Supreme Court of New Jersey
Disciplinary Review Board
Docket Nos. DRB 18-124 and DRB 18-196
District Docket Nos. XIV-2016-0749E;
XIV-2017-0586E; XIV-2017-0587E;
XIV-2017-0588E; and XIV-2017-0589E

In The Matters Of	
Peter Jonathan Cresci	
An Attorney At Law	

Decision

Decided: December 12, 2018

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

These matters were before us on certifications of the record, filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). They have been consolidated for disposition.[1]

[1] Office of Board Counsel docketed the DRB 18-124 matter on April 16, 2018. The DRB 18-196 matter was docketed on June 15, 2018.

In the first matter (DRB 18-124), the OAE charged respondent with practicing law while suspended (RPC 5.5(a)(1)); committing a criminal offense, the unauthorized practice of law (RPC 8.4(b)); engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)); and failing to cooperate with disciplinary authorities (RPC 8.1(b)).

In the second matter (DRB 18-196), the OAE charged respondent with knowing misappropriation of client and/or escrow funds in three client matters (RPC 1.15(a) and the principles set forth in In re Wilson, 81 N.J. 451 (1979) and/or In re Hollendonner, 102 N.J. 21 (1985)), failing to make prompt disposition of funds in which a client or third person had an interest (RPC 1.15(b)); making a false statement of material fact to a disciplinary authority (RPC 8.1(a)); and conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)).

In two of the three client matters, the OAE also charged respondent with gross neglect (RPC 1.1(a)) and lack of diligence (RPC 1.3)); failing to communicate with the client (RPC 1.4(b)); charging an unreasonable fee (RPC 1.5(a)); upon conclusion of a contingent fee matter, failing to provide the client with a writing stating the outcome of the matter and showing the remittance to the client and the method of its determination (RPC 1.5(c)); failing to comply with the recordkeeping requirements of R. 1:21-6 (RPC

1.15(d)); failing to cooperate with disciplinary authorities (RPC 8.1(b)); and committing a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer (RPC 8.4(b)).

Finally, in one of the client matters, the OAE charged respondent with commingling personal funds and trust account funds (RPC 1.15(a)).

In both disciplinary cases, respondent filed a motion to vacate the default. We deny both motions, and now recommend respondent's disbarment for the knowing misappropriation of client, escrow, and estate trust funds. Alternatively, we recommend disbarment based on respondent's repeated defaults and his inability or refusal to conform his conduct to the standards required of all members of the New Jersey bar.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1992, to the Texas bar in 1998, and to the New York bar in 2011. At the relevant times, he maintained an office for the practice of law in Bayonne, which operated under various names, including Cresci, A Limited Liability Company; Cresci Law Firm, A Limited Liability Company; and Cresci Law Firm, LLC (collectively, the Cresci firm).

On November 17, 2016, the Court temporarily suspended respondent, effective immediately, based on the knowing misappropriation claims asserted

in DRB 18-196. In re Cresci, 227 N.J. 139 (2016). Respondent remains suspended.

On December 3, 2018, in another default matter, the Court imposed a censure on respondent for his failure to file an affidavit of compliance with R. 1:20-20 following his temporary suspension, a violation of RPC 8.1(b) and RPC 8.4(d) (conduct prejudicial to the administration of justice). In re Cresci, ___ N.J. ___ (2018).

DRB 18-124 (XIV-2016-0749E)

These charges arose from respondent's continued practice of law following his November 17, 2016 temporary suspension and from his failure to cooperate with the OAE's investigation of his post-suspension conduct.

Service of process was proper. On February 16, 2018, the OAE sent a copy of the formal ethics complaint, by regular and certified mail, return receipt requested, to respondent's last known home address listed in the records of the New Jersey Lawyers' Fund for Client Protection (CPF). Although the certified green cards were returned to the OAE, without signatures, the United States Postal Service (USPS) tracking system reflected that the letters had been "Delivered, Left with Individual." The letters sent by regular mail were not returned.

On March 14, 2018, the OAE sent another letter to respondent, at the same addresses, by regular and certified mail, return receipt requested. The letter informed respondent that, if he failed to file an answer within five days, the allegations of the complaint would be deemed admitted, the record would be certified directly to us for the imposition of a sanction, and the complaint would be deemed amended to include a charge of a violation of RPC 8.1(b). The certified letters were marked "unclaimed" and "vacant unable to forward," and, thus, returned to the OAE. The letters sent by regular mail were not returned.

As of April 13, 2018, respondent had not filed an answer to the complaint in this matter, and the time within which he was required to do so had expired. Accordingly, the OAE certified this matter to us as a default.

The first count of the two-count complaint arises from respondent's alleged practice of law while suspended, commission of the criminal act of the unauthorized practice of law, and conduct involving dishonesty, fraud, deceit or misrepresentation. The second count stems from respondent's failure to cooperate with the OAE's investigation.

We note that few of the allegations in the first count of the complaint relate to the OAE's claim that respondent practiced while suspended. Instead, they pertain to respondent's failure to comply with R. 1:20-20, which imposes

several obligations on suspended attorneys, and which resulted in the censure recently imposed by the Court.

