the funds. Indeed, respondent admitted sending a letter, dated August 8, 2012, to his former counsel, stating that he did not have permission or authority to borrow any money from DeVito or from any of his clients. Respondent further admitted that his financial circumstances had not changed from 2004 through 2017. Although respondent stated, "I definitely am in a situation where I do not have enough funds in my account" and was in overdraft and "clearly [did] not make enough" money or have enough clients, he claimed that he would not take client money. Respondent maintained that his failure to verify his receipt of the retainer was a "very negligent error" on his part.

DeVito recalled that, at some later unidentified point after the March 2007 agreement, respondent called to complain that he had not received the retainer. They were both angry - DeVito because he was dissatisfied with respondent's services for "dozens" of reasons, and respondent because he had not received the retainer. Eventually, DeVito agreed to pay $17,500 for respondent's services. DeVito remarked that respondent's services were not worth $50,000. Thereafter, they parted ways.

DeVito ignored the OAE's initial attempts to obtain information about his Adam Tech records, until the OAE subpoenaed

the information. After receiving DeVito's records, on August 11, 2011, the OAE wrote to him to inquire whether he had ever seen respondent's March 5, 2007 letter, as DeVito had not supplied it with the subpoenaed documents. In an August 23, 2011 reply, DeVito stated:

> I do recall receiving the letter from [respondent] that you provided with your correspondence, and I do recall having had discussions with [respondent] relative to his proposal for the $50,000 retainer. After careful consideration of the proposal, however, I decided not to go forward under the financial arrangement. In fact, that was the subject of a disagreement that he and I had approximately a year later. He had claimed that I had never informed him that I would not pay the retainer while I told him that I had not agreed to the proposed arrangements.
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> After much discussion, we settled the matter with a payment of $17,500.00 in November 2008. I do not have any invoices from [respondent] for the 2007/2008 period, but I do recall reviewing his billing records with him when we finalized our settlement.
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> [Ex.R-16 and Ex.R-22.]

Notwithstanding the above, DeVito executed an affidavit, prepared by respondent's counsel, asserting that the OAE never contacted him to provide a statement about the $50,000 at issue.

Lakind's review of respondent's reconstructed records, subpoenaed bank records, and her own reconstruction of various client ledgers, revealed that the Adam Tech client ledger had been overdrawn by a number of disbursements for the eleven-month

period from April 2007 to March 2008. According to Lakind, when she inquired why respondent failed to tell her about the overdrafts, he replied that McKay had told him not to reveal that information.

Respondent admitted that he had online access to his business and personal accounts, and initially did not recall whether he had online access to his trust account, as well. The OAE, however, showed him a copy of his August 2006 PNC Bank statement, establishing that he had made online transfers from his trust account. Although respondent testified that he did not recall making those transfers, ultimately, he admitted having online access to his trust account. Respondent asserted that, when he issued payments from his trust account, he was aware of the specific amounts of money he held for each client, except for Adam Tech, for whom he believed he held $50,000.

As to the Adam Tech ledger, as of January 1, 2006, respondent held $5,000, in his trust account, pursuant to an escrow agreement, in connection with the sale of property from Adam Tech to Jane and Albert Fershing.[12] On February 12, 2008, an

[12] On March 20, 2009, after several unsuccessful telephone calls and letters, Fershing, also an attorney, demanded that respondent return the $5,000 escrow, lest Fershing file a lawsuit or an ethics grievance. Respondent did not return the funds until April 28, 2009, after the OAE audit.

additional $1,000 was credited to the Adam Tech ledger in connection with the "DeVito v. Liccardi" matter. By December 28, 2007, the shortage in respondent's trust account totaled $34,707.47. Lakind testified that the withdrawals that respondent made from his trust account and attributed to Adam Tech actually came from other client trust funds.

Lakind opined that, had respondent's mistake gone undetected for only a month, she might have accepted his explanation. However, it continued for almost one year. The shortage was just under $50,000. She concluded that respondent had to be keeping track of the shortages, because he did not overdraw the ledger by more than $50,000. Lakind did not accept respondent's explanation about the anticipated $50,000 wire from DeVito because (1) respondent made online transactions and, therefore, could see the balances in all three accounts (trust, business, and personal); (2) if the trust account had been overdrawn, the bank would have notified the OAE; and (3) there was no wiring information from the bank notifying respondent that the wire had been received, as had occurred for each of the closings he had conducted in which funds had been wired into his trust account.

Although respondent's trust account was never overdrawn, his business account was. Respondent maintained that the

constant overdrafts in that account resulted from his failure to reconcile his accounts for more than two years. According to Lakind, the bank "levied on his attorney trust account" to satisfy the deficiencies in his business account, which was improper because that account contained client funds.

Lakind asserted that the Adam Tech trust account ledger showed the escalating misappropriated balances from that account, indicating that no funds were left for Adam Tech, and that $50,000 had never been wired into the trust account for that client. Kohlhagen's recreated ledger card charged disbursements (checks and online transfers) to Adam Tech when no other funds were available. Thus, other clients' monies were used for those disbursements. The Adam Tech ledger was consistently overdrawn, "month after month after month."