For example, following respondent's November 17, 2016 temporary suspension, the Cresci firm continued to represent clients in several matters, albeit through attorneys other than respondent. Yet, between November 21, 2016 and March 20, 2017, no fewer than thirteen letters, in seven client matters, were written to adversaries, judges, and courts on letterhead that contained the following banner:

CRESCI
LAW FIRM
A Limited Liability Company

With one exception, respondent did not sign the letters and the record does not suggest that they were written by him or at his direction. The signatory to every letter almost always signed his or her name as "For the Firm." In some cases, the letters were signed by a non-lawyer firm employee and an attorney who was not identified on the letterhead and whose name does not appear in the New Jersey attorney index.

Other issues with the letterhead involve the continued identification of respondent as an attorney with the Cresci firm, from his November 17, 2016 suspension until December 1, 2016. From December 12, 2016 through February 20, 2017, the letterhead did not contain the name of any attorney

affiliated with the firm, although the street, post office box, and e-mail addresses and the telephone and fax numbers remained the same.

By February 21, 2017, the letterhead identified Christine Finnegan and John G. O'Brien as firm attorneys. All other information remained the same. Two days later, the letterhead reflected a different street address and the post office box number was removed, but the e-mail address and the telephone and fax numbers remained the same through at least March 3, 2017, when the original post office box address re-appeared.

By March 20, 2017, the firm's telephone and fax numbers had changed, and the e-mail address was removed. The original post office box remained, however. Finnegan was now identified as "Member of Cresci Law Firm, LLC."

Our recitation of the facts omits the details underlying the changes to the letterhead, except when necessary for context or relevant to the issue of respondent's continued practice of law following the temporary suspension.

COUNT ONE

On November 21, 2016, four days into respondent's temporary suspension, he wrote and signed a letter to Valley National Bank (VNB), where he maintained attorney trust and business accounts for the Cresci firm. Respondent requested VNB to honor all attorney business account checks

issued prior to the Order of temporary suspension, in addition to "several automatic debits."

The letterhead identified three attorneys: respondent, Drew M. Pratko-Rucando,[2] and John G. O'Brien (who was of counsel). Respondent signed the letter. Below his name were the words "For the Firm."

The Finnegan Interview

On March 29, 2017, the OAE interviewed Finnegan. The complaint alleged both that, at the time, Finnegan had a solo practice in Washington, New Jersey, and that "Respondent's firm is now her firm."

Finnegan told the OAE that she and respondent met at New York Law School in 1989. They have socialized and worked together since that time.

Finnegan claimed that, as of November 1, 2016, she became of counsel to the Cresci firm and the "transitional process" began. Yet, she also stated that respondent did not inform her of the temporary suspension until mid-November, when he gave her a copy of the Order "because they would eventually merge her practice with his firm." Regardless, she became a

[2] As shown below, Pratko-Rucando had left respondent's employ in April 2016, seven months earlier.

"member/partner" by late December 2016, and, in February 2017, she was registered with the State of New Jersey as a member of the LLC.

Finnegan and respondent discussed the matter of the Cresci firm's name and neither believed that it had to be changed. Finnegan explained:

> Plus there was the issue of this whole thing with transition, with Pete no longer [being] affiliated with the firm, cases filed in court and associated with Cresci Law. At that juncture[] it didn't also make sense to then also change the firm name and make things even more confusing.
>
> [C¶63;Ex.19p.85.][3]

Further, Finnegan explained to the OAE that, after respondent's temporary suspension, the Cresci firm's name was not changed because that was "the original name of the firm, the name of the firm whom the clients hired, and was the name registered with the courts." Moreover, the complaint alleged that, because "all of the correspondence, orders, and filings go through the Court system electronically, . . . [Finnegan] was afraid that something would come through, or get missed, and the firm would not have the ability to review matters pertaining to the clients' cases."

[3] "C" refers to the formal ethics complaint, dated January 29, 2018.

In addition, respondent's firm's answering machine remained active. Finnegan stated that she had left it in place until she could "transition everything over."

Finnegan claimed that, after respondent was temporarily suspended, she did not review the cases with him. Rather, she put a wall between respondent and the Cresci firm. She and respondent talked "twice a week, maybe." Although they did not talk "about everyday things that go on with each case," she admitted that, if she did not understand something about a particular client matter, even after reviewing the file, she "may have reached out" to respondent about the issue. Moreover, she admitted that she talked to respondent "about motions that specifically address what transpired with the firm when he was in control of the firm."

The complaint detailed a number of items that Finnegan had discussed with respondent after the effective date of his temporary suspension. These included respondent's signature on the check drawn against the TD Bank "transitional" account. They also discussed various aspects of a client matter (Percella), including the settlement value.

Finnegan assumed that, between November 16, 2016 and February 16, 2017, respondent handled the firm's bills. On February 16, 2017, Finnegan opened new trust and business accounts with PNC Bank. The accounts

remained in the name of the Cresci firm, however. Presumably, Finnegan took over the payment of bills upon the opening of the PNC accounts.