Lakind performed a line-by-line reconstruction of the Adam Tech ledger for deposits and withdrawals, relying on subpoenaed bank records, information prepared by Kohlhagen, and the Adam Tech client ledger. Lakind also prepared a trust account trial balance ledger, listing all of the money owed to clients at the end of the month and the amount respondent had on deposit for that month. Lakind focused on thirteen transactions to establish the allegation that respondent had knowingly misappropriated client trust funds. The transactions were listed as debits for

legal fees on the Adam Tech client ledger card. Respondent agreed that the transactions occurred as Lakind had reported, but denied that he had misappropriated the funds.

On January 1, 2006, the opening balance in the Adam Tech ledger was the $5,000 escrow held for the Fershing matter. The thirteen transactions are as follows.

1. On April 18, 2007, respondent wired $1,505.56 from his PNC trust account to Broadway Database for his firm's payroll expenses, charging it to Adam Tech as "legal fees." The balance prior thereto was $7,500 ($2,500 from a "Shannon" matter and $5,000 from the Fershing matter).

In April 2007, with the exception of the first two days, respondent's business account was overdrawn each day. By April 19, 2007, respondent's and his wife's personal account also was overdrawn, by $5,800. Therefore, neither account had sufficient funds to support the $1,505.56 payroll expenses.

2. On May 3, 2007, respondent again wired $1,505.56 from his trust account to Broadway DataBase for payroll expenses, charged against the Adam Tech ledger. A day earlier, the business account was overdrawn by $2,118.61. The personal account was overdrawn by $9,091.15.

3. On May 3, 2007, the business account was overdrawn by $167.89. On May 4, 2007, respondent moved $8,000 from the trust

account to his personal account to cover the $9,163.15 overdraft; the personal account was still overdrawn by $766.15.

According to Lakind, in May 2007, respondent disbursed $11,011.12 from his trust account, attributed to Adam Tech, for which there were no funds available. Thus, other client funds were used to cover the disbursements. Following those disbursements, the Adam Tech deficit rose to $6,011.12.

4. On June 12, 2007, respondent made a $1,000 cash withdrawal from his trust account. On June 11, 2007, his business account was overdrawn by $2,485.75; his personal account was overdrawn by $2,997.75. The Adam Tech ledger deficit rose to $7,011.12.

5. On June 27, 2007, respondent wired $1,515.35 from the trust account, charged to the Adam Tech ledger, to Broadway DataBase. The day before the transfer, June 26, 2007, respondent had only $295.50 in his business account, an insufficient amount to cover payroll. Respondent's personal account had a $2,200.24 overdraft. The Adam Tech ledger deficit rose to $8,526.47.

6. On September 20, 2007, respondent had a $455.50 balance in his business account and an $18,389.91 overdraft in his personal account. On September 21, 2007, he made a $2,000 cash withdrawal from his trust account, charged against the Adam Tech ledger. The Adam Tech deficit rose to $10,526.47.

7. On September 26, 2007, respondent made a second $2,000 cash withdrawal from his trust account, charged against the Adam Tech ledger. On September 20, 2007, respondent's business account had a $455.50 balance and on September 25, 2007, a $208.01 balance. On neither date were there sufficient funds to cover either of the $2,000 withdrawals. The Adam Tech deficit rose to $12,526.47.

8. On September 24, 2007, respondent's personal account was overdrawn by $7,180.41. On October 1, 2007, respondent transferred $7,181 from his trust account, charged to Adam Tech, to his personal account, which on that same date had a balance of $.59. According to Lakind, respondent's personal account was overdrawn for the entire month, until the $7,181 was credited to it. As to respondent's business account, his September 2007 bank statement showed that the account was overdrawn by $1,274.48. That account, therefore, could not have supported the $7,181 withdrawal. By October 2007, the shortage against the Adam Tech ledger totaled $19,707.47.

Because respondent's trust account balance, at the end of October 2007, was only $62,754.32, he had insufficient funds to pay client "Rocco" the $75,100 he was due.

9. On December 5, 2007, respondent's business account was overdrawn by $3,564.07. On December 6, 2007, respondent withdrew

$5,000 from his trust account, charged against the Adam Tech ledger, and transferred the funds to his business account.

In November 2007, even though respondent had a $31,000 deposit for client "Lewis," his trust account balance was only $15,654.32. Therefore, the Adam Tech shortage affected the Lewis deposit. The Adam Tech shortage totaled $24,707.47.

10. and 11. On December 28, 2007, respondent's trust account was charged with $5,000 twice. Both charges were reflected on the Adam Tech ledger. On December 26, 2007, respondent's personal bank account was overdrawn by $5,019.68 and, on December 28, 2007, it was overdrawn by $5,219.68. His business account was overdrawn by $2,992.04. Respondent had withdrawn $5,000 from the trust account on December 6, 2007. The same amount was credited to his business account that day.

Lakind testified that, in December 2007, over the course of twenty-two days, respondent withdrew $15,000 from his trust account against the Adam Tech ledger, but no corresponding funds were on deposit to support the charges against it. On December 5, 2007, there was a $43,500 deposit for clients Edward Gayad and Mervat Awad for the purchase of property. Respondent's Adam Tech shortage for the month totaled $39,707.47.

The trust account balance on January 31, 2008, was $48,154.32. Of those funds, $43,500 were credited to "Gayad and

Awad" and $31,000 were credited to "Lewis." The balance in the trust account for those two clients alone should have been $74,500. Therefore, the account was out of trust by at least $33,000; $39,707.47 was due to withdrawals made against Adam Tech, for which there were insufficient funds.

12. On February 14, 2008, respondent's business account was overdrafted by $7,846.68, and his personal account showed a $2,283 overdraft. On February 15, 2008, respondent made a $5,000 cash withdrawal from the trust account against the Adam Tech ledger and, on the same day, deposited it into the business account. On February 8, 2008, he received a $663,524.39 wire into his trust account, which was disbursed that month. On February 12, 2008, respondent made a $50,000 deposit into the trust account (settlement for David Foreman). In February 2008, the shortage on the Adam Tech ledger again totaled $38,707.47. The trust account balance, on February 28, 2008, was $16,797.32. Thus, for the Foreman balance alone, respondent's trust account was short by approximately $34,000. On February 13, 2008, respondent issued a $43,500 trust account check to Gayed and Awad as a refund of their deposit.

13. On March 5, 2008, respondent's business account was overdrawn by $3,108.92 and, on March 6, 2008, by $3,326.39; his personal account was overdrawn by $2,757.38. On March 6, 2008,

respondent withdrew $5,000 from his trust account against the Adam Tech ledger, bringing the Adam Tech shortage to $43,707.47 The following day, respondent made a $5,000 cash deposit into his business account.[13]

On February 12, 2008, respondent deposited $50,000 into his trust account on behalf of client "Forman." However, less than a month later, on March 6, 2008, respondent's trust account bank balance was $10,654.32. He, therefore, was out of trust by approximately $39,500. On March 13, 2008, respondent issued a $50,000 trust account check to Forman, even though insufficient funds were in the trust account to cover the check. The check did not clear the account until March 18, 2008. In the interim, on March 14, 2008, respondent received a $50,000 wire into his trust account from one of his in-laws, David Goren, raising the trust account balance to $60,654.32. After the Forman check cleared, respondent's trust account balance decreased to $10,654.32. According to Lakind, the $50,000 wire was a "loan" because respondent did not have sufficient funds to pay Forman. Without the infusion of funds, the check to Forman would have bounced.

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[13] The deficit in the Adam Tech "account" totaled $49,707.47, when the Fershing deposit and Liccardi deposit were added to the total.

Respondent asserted that he first learned about the trust account shortage in April 2008, before receiving notice of the OAE random audit, when he realized he had insufficient funds for a closing. When he obtained documentation from the bank, "it was like a big bulb that went off;" he realized that DeVito must not have wired the funds to his trust account.

Lakind, however, pointed out that the obligation to pay Foreman represented the first time in more than eleven months (from April 1, 2007 through March 6, 2008), that respondent had insufficient funds in his trust account to accommodate the withdrawals. Until then, respondent always had other client funds in the trust account to cover the shortages. Before March 13, 2008, Forman's $50,000 and other client funds supported the $49,707 shortage in respondent's trust account. According to Lakind, if respondent had not obtained the loan from Goren, the check to Forman would have overdrawn the trust account.

Lakind ended her trial balance ledger on March 6, 2008, the day before $50,000 was returned to the trust account. She determined that respondent had used funds from his trust account to cover the overdrafts in his other accounts and charged them to the Adam Tech ledger, even though there were insufficient funds for Adam Tech against which to draw.

Further, Lakind calculated that respondent's overdraft charges for his business account, from January 2007 through the first nine months in 2008, were $11,859; and the overdraft charges for his personal account, from December 2006 through April 2008, totaled $8,317. He had amassed more than $20,000 in bank fees over the course of the audit period.

Lakind noted some of respondent's additional financial obligations: a debt to the Borgata Hotel, for $4,000 worth of dishonored checks from his business account in exchange for casino credit slips; and back payroll taxes from 2007, through the second quarter of 2008, totaling $22,341.48.

Respondent's January 28, 2009 letter to Lakind blamed his misappropriation of trust funds on his failure to reconcile his accounts and to maintain appropriate records, which prevented him from discovering that he had not received the Adam Tech retainer.

Respondent submitted approximately forty-five letters, attesting to his good character, professionalism, loyalty, satisfactory services, work ethic, honesty, good moral character, and contributions to the community. Respondent also asserted that he has had a proctor monitoring his trust account, since 2011.

At the ethics hearing, the OAE argued that respondent's overdrafts served as a motive for him to knowingly misappropriate funds.

In its post-hearing submission, the OAE argued that respondent's routine withdrawal of trust funds for his personal and/or business uses created shortages in his trust funds, that he invaded $49,707.47 of trust account funds in an eleven-month period; that he engaged in the "lapping" of funds, that is, using one client's funds to meet another client's obligations; and that his conduct constituted the knowing misappropriation of client trust and/or escrow funds.

The OAE pointed out that respondent did not dispute the thirteen transactions. His defense was his erroneous reliance on DeVito's having wired $50,000 into respondent's trust account and his failure to check his trust account balance during that period to ensure that he had received the funds. The OAE argued that respondent's testimony was simply not credible. Respondent repeatedly withdrew trust funds for personal or business expenses, without checking whether he had received the $50,000 retainer and without obtaining the consent of any of the individuals for whom he held funds.