When Finnegan became a registered member of the Cresci Firm, she reviewed the client files, which did not contain copies of letters informing the clients of respondent's suspension. Finnegan believed that the clients had been informed orally. At the time of her interview, Finnegan was in the process of sending letters to the clients, re-notifying them of respondent's suspension.

Other OAE Interviews

On March 29, 2017, the OAE interviewed attorney Pratko-Rucando, who had left the Cresci firm in April 2016. She did not know that, thereafter, the letterhead continued to list her name as a Cresci firm attorney.

On April 3, 2017, the OAE interviewed attorney Gina Mendola-Longarzo, who represented Anthony Larino in a union disciplinary matter, underlying the state and federal court litigation in which respondent had represented Larino. Mendola-Longarzo stated that, on March 15, 2017, respondent had called her to discuss settlement terms, presumably in the litigation, but that she was unavailable to talk to him. In an e-mail exchange with another attorney in the litigation, Mendola-Longarzo learned that respondent was suspended. Mendola-Longarzo texted respondent and said that,

if it was true that he was suspended, she would "just handle it." Respondent replied that Finnegan would be "the point of contact."

Based on the above facts, the complaint charged respondent with having violated RPC 5.5(a)(1) and RPC 8.4(b) and (c).

COUNT TWO

On December 20, 2016, the OAE docketed a grievance against respondent, alleging that he had practiced law while temporarily suspended. Judges and attorneys had alerted the OAE and the local district ethics committee to most of the communications emanating from the Cresci firm after respondent's temporary suspension.

On January 11, 2017, the OAE informed respondent that it was investigating whether he had practiced law while temporarily suspended and directed him to submit a written reply no later than January 26, 2017. Specifically, the OAE asked respondent to explain his use of letterhead with the banner "Cresci Law Firm, A Limited Liability Company" on the letters to VNB and the letters written to the judge and other attorneys in the Percella matter, while he was under suspension.

The OAE's letter was sent to respondent at his home address by regular and certified mail, return receipt requested. The certified letter was marked

"unclaimed" and returned to the OAE. The letter sent by regular mail was not returned.

On January 27 and June 21, 2017, the OAE sent two letters to respondent, in respect of the practicing while suspended allegation, at his home address by regular and certified mail, return receipt requested. The certified letter was marked "unclaimed" and returned to the OAE. The letter sent by regular mail was not returned. The OAE confirmed respondent's address with the USPS.

Respondent ignored the OAE's letters.

On July 13, 2017, the OAE directed respondent to provide a written reply to the January 11, 2017 grievance and to all of the outstanding inquiries. Respondent's deadline was July 24, 2017. The letter was sent to a new address that respondent had identified on his April 11, 2017 verified answer to the formal ethics complaint in the knowing misappropriation matter (DRB 18-196). On July 14, 2017, the letter was delivered to respondent's new address via UPS ground delivery.

On July 14, 2017, the OAE directed respondent to explain why he had used the title "Peter J. Cresci, Esq." in his verified answer to the formal ethics complaint in the knowing misappropriation matter (DRB 18-196). The letter was sent to the new address by regular and certified mail, return receipt

requested. On August 2, 2017, the OAE sent a follow up letter to respondent, also by certified and regular mail.

The certified letters were marked "unclaimed" and returned to the OAE. The letters sent by regular mail were not returned. Respondent ignored the letters.

On July 19, 2017, the OAE directed respondent to appear for a demand interview on August 22, 2017. The letter was sent to the new address by regular and certified mail, return receipt requested. The certified letter was marked "unclaimed" and returned to the OAE. The letter sent by regular mail was not returned. Respondent ignored the letter and did not appear for the interview.

Finally, on August 2, 2017, the OAE sent a second letter to respondent, directing him to appear for the August 22, 2017 demand interview. The letter was sent to respondent's home address by regular and certified mail, return receipt requested. The certified letter was marked "unclaimed" and returned to the OAE. The letter sent by regular mail was not returned. Respondent ignored the letter and did not appear for the interview.

In total, between and including January 11 and August 2, 2017, the OAE sent more than twenty letters to respondent, seeking information. He ignored every letter. Based on the above facts, the second count of the complaint

charged respondent with having violated R. 1:20-3(g)(3) and, thus, RPC 8.1(b).

Respondent's Motion to Vacate the Default

As stated previously, respondent has filed a motion to vacate the default. To succeed, he must (1) offer a reasonable explanation for the failure to answer the ethics complaint and (2) assert a meritorious defense to the underlying charges. Respondent has not satisfied either prong and, therefore, we denied the motion.

In respect of the excusable neglect prong, respondent claims that he filed an answer to the ethics complaint on April 11, 2018, as instructed. Respondent attached to his motion what purports to be a copy of the answer. That answer, however, was filed in DRB 17-117, which is the knowing misappropriation matter now docketed as DRB 18-196.

In addition to respondent's claim that he filed an answer in this matter, he offers other reasons in support of his motion to vacate. These reasons, identified below, neither support a finding of excusable neglect nor constitute defenses to any of the claims asserted in the ethics complaint.