The OAE argued, on one hand, that respondent's conduct constituted willful blindness; but, on the other hand, he knew

what he was doing. He was motivated by his need for funds; monitored his accounts online; had online access to all of his accounts; and changed explanations and made misrepresentations about when or by whom he was told that the $50,000 was being transferred. According to the OAE, these facts demonstrated by clear and convincing evidence that respondent knowingly misappropriated funds, for which he should be disbarred.

In his post-hearing submission, respondent urged a finding that the OAE failed to establish, by clear and convincing evidence, that he knowingly misappropriated client funds, but rather only that the misappropriations were grossly negligent. Respondent's counsel argued that respondent's negligence led to his failure to reconcile his accounts, which prevented him from discovering that DeVito had not remitted the retainer. He then negligently drew on the non-existent retainer, which he believed he could use at his discretion. Counsel likened respondent's conduct to that of the attorney in In re Wigenton, 210 N.J. 95 (2012) (censure for attorney who negligently misappropriated client funds due to poor recordkeeping; the attorney failed to maintain client ledgers for his trust account or to reconcile his trust account for extended periods; the Court found that the attorney had a reasonable belief that sufficient funds were in the trust account and that his actions were not an intentional ignorance that cloaked a more

nefarious intent; the significant period of time between the audit and the ultimate prosecution of the charges and the attorney's practice of law without further incident played a role in the quantum of discipline); In re Librizzi 117 N.J. 481 (1990) (six-month suspension for attorney whose negligent recordkeeping practices caused a $25,000 trust account shortage); In re Konopka, 126 N.J. 225 (1989) (six-month suspension for an attorney who, on twenty-six occasions over a three-year period, made disbursements in excess of the amounts on deposit; the Court found no intent or knowledge of the misappropriation); and In re Orlando, 104 N.J. 344 (1986) (four-and-one-half-year temporary suspension for negligent misappropriation by an attorney who was "seriously and inexcusably inattentive to the accounting and bookkeeping details of his voluminous real estate practice").

Here, counsel argued that respondent's missing documents, poor bookkeeping, failure to open bank statements, and out-of-trust circumstances did not establish knowing misappropriation of client funds. Moreover, his actions and testimony were consistent with his argument that he was negligent in not confirming the receipt of the wire, which inadvertently caused the invasion of other client funds.

Counsel's supplemental May 8, 2017 letter-brief addressed respondent's mitigating circumstances: (1) lack of prior or

subsequent ethics violations; (2) the retention of Kohlhagen to perform monthly reconciliations; (3) the retention of a proctor; (4) the completion of continuing legal education courses; (4) his good character in the community as evidenced by the numerous letters submitted on his behalf; and (5) the significant passage of time between the conduct in 2008 and the filing of the complaint in 2011, and the effect thereof on the witnesses' memories. Counsel urged us to consider these "significant" mitigating factors in tempering discipline.

* * *

To determine whether respondent's misappropriations were knowing or negligent, the special master examined four areas: (a) the absence of original records for Lakind's review; (b) respondent's financial need; (c) the timing and amounts of the withdrawals at issue; and (d) respondent's testimony.

As to (a), the special master emphasized that respondent did not provide Lakind with original records required pursuant to R. 1:21-6, but, rather, only documents created by Kohlhagen, which were generated after respondent had received notice of the random audit. The records were not made contemporaneously, but, rather, were created between June 2008 and the end of October 2008, during the period of the nearly four-month adjournment. The special master

was particularly disturbed by the fact that respondent's original records were destroyed.

With respect to (b), respondent's financial need, the special master underscored the fact that respondent's personal account was frequently overdrawn and that the account was overdrawn for the entire month of October 2007, until respondent deposited funds from his trust account. Respondent also admitted his grave financial need at the time - he had been in overdraft status from 2004 to the present. Likewise, he had shortfalls in his business account and had accrued overdraft charges from both accounts totaling approximately $20,000. In addition, respondent had to borrow $50,000 from a family member to replenish the funds he had misappropriated.

With respect to (c), the timing of the withdrawals, the special master pointed out that, on the day of each of the thirteen withdrawals at issue, respondent's business and/or personal accounts were overdrawn. The special master, thus, determined that respondent was fully aware of the state of his accounts. Specifically, as to transaction number 8, on October 1, 2007, respondent withdrew $7,181 from his trust account and transferred it to his personal account, which at that time was overdrawn in the amount of $7,180.41. The transfer increased the balance in his personal account to a positive balance of $0.59.

Finally as to (d), testimony, the special master found Lakind's testimony "to be highly credible." He determined that the facts elicited, which he focused on in sections (a) through (c), were representative of the evidence of respondent's intentional and knowing misappropriation of his clients' trust funds.

Conversely, the special master found respondent's testimony that he did not reconcile his bank accounts unbelievable. He stated:

> It is incredulous [sic] to believe that an individual who does not reconcile bank records, would know exactly how much to transfer from an account that has money in it, to an account that does not have money, in order to give the account without the money, a positive balance. On each of the thirteen transactions noted by the OAE, a specific amount of money was transferred from the trust account to satisfy a specific need for the business account, the payroll, or respondent's personal checking account. An individual could not guess that exactly $7,181.00 would be needed to bring a checking account that had been overdrawn for twenty-three straight days to a positive balance of fifty nine cents. He would have to know the amount of money overdrawn. In order to know this amount, one would have to reconcile his accounts.
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> [SMR9.][14]

The special master also found DeVito's testimony to be contradictory and, therefore, not credible. The special master

[14] SMR denotes the March 22, 2017 special master's report.

mentioned the inconsistencies relating to the proposal for the $50,000 retainer. Initially, DeVito stated, in his 2011 letter to the OAE, that he had not agreed to the proposal. He testified, however, that he never informed respondent that he would not pay the retainer.

The special master found it troubling, in light of (1) the additional time DeVito requested to compile the Adam Tech records, and (2) his discussion about the compilation with counsel before forwarding the records, that DeVito failed to include the March 5, 2007 letter in the subpoenaed records. The special master stated that, considering that the QuickBook records were specifically created for the audit and did not exist prior thereto, "one could almost conclude that the March 5, 2007 letter was created for the audit." Nevertheless, before DeVito knew the significance of the letter, he was "adamant" that he never agreed to pay respondent the $50,000 retainer.

As to the audit, the special master found no legitimate excuse for an attorney to fail to produce original documents four months after a scheduled audit or for the records that were produced to have been created after receipt of the notice of the random audit. Lakind's detailed analysis was possible only because of the subpoenaed bank records she obtained. If respondent had nothing to

hide, "original records, even 'messy ones' would have been present."

According to the special master:

> It defies logic and common sense that an individual with significant financial issues, no original trust or business account records, and a self-proclaimed propensity not to reconcile bank statements, can know when and how much money to transfer, from the one account that he has access to which is solvent, to achieve positive balances in the bank accounts that have negative balances. When I additionally consider the fact that the same individual accumulated over twenty thousand dollars in bounced check fees, during the same relatively short period of time, but would claim that he never checked a bank record for more than a year to see if a $50,000 deposit was made, I cannot accept [respondent's] version of the facts. I therefore find [respondent's] testimony to be incredible.
>
> [SMR10.]

The special master, thus, found clear and convincing evidence that respondent violated RPC 1.15(a), R. 1:21-6 (RPC 1.15(d)) and RPC 8.4(c).

The special master rejected the passage of time as a mitigating factor warranting any substantial weight in respect of discipline, noting that respondent himself had created much of the delay. To support that conclusion, the special master emphasized the events that took place in the twenty-two months that he was special master. During that time, the OAE requested only one

adjournment to enable the newly assigned deputy ethics counsel to familiarize himself with approximately eight banker's boxes worth of documents. The proceedings were, thus, extended from August 2015 to November 2015. During that same period, respondent requested and was granted: (1) an extension of the first pre-hearing conference date; (2) two extensions of the second pre-hearing conference; (3) an extension of the hearing date (the second request for an extension of the hearing date was denied); (4) two extensions for the date to submit final written arguments; and (5) two extensions to submit mitigating information and arguments. The special master also considered that respondent, as well as his accountant, had made multiple requests for extensions to submit documentation to the OAE.

Based on the foregoing, the special master recommended respondent's disbarment.

* * *

In a letter-brief to us, respondent's counsel argued that respondent's conduct amounted to negligent misappropriation of client funds requiring discipline no greater than a reprimand. According to counsel, the OAE failed to meet its burden of proof, by clear and convincing evidence, that respondent's conduct was knowing.

Counsel maintained that the special master's reliance on the four factors in his report, to determine whether respondent's conduct was knowing, was misplaced and erroroneous. Counsel disputed the testimony that Kohlhagen destroyed respondent's original records, claiming there was no support for such an allegation. Respondent denied having heard anyone use that word during the audit or with reference to documents in the case. Prior to receiving notice of the audit, respondent had recognized that his books were deficient, and "at the suggestion of an attorney whom he had contacted to determine how to address the trust account problem," he retained Kohlhagen to remedy his bookkeeping errors.

Counsel argued further that respondent's admittedly poor financial circumstances did not constitute proof of misappropriation. His use of trust funds to directly pay financial obligations, rather than first transfer the funds to the business account, simply amounted to a recordkeeping violation. Counsel stated that "[i]t is entirely possible that Respondent paid obligations from the fees that he believed were on deposit in the trust account instead of transferring the funds first to the business account to ensure that the funds reached the intended recipient, rather than used by the bank to cover an existing business account overdraft."

Counsel admitted that respondent's business and personal accounts were repeatedly overdrawn, but stated that:

> there is not necessarily a correlation between that fact and the withdrawals made by Respondent from his trust account . . . . It is at least as likely that Respondent was using the fees that he believed were in his trust account and available to his use to pay other obligations directly, rather than dealing with the overdraft issue.
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> [RB8.][15]

Counsel contended that respondent's knowledge of the exact amount needed to bring his personal account into balance did not establish knowing misappropriation. Moreover, "it is more than possible that he either called or went to the bank to determine the overdraft amount in his personal account." Indeed, counsel maintained that it was respondent's practice "to go to the bank in person" to ascertain the balance in his personal account, as he did "to pay the two Broadway Database transactions."[16]

Counsel disagreed with the special master's credibility findings, particularly DeVito's, with respect to payment of the $50,000 retainer. Counsel focused on DeVito's August 23, 2011 letter to the OAE, wherein he referenced a disagreement that he

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[15] RB refers to respondent's February 11, 2018 letter-brief.