Moreover, respondent copied and pasted from a previous motion to vacate default that he filed in DRB 17-117 some of the same reasons for his failure to file an answer in this matter. Of particular note is his reference, in this motion, to the OAE's "underlying complaints apparently filed in March, 2017." The complaint in this matter is dated January 29, 2018, and was mailed to respondent on February 16, 2018.

Similar to his previous motion, respondent offers the following reasons for his failure to file an answer to the ethics complaint: (1) we lack jurisdiction, as a federal court action that respondent filed against OAE Director Charles Centinaro and OAE Assistant Ethics Counsel Timothy J. McNamara "preempted" the filing of the "underlying complaints apparently filed in March, 2017;" (2) he is entitled to representation by counsel, but is without same because the OAE froze his bank accounts, thus causing former counsel to terminate the representation; (3) he (presumably) acted on the advice of counsel; and (4) he was precluded from changing his current address when he submitted his annual registration to the CPF, in March 2017.

In respect of the meritorious defense prong, respondent identifies many of the same meritorious defenses that he raised before: (1) the age of two of the client matters at issue in the knowing misappropriation case; (2) the conflict of interest on the part of Centinaro and McNamara, defendants in a

federal civil action that respondent has filed against them; and (3) his temporary suspension, which prevents harm to the courts and the public while this matter is held in abeyance or stayed.

Respondent's additional meritorious defenses are (1) that "[t]here is no rational basis for Defendant McNamara's actions," and, thus, respondent is entitled to a hearing; and (2) there is an appeal in another federal case filed by Cresci, which has either been filed or "is necessary."

We determine to deny respondent's motion to vacate the default in this matter for several reasons. First, he has done nothing more than copy and paste many of the same claims he made in the motion to vacate the default in the DRB 17-117 matter, which involved grievances filed by several clients. The ethics complaint in that matter charged respondent with neither practicing law while suspended nor failure to cooperate with disciplinary authorities.

Second, because respondent has copied and pasted most of what he had raised in the previous motion to vacate, his proffered "reasonable" excuses for his failure to file an answer in this matter are inapplicable, as are his "meritorious" defenses.

For the above reasons, we deny the motion to vacate the default.

* * * *

The facts recited in the complaint support most of the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). Notwithstanding that Rule, each charge must be supported by sufficient facts for us to determine that unethical conduct has occurred.

The first count of the complaint offers only a few examples of respondent's unauthorized practice of law. All other examples are violations of R. 1:20-20, which defines the administrative requirements imposed on an attorney who is suspended from the practice of law.

RPC 5.5(a) prohibits an attorney from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. Under N.J.S.A. 2C:21-22(1)(a) knowingly engaging in the unauthorized practice of law constitutes a crime of the fourth-degree. Under RPC 8.4(b), the violation of N.J.S.A. 2C:21-22(1)(a) constitutes the commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

Here, once respondent was suspended, albeit temporarily, he was prohibited from practicing law. Thus, his continued involvement in certain client matters constituted the unauthorized practice of law, contrary to RPC 5.5(a), and a fourth-degree crime and, thus, a violation of RPC 8.4(b).

The limited examples of respondent's unauthorized practice of law are his March 2017 communication with Mendola-Longarzo regarding a possible settlement in the Larino matter and his discussions with Finnegan "about twice a week" when she had questions about client matters, including the settlement value of the Percella matter. All other incidents alleged in the complaint involve violations of R. 1:20-20.[4]

Specifically, respondent allowed the Cresci Firm to continue with business as usual, with the only exception that, after December 11, 2016, he was no longer identified as an attorney with the firm. The most egregious example is the continued use of letterhead with the banner "Cresci Law Firm," which is a violation of R. 1:20-20(b)(4). In re Powell, 219 N.J. 128 (2014) (the continued use of the name of the suspended attorney on the firm's letterhead, following the attorney's suspension, whether the attorney or someone else

[4] By its very terms, a violation of R. 1:20-20 operates as a violation of RPC 8.1(b) and RPC 8.4(d) – the same violations on which the recent censure was based.

signs the letter, is a violation of R. 1:20-20(b)(4) and, thus, RPC 8.1(b) and RPC 8.4(d)).

Respondent violated other provisions of R. 1:20-20(b), by (1) setting up the "transitional account," which identified the holder of the account as "CRESCI LAW FIRM" (R. 1:20-20(b)(5)); (2) failing to notify clients, attorneys for adverse parties, and the assignment judges in all litigated matters of his suspension (R. 1:20-20(b)(11)); and (3) failing to file an affidavit of compliance with R. 1:20-20(b)(15), which resulted in the recent censure. These are just a few of the violations of R. 1:20-20(b), based on the allegations of the complaint.

Failure to comply with the above requirements of R. 1:20-20 does not constitute practicing law while suspended. Accordingly, these violations cannot support that charge. However, as shown below, some violations support the RPC 8.4(c) charge.