[16] Respondent's testimony, however, was that he regularly talked to an individual at PNC Bank and went to the bank only when he discovered the $50,000 shortage.

had with respondent "approximately a year later," after receiving respondent's proposal for the $50,000 retainer. Counsel pointed out that DeVito's letter and affidavit make it clear that he did not inform respondent that he would not pay the retainer until a year after he received the agreement. Thus, she argued, there was no inconsistency in his testimony and, therefore, it did not support the finding that DeVito's testimony was not credible.

Counsel argued further that none of the special master's "'findings' – not the financial issues, bank fees, original records issue, or how one could ascertain the amount of an overdraft in a personal or business account – support a conclusion that Respondent is not credible." Moreover, none of the findings, either individually or as a group, establish clear and convincing evidence that respondent knowingly misappropriated funds.

As to the special master's theory, that the March 5, 2007 retainer agreement was created for the audit, counsel pointed to the fact that there were three copies of it in the OAE's exhibits, that respondent "likely provided the letter" to Lakind at the OAE audit, and that the fact that DeVito did not provide a copy of it when the OAE subpoenaed his documents did not itself call into question the document's validity. Counsel

attributed DeVito's failure to turn over the document to his inadequate filing system – keeping documents in a pile on the floor of his office. According to counsel, "the passage of time combined with DeVito's hearing problem and the possible lack of clarity in questioning may account for some of the Special Master's confusion," leading to the "ridiculous suggestion that the document might be false."

Counsel blamed any discrepancy or confusion during respondent's or DeVito's testimony "in large part to [the] extreme passage of time." Counsel maintained that respondent's practice was to keep time records and turn them over to DeVito with the documents for each file.[17] It would have been in respondent's best interests to keep copies of those records. According to counsel, "when Respondent contacted his bank to ascertain whether a check had cleared, he learned, to his horror, that, while the check in question had cleared, his trust account did not contain sufficient funds to accomplish a necessary transfer of other client funds."

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[17] There is no testimony or documentary support for this assertion. Indeed, respondent testified that he was not required to submit bills to DeVito because of the retainer agreement and that "one full year went by without me discussing one penny of money to Vince." DeVito testified, however, that respondent gave him frequent updates on the work he was doing, both in person and by phone.

He then, immediately borrowed the funds from a relative to "restore equilibrium."

Counsel maintained that respondent's credibility should be viewed in light of character evidence. Respondent produced nearly fifty character letters confirming that he is a person of integrity, honesty, and professionalism. He serves his community, and is devoted to friends, family, the community, and his synagogue. Counsel accused the special master of ignoring evidence of respondent's good character, remarking that, "[i]t is undeniable from [the character letters] that Respondent would neither intentionally misappropriate client funds nor make misrepresentations to his clients."

Counsel disputed the special master's finding that Lakind's testimony was "highly credible," relying on her comment about the destruction of the original records. Counsel argued that, as hearsay, the statement should not be considered. Counsel pointed out that, even though the Rules of Evidence in ethics matters are relaxed, the residuum evidence rule applies. According to counsel, nothing in the record permitted consideration of Lakind's testimony regarding the destruction of records. Counsel argued that it was a serious claim, and one that went to the heart of any finding of whether respondent acted knowingly.

Counsel pointed out that Lakind did not make any notations about the destruction and that respondent's former counsel had noted significant issues about Lakind's testimony, including that respondent had sent her "voluminous records" at her request, which "she never took the time to analyze."[18]

Counsel argued further that the special master's credibility findings were misplaced because he did not "state" that he based them on any intangible aspects of the case such as the demeanor of the witnesses. Rather, he compared or "picked apart" aspects of DeVito's and respondent's testimony as "compared to written documents" and did not address respondent's former counsel's concerns regarding Lakind's attitude and other issues.

Counsel maintained that respondent's and DeVito's testimony as to the critical issues were not inconsistent. Moreover, respondent's testimony throughout was consistent: he did not know that DeVito failed to wire $50,000 to his trust account and did not know that DeVito disagreed with the payment requirement until late March 2008. Citing In re Seaman, 133 N.J. 67, 88 (1993), counsel stated that "[c]onsistency of testimony, both

[18] Those records, however, pertained to dates that fell beyond the audit period – 2009 and 2010. Lakind's analysis focused on 2007.

internally and between witnesses, is an important indicator of truthful testimony." Finally, counsel argued, the special master's credibility explanations were not plausible or reliable and must be overturned.

As to the passage of time as a mitigating factor, counsel submitted that respondent's adjournment requests were justified and did not significantly delay the resolution of the matter. Rather, the OAE could have filed a complaint more promptly had it not expanded the scope of the audit every few months. Thus, counsel urged us to consider the passage of time as a mitigating factor and to impose discipline no greater than a reprimand.