Specifically, count one charged respondent with having violated RPC 8.4(c), by the continued use of the Cresci firm banner on letterhead following his temporary suspension, and his failure to advise the courts and his clients and adversaries, in writing, of his suspension. As stated previously, these particular violations of R. 1:20-20 constitute violations of RPC 8.1(b) and RPC 8.4(d). However, if the intention in doing so was for the purpose of subverting

the effect of the suspension, the attorney can be found guilty of violating RPC 8.4(c). See, e.g., In re Stolz, 229 N.J. 223 (2017) (the continued use of the attorney's surname in the firm's name, following his temporary suspension, was intended to circumvent the very purpose of the suspension, that is, the complete removal of the attorney from the practice of law and the prohibition against continued representation of clients in existing matters and the ability to continue taking on new matters during the period of suspension).

Here, Finnegan clearly asserted that the Cresci firm banner continued to be used because it was "the original name of the firm, the name of the firm whom the clients hired, and was the name registered with the courts." In other words, it was an intentional decision, made by respondent and Finnegan, to create the impression that it was business as usual for the Cresci firm. This is particularly so, given the continued use of the same telephone number, fax number, and e-mail address for at least three months following the November 2016 temporary suspension, coupled with the absence of letters to clients, adversaries, and courts notifying them of the suspension. Moreover, prior to respondent's suspension, Finnegan was not an attorney associated with the firm, in any capacity, but, rather, was brought on board for the purpose of acting in respondent's stead.

Finally, respondent violated RPC 8.1(b), by ignoring the OAE's multiple and painstaking attempts to secure his cooperation in its investigation of his conduct.

To conclude, the clear and convincing evidence supports the alleged violations of RPC 5.5(a)(1), RPC 8.1(b), and RPC 8.4(b) and (c).

DRB 18-196 (XIV-2017-0586E, XIV-2017-0587E, XIV-2017-0588E, XIV-2017-0589E)

The five-count formal ethics complaint charged respondent with multiple ethics infractions in three matters, including knowing misappropriation of client, escrow, and trust funds, and failing to cooperate with the OAE in its investigation of two of them.

This is the third time that this matter has been before us on a certification of the record. The record was first certified on March 22, 2017. On June 21, 2017, we granted respondent's motion to vacate the default and remanded the matter for the filing of an answer.

On July 10, 2017, respondent filed an answer, which the OAE deemed deficient on the ground that it did not comply with In re Gavel, 22 N.J. 248, 263 (1956), and with R. 1:20-4(e). Accordingly, the OAE certified the record again, and respondent filed another motion to vacate the default.

Although we agreed that respondent's answer did not fully comply with In re Gavel and the Court Rule, in our view, R. 1:20-4(f) permits certification of the record only when a respondent either fails to file an answer or files an answer without the required verification. Thus, on October 23, 2017, we denied the motion to vacate, as moot, and directed that the matter be assigned to a special ethics master (or a hearing panel) who, guided by R. 1:20-5(b)(3), was to schedule a pre-hearing conference where the sufficiency of both the OAE's complaint and respondent's answer could be addressed, along with possible sanctions for non-compliance with any pre-hearing orders the factfinder might issue, including suppression of respondent's answer.

The Court appointed Honorable Harold W. Fullilove, J.S.C. (ret.), to serve as the special ethics master. On March 22, 2018, the special master set a deadline of March 28, 2018 for respondent to retain counsel, and April 11, 2018 to file an amended answer that complied with Gavel and the Court Rule.

Respondent did not retain counsel, but, on April 11, 2018, filed a pro se amended answer to the complaint. On April 30, 2018, the special master informed the parties that the amended answer "in no way complies with the requirements of Gavel" and, therefore, "the appropriate remedy," under R. 1:20-5(c), was to suppress the pleading and bar respondent's defenses. On May

14, 2018, the special master entered an order confirming his April 30, 2018 determination.

In the special master's April 30, 2018 letter, he offered a number of reasons in support of his finding that the amended answer did not comply with Gavel's requirements. In general, the special master determined that many of respondent's answers to individual paragraphs were "at best, duplicitous," inappropriate, or "clearly disingenuous." The special master's conclusions focused mainly on general denials or respondent's claims that he lacked sufficient knowledge or information to form a belief about the truth of the allegations, or both.

On June 6, 2018, the OAE, once again, certified the record to us. Once again, respondent has filed a motion to vacate the default.

We had determined, long before, that service of process was proper in connection with our consideration of respondent's motion to vacate the default. Respondent has since filed an answer to the complaint, participated in a pre-hearing conference regarding the sufficiency of his answer, and filed an amended answer with the special ethics matter. The special master struck the amended answer, as non-compliant with In re Gavel and R. 1:20-4(e), which resulted in re-certification of this matter to us as a default. Thus, there was no need for the OAE to serve the complaint again.

Respondent's Motion to Vacate the Default

On August 22, 2018, respondent filed a motion to vacate the default in this matter. The motion repeats most of the same arguments that already have been raised and rejected repeatedly. These include pre-emption by a federal court action that respondent has filed against Centinaro and McNamara; the OAE's failure to provide him with materials supporting the allegations in the complaint; respondent's claim that he both lacked counsel and acted on advice of counsel; his inability to change his contact information with the CPF; the conflict of interest on the part of Centinaro and McNamara; the OAE's dilatory conduct in investigating the grievances; and the lack of harm to the public because his temporary suspension remains in effect.