According to counsel, the facts of this case do not support a claim of willful blindness. Citing Wigenton, 210 N.J. at 96, counsel argued that there was "absolutely no indication that Respondent was guilty of 'willful ignorance designed to camouflage a more serious intent to take funds to which respondent was not entitled.'" Like respondent, Wigenton's significant recordkeeping deficiencies led to the negligent misappropriation of client funds. Wigenton hired an accountant during the audit, whereas here, respondent hired an accountant before any audit was scheduled, after he personally discovered

the shortage.[19] Counsel cited numerous additional cases where negligent, rather than knowing, misappropriation was found, in which the attorneys received discipline far short of disbarment, including: In re Gonzalez, 225 N.J. 603 (2016) (reprimand for attorney who stipulated to negligent misappropriation and recordkeeping violations); In re Christoffersen, 220 N.J. 2 (2014) (reprimand for negligent misappropriation, failure to segregate funds, commingling personal and trust funds, and recordkeeping violations); In re Wecht, 217 N.J. 619 (2014) (reprimand for negligent misappropriation and recordkeeping violations); and Librizzi, 117 N.J. 481 (six-month suspension for attorney who invaded client funds; over a twelve-year period he was found grossly negligent in the maintenance of his trust account records; his "unhealthy ignorance" of the status of his trust account was unintentional and prevented him from committing knowing misappropriation). Based on these cases and the above arguments, counsel contends that no more than a reprimand is warranted for respondent's misconduct.

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[19] Lakind testified, however, that Kohlhagen began to reconcile/recreate respondent's records only after respondent received notice of the random audit, a fact supported by respondent's four-month delay in turning over any records to the OAE.

The OAE did not submit a brief but, rather, relied on the record below, as well as the findings and conclusions of the special master.

* * *

Following a de novo review of the record, we are satisfied that the conclusion of the special master that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. We do not, however, agree with all of the special master's findings or with his recommendation for discipline.

Determining whether an attorney's conduct amounts to negligent or knowing misappropriation is a challenging task. Because of the grave consequences that befall attorneys found guilty of knowing misappropriation, the standard of proof – clear and convincing evidence – must be fully satisfied. In re Johnson, 105 N.J. 249, 260 (1987).

In In re Konopka, 126 N.J. 225, 234 (1991), the Court stated:

> We insist, in every *Wilson* case, on clear and convincing proof that the attorney knew he or she was misappropriating. Obviously, we consider the attorney's records, if relevant, along with testimony, but if all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no

> disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [citations omitted.]

In this case, we are not persuaded, to a clear and convincing standard, that respondent's misconduct was knowing. We base our conclusion on the uncertainty surrounding respondent's March 5, 2007 letter/agreement to DeVito requiring the wiring of the $50,000 retainer, even though it was not signed by either party. This agreement, together with respondent's and DeVito's testimony that they had discussed the retainer, as well as DeVito's further testimony that he intended to provide respondent with the retainer, but failed to follow through with it, persuaded us that respondent may have had a reasonable belief that DeVito had wire-transferred the funds to his trust account. We do not share the special master's suspicion that the retainer agreement was created after the fact for the purpose of providing respondent's defense. The OAE did not submit any metadata to support such a proposition. In addition, we do not find DeVito's failure to provide the OAE with the March 5, 2007 agreement with his other subpoenaed records dispositive on this issue.

Respondent's failure to verify the receipt of the wire-transfer exemplifies gross negligence on his part. Had he

followed the recordkeeping rules, and timely transferred his fees to his business account, he would have readily discovered that DeVito had not wire-transferred any funds. Respondent's failure to discover this fact does not equate to his knowing invasion of his other client funds, however. Thus, we find that, due to his mistaken belief that he had the retainer, an additional $50,000 in his trust account, respondent systematically utilized other client funds for business and personal purposes. Respondent's conduct in this regard amounts to commingling personal and client funds, negligent misappropriation, and failure to safeguard funds, all in violation of RPC 1.15(a).

Although the OAE withdrew count three of the complaint, which charged recordkeeping violations (RPC 1.15(d) and R. 1:21-6), we find that respondent had sufficient notice of these violations, that there was ample testimony as to his violation of the recordkeeping rules, to which he did not object, that he readily admitted that he did not comply with R. 1:21-6, and that he was not familiar with his obligations under the Rule. We, therefore, find that respondent is not prejudiced by our finding that he also violated RPC 1.15(d) and R. 1:21-6.

In sum, we find respondent guilty of violating RPC 1.15(a) and RPC 1.15(d). Because we do not find knowing misappropriation

of trust funds, we dismiss the charged violation of RPC 8.4(c). The remaining charges (RPC 1.5(a), RPC 1.5(b), and RPC 1.15(c)) pertain to count three, which were withdrawn.