The only new argument advanced by respondent is that his license is a property right, which demands due process, before he may be deprived of the license. Among the requirements that due process demands, according to respondent, is adequate notice, the opportunity for a hearing, a fair and impartial hearing panel, and the opportunity to confront and cross-examine adverse witnesses.

The OAE opposes respondent's motion on the grounds that respondent has been given multiple chances to be heard but has availed himself of none. Moreover, the OAE notes, respondent was given, and rejected, the opportunity

to retain counsel. Finally, the OAE maintains that most of respondent's reasons for overturning the default previously have been raised and rejected.

We agree that respondent has been given multiple opportunities to file a fully responsive and confirming answer to the ethics complaint. He repeatedly has failed to do so. There is no reason to believe that, given yet another chance, he will submit a pleading that complies with Gavel and R. 1:20-4(e). We, thus, deny the motion.

We now turn to the allegations of the complaint. The five counts of the formal ethics complaint stems from a wrongful termination case, a real estate transaction, and the administration of an estate. Among other RPC violations, the complaint charged respondent with knowing misappropriation of client and/or escrow funds in all three matters. The remaining counts arise from respondent's failure to cooperate with the OAE in its investigation of two of the knowing misappropriation cases.

COUNT ONE: XIV-2017-0587E (Figueroa Matter)

On December 12, 2012, Nuala Figueroa filed a grievance against respondent, alleging that he had settled her employment wrongful termination case without her knowledge, deposited the settlement proceeds into his attorney trust account, failed to disburse any funds to her, and failed to

communicate with her.[5] The facts uncovered during the OAE's investigation are set forth below.

In April 2010, Figueroa retained respondent to represent her in a wrongful termination action against the Bayonne Housing Authority (BHA). The retainer agreement required the payment of a $1,500 non-refundable retainer fee, as well as both a contingent and an hourly fee.

In June 2010, respondent filed a federal wrongful discharge action against BHA, which was settled in March 2011 for $25,000. Respondent did not inform Figueroa of the settlement, and she never saw or signed a settlement agreement. Moreover, Figueroa claimed that someone had forged her signature on the settlement agreement and release, and had attested to the signature's authenticity.

The $25,000 settlement check was issued on April 2, 2011, and made payable to the Cresci Firm and Figueroa. Yet, respondent deposited the check in his new Bayonne Community Bank business account, without Figueroa's

[5] The grievance did not allege that respondent failed to communicate with Figueroa, or that he deposited the monies in his attorney trust account. These claims are based on information gathered during the OAE's investigation, as set forth in the formal ethics complaint.

endorsement or her knowledge.[6] He did not disburse a penny to Figueroa, on the claim that the entire sum represented his fee and, thus, she had no right to the funds. Respondent further contended that, in this regard, Figueroa "knew the score," and knew "what was going on." By April 27, 2011, about three weeks later, the balance in the new BCB bank account was only $15,235.82.

Respondent denied that he had settled Figueroa's case without her knowledge and that he had not informed her about the settlement. According to respondent, he "kept in constant contact with Figueroa" and provided her with "updates."

Specifically, respondent claimed that he had informed Figueroa of the settlement, in a letter dated April 7, 2011, which contained an attachment that reflected a total settlement amount of $67,075, representing $42,075 in "compensatory damages" to Figueroa and $25,000 in "money paid at conclusion of case." The attachment also reflected $57,971.47 due to the firm, representing $22,335.97 in "compensatory damages to firm" and $35,635.50 in "attorney fees, costs & expenses." Thus, according to the attachment and respondent, the $25,000 settlement monies were to be applied to outstanding

[6] Over the years, respondent maintained attorney trust and business accounts at Valley National Bank (VNB) and Bayonne Community Bank (BCB). The old BCB business account ended in 3502. The new BCB business account ended in 7288.

fees that Figueroa owed to the Cresci firm. Respondent acknowledged that he did not meet with Figueroa to discuss the itemization of figures in the letter because he "sent her everything."

Figueroa told the OAE that respondent did not discuss a final settlement figure with her; she never agreed upon a figure; she never saw or signed a settlement agreement; and respondent never told her that he had received a settlement check from BHA. Indeed, throughout the representation, Figueroa attempted, on several occasions, to ask respondent about the status of her case, to no avail.

Between September 11, 2011 and September 2012, Figueroa made several attempts to communicate with respondent by e-mail, telephone, and personal appearances at his office. He called her once, but told her that he would have to review her file. She never heard from him.

In respect of the settlement negotiations and settlement terms, respondent took the position that, as part of the settlement, Figueroa had received $40,000 in bi-weekly unemployment benefits, which he had negotiated, representing "compensatory damages received from the settlement." He claimed that, "at all times," Figueroa understood this to be the case, and that, if he had not negotiated the unemployment benefits, she would not have received any.

Despite respondent's claim that he had negotiated $40,000 in unemployment benefits, he neither discussed these benefits with his client, nor took any action to obtain those benefits. Rather, Figueroa had applied for unemployment benefits on-line, and participated, without respondent, in an in-person interview with both an unemployment insurance case worker and a BHA representative. She received her first check, in the amount of $389, on June 28, 2010. Respondent had filed the civil complaint against BHA only a week earlier.

Notwithstanding Figueroa's personal involvement in obtaining unemployment compensation, and her receipt of the first check in June 2010, respondent claimed that a January 2011 letter that he sent to BHA lawyer, John J. Mercun, demonstrated that he was responsible for obtaining "unemployment benefits as compensatory damages from BHA." Respondent acknowledged that the letter merely made a settlement offer of $65,000, without reference to $40,000 in unemployment compensation. Yet, he claimed that this was his goal in requesting $65,000 to settle the case.

According to respondent, he discussed the matter with BHA lawyers Steven Zabarsky, Jeanette Samra-Arteaga, and Harold Fitzpatrick, who represented BHA at the "termination hearing" and, possibly, BHA Executive Director John Mahon. The OAE interviewed Mercun, Zabarsky, Samara-

Arteaga, and John Mahon, all of whom denied having discussed with respondent unemployment benefits for Figueroa.

In respect of the actual settlement agreement and release, respondent had no recollection of meeting with Figueroa to review the documents, and he did not "think" that someone else from the firm had done so. When asked whether Figueroa had signed both documents, he answered "I believe so" and "I think so."

Respondent acknowledged that the release reflected that Cresci firm employee and receptionist Duffy had notarized Figueroa's signature. He did not know, however, whether Duffy had actually witnessed Figueroa sign the document, claiming that, sometimes, clients "drop things off." When the OAE informed respondent that one cannot notarize a signature without knowing the witness, respondent replied that he thought Duffy knew Figueroa.

Although Duffy notarized Figueroa's signature on the settlement agreement, Figueroa stated that she had never seen the document. As shown below, respondent eventually pleaded guilty to uttering a false document, contrary to N.J.S.A. 2C:21-4.

Respondent acknowledged that the $25,000 check was deposited in the Cresci firm's business account. Figueroa stated that she never saw the check,

was not told that it had been received, and did not authorize respondent to use the settlement monies in any way, either temporarily or permanently.

According to respondent, the $25,000 was the fee owed to the firm because it was through his efforts that Figueroa was able to collect unemployment benefits. He claimed that, "[i]f she had never come into our building, she would never have gotten unemployment benefits, and she would never have received over $40,000 in compensatory money." Respondent denied that Figueroa had paid him any attorney fee, claiming instead that the defendants paid the fee by issuing the $25,000 settlement check.

Respondent claimed that, despite his assertion that the $25,000 was due to the firm and that Figueroa had no right to the funds, the check was payable to both the Cresci firm and Figueroa because the monies paid were in respect of "Figueroa's case." Respondent did not believe that he had told the BHA attorneys that the $25,000 was going to the Cresci firm.

Zabarsky told the OAE that respondent had requested that the check be made payable to the firm and to Figueroa. Further, if Zabarsky had understood that the $25,000 belonged solely to the Cresci firm, the check would have been payable to the firm only.

The ethics complaint contained several allegations regarding respondent's fee agreement with Figueroa. Respondent referred to the agreement as a "hybrid retainer." According to respondent, the agreement provided that the Cresci firm would receive one-third of the gross recovery. The firm also charged Figueroa a $1,500 non-refundable retainer. Section XII of the fee agreement provides:

> There is a contingent nature to this case, and Client will not be billed hourly in accordance with paragraph III c. Client is responsible for costs and expenses from the proceeds.
>
> [Ex.23.]

Respondent agreed that there was "an hourly component" to the agreement, but denied that Figueroa was charged an hourly rate, in addition to the contingency fee, saying "[s]he didn't have the money." Later, he claimed that she had been charged both types of fee, in addition to the $1,500 retainer. In the end, respondent stated that the hourly rate "is coming from the settlement."

In July 2013, respondent was indicted for third degree theft by unlawful taking and third degree forgery. On September 22, 2015, he pleaded guilty to uttering a document, knowing that it contained a false statement or information, under N.J.S.A. 2C:21-4, a fourth-degree crime. Respondent testified, in the criminal matter, that he had presented to counsel for BHA a

settlement agreement that he knew to be false, as it contained an incorrectly notarized signature. He was admitted to the pre-trial intervention program and agreed to pay Figueroa $15,000 in twelve monthly payments of $1,250.

Based on the above facts, the complaint charged respondent with having violated RPC 1.15(a) (knowing misappropriation of client funds and/or escrow funds, in violation of the principles set forth in In re Wilson, 81 N.J. 451 (1979) and/or In re Hollendonner, 102 N.J. 21 (1985)); RPC 1.15(a) (failure to safeguard funds of a client or third person); and RPC 1.15(b) (failure to make prompt disposition of funds in which a client or third person has an interest). The complaint also charged respondent with having violated RPC 1.5(a) (unreasonable fee) and RPC 1.5(c) (upon conclusion of a contingent fee matter, failure to provide the client with a writing stating the outcome of the matter and showing the remittance to the client and the method of its determination).