Generally, a reprimand is imposed for recordkeeping deficiencies that result in negligent misappropriation of client funds. See, e.g., In re Cameron, 221 N.J. 238 (2015) (on a motion for discipline by consent, attorney guilty of negligent misappropriation of client trust funds and recordkeeping violations); In re Wecht, 217 N.J. 619 (2014) (attorney's inadequate records caused him to negligently misappropriate trust funds); In re Arrechea, 208 N.J. 430 (2011) (negligent misappropriation of client funds in a default matter; the attorney also failed to promptly deliver funds that a client was entitled to receive and ran afoul of the recordkeeping rules by writing trust account checks to himself and making cash withdrawals from his trust account, practices prohibited by R. 1:21-6; although the baseline discipline for negligent misappropriation is a reprimand and, in a default matter, the otherwise appropriate level of discipline is enhanced, a reprimand was viewed as adequate in this case because of compelling mitigation); In re Gleason, 206 N.J. 139 (2011) (attorney negligently misappropriated clients' funds by disbursing more than he had collected in five real estate

transactions; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Clemens, 202 N.J. 139 (2010) (as a result of poor recordkeeping practices, attorney over disbursed trust funds in three instances, causing a $17,000 shortage in his trust account; an audit conducted seventeen years earlier had revealed virtually the same recordkeeping deficiencies; the attorney was not disciplined for those irregularities; the above aggravating factor was offset by the attorney's clean disciplinary record of forty years); and In re Mac Duffie, 202 N.J. 138 (2010) (negligent misappropriation of client's funds caused by poor recordkeeping practices; some of the recordkeeping problems were the same as those identified in two prior OAE audits; the attorney had received a reprimand for a conflict of interest).

Respondent's conduct is somewhat similar to the attorney's conduct in Wigenton, 210 N.J. 95. In that case, the attorney was selected for an OAE random compliance audit. As in this case, the primary issue was whether he was guilty of negligent or knowing misappropriation of funds. The attorney's recordkeeping practices were "grossly deficient," and his practice in real estate transactions was improper. Wigenton was required to

deposit, in his trust account, funds received, such as deposits and mortgage proceeds, and then to issue trust account checks to his business account for earned legal fees and reimbursed expenses. Instead, he deposited checks in his trust account and simultaneously "cashed out" the portion to which he was entitled for his fees and expenses, from funds from prior real estate transactions. In other cases, he left his earned legal fees in his trust account. Later, when he received funds from unrelated real estate transactions, he deposited them in his business or personal account, reasoning that they would be offset by the earned fees that he had retained in his trust account. In the Matter of Kevin P. Wigenton, DRB 11-015 (July 7, 2011) (slip op. at 2-3). In all cases, he removed his fees only after they had been earned. Rather than maintain a formal ledger of fees and expenses that he was owed, he kept files on his desk, jotting down the amounts he was owed on slips of paper, which were discarded after he received his fees. Id. at 4. Wigenton left his fees in his trust account for up to one month. He believed that his trust account contained sufficient earned fees to back up checks written against newly received funds. He did not reconcile his trust account during the period covered by the OAE audit. Ibid.

Although the OAE auditor's reconstruction of a portion of Wigenton's trust account uncovered trust account shortages ranging from approximately $8,500 to $45,300, there was simply no proof that he knowingly misappropriated the funds. Rather, he reasonably, "albeit mistakenly," believed that he was entitled to the funds. Therefore, the misappropriations were negligent. Id. at 2. As to the real estate transactions themselves, they were all conducted properly. Id. at 8. Wigenton also was guilty of numerous recordkeeping deficiencies, failure to safeguard funds, and a conflict of interest.

The mitigating factors we considered in imposing a censure on the attorney included, among others: (1) that he had contacted an accountant before the audit occurred to learn about the audit process; (2) that he took corrective measures to improve his accounting practices, including hiring a bookkeeper and a "CPA;" (3) that he performed monthly three-way reconciliations of his trust and business accounts, and maintained detailed client ledger cards and receipts and disbursements journals; (4) that no client or third person suffered financial harm; (5) that no ethics grievances had been filed against him; (6) that he cooperated with the OAE; (7) that he submitted substantial evidence of his good character; and (8)

that a significant amount of time had elapsed from the time of the events – nine to ten years. Id. 101.

We found, as a significant aggravating factor, Wigenton's failure to understand his responsibilities under the RPCs and his complete lack of knowledge about proper recordkeeping and attorney accounting requirements. Id. at 98.

Because, like Wigenton, respondent's recordkeeping was grossly negligent and because he failed to comply with or even familiarize himself with his recordkeeping responsibilities, a significant aggravating factor, we determine that a censure, rather than a reprimand, is appropriate discipline.

We further determine to require respondent to practice under the supervision of an OAE-approved proctor for two years; for the same two-year period, to provide the OAE with monthly reconciliations of his trust account on a quarterly basis; and to provide proof to the OAE that he has taken an OAE-approved accounting course.

Vice-Chair Baugh and Members Gallipoli, Rivera, and Zmirich voted to recommend respondent's disbarment, finding that he knowingly misappropriated client funds. These members filed a dissenting opinion.

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 Jordan B. Comet
Docket No. DRB 17-353

Argued: March 15, 2018

Decided: June 8, 2018

Disposition: Censure

Members	Censure	Disbar
Frost	X	
Baugh		X
Clark	X	
Boyer	X	
Gallipoli		X
Hoberman	X	
Rivera		X
Singer	X	
Zmirich		X
Total:	5	4

Ellen A. Brodsky
Chief Counsel