Presumably,[7] based on respondent's failure to inform Figueroa that her case had settled for $25,000, and other deceitful and fraudulent conduct (e.g., his guilty plea arising out of the forged signature on the settlement documents), the complaint charged him with having violated RPC 1.4(b)

[7] The complaint lists the RPC violations without identifying which facts support the individual violations.

(failure to communicate with the client), RPC 8.4(b) (commission of a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The complaint charged respondent with a second RPC 8.4(c) violation, in addition to RPC 8.1(a) (false statement of material fact to a disciplinary authority), as the result of various misrepresentations that he had made to the OAE during the investigation of Figueroa's grievance. These charges apparently relate to respondent's claim that he had discussed with BHA's lawyers the inclusion of Figueroa's unemployment benefits in the settlement.

Finally, respondent was charged with having violated RPC 1.1(a) (gross neglect) and RPC 1.3 (lack of diligence).

We find that respondent violated all RPCs charged, except RPC 1.1(a) and RPC 1.3. In particular, we find that respondent knowingly misappropriated at least $16,675 of the $25,000 settlement collected from BHA. (Respondent was entitled to a one-third contingent fee, or $8,325.)

In Wilson, 81 N.J. 451, the Court described knowing misappropriation as follows:

> Unless the context indicates otherwise, "misappropriation" as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also

> unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under *In re Wilson,* 81 *N.J.* 451 (1979), disbarment that is "almost invariable," *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, is irrelevant; it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" – all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since *Wilson*, it has been invariable.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the evidence must be clear and convincing that the attorney took client funds, knowing that the client had not authorized him or her to do so, and used them.

We find that, in March 2011, respondent orally agreed to settle Figueroa's case, without her knowledge, for $25,000; that the $40,000 in unemployment compensation benefits paid to Figueroa were not a part of the settlement; that either respondent or someone acting on his behalf forged Figueroa's signature on the settlement documents; that, despite several direct inquiries from Figueroa through September 2012, he never informed her of (1) the settlement, (2) his receipt of the $25,000 check, or (3) his deposit of the funds in the new BCB business account; and that he dissipated the funds without Figueroa's knowledge or authorization.

According to the allegations of the complaint, respondent informed the OAE that the Cresci firm was entitled to the entire $25,000 because the firm's "1/3rd compensatory damages" of $22,335.97, plus the $35,635.50 in "attorney fees, costs, and expenses," totaled $57,971.47, which far exceeded the $25,000 recovery. In support of respondent's claim, he produced a copy of an April 7, 2011 letter to Figueroa with an attachment showing the breakdown of the settlement, including the firm's entitlement to the full $25,000. We give this letter and attachment no credence for several reasons.

First, all of the attorneys involved in the BHA litigation denied that respondent ever discussed the topic of Figueroa's unemployment compensation with them. Indeed, she already had filed and received unemployment benefits months before respondent made the January 2011 settlement demand. Second, Figueroa denied that respondent ever informed her of the settlement, and he could not recall ever having met with her. Third, Figueroa's signature was forged on the settlement documents, leading to respondent's guilty plea to and conviction of uttering a false instrument. In this context, we question the authenticity of the April 2011 letter and attachment.

Moreover, although the OAE alleged that the fee agreement is hopelessly unclear about how the fee was to be calculated in this matter, and respondent's attempt to explain it was confusing, section twelve of that agreement expressly states that "[t]here is a contingent nature to this case," thus, the client will not be billed hourly, although the client "is responsible for costs and expenses from the proceeds." Thus, the Cresci firm was entitled to one-third of the gross recovery, plus reimbursement of costs and expenses, and no more.

Although the firm's contingent fee, plus costs and expenses, could have exceeded the $25,000 recovery, the so-called breakdown of fees, costs, and expenses fails to clearly and convincingly establish that the Cresci firm was

due anything more than one-third of the $25,000. It is not clear why the one-third was identified as "compensatory damages" to the firm. It is not clear, why, in addition to that one-third, the firm claimed entitlement to additional attorney fees of any amount. There is not a shred of evidence identifying the nature and amount of the individual costs and expenses allegedly incurred by the Cresci firm. There is no reason to believe that the letter and the attachment were sent to Figueroa. Thus, we give the document no credence.

In short, respondent settled Figueroa's case for $25,000 without her knowledge and consent, never told her that he had settled the case, forged her signature on the settlement documents, and dissipated the entire $25,000, all while ignoring his client's pleas for information about her case. Thus, under Wilson, respondent knowingly misappropriated at least $16,675 of the $25,000 in settlement monies. In turn, he also violated RPC 1.15(a) and (b).

Respondent violated RPC 1.4(b), by failing to keep Figueroa informed about the status of her case, particularly the settlement negotiations and his receipt of the settlement check; RPC 1.5(c), by failing to provide Figueroa with a written statement informing her of the outcome of the matter and, in the event of a recovery, showing the remittance to her and the method of its determination; RPC 8.4(b), by virtue of his conviction of uttering a false document, that is, the settlement documents with Figueroa's forged signature;

and RPC 8.1(a) and RPC 8.4(c), based on his multiple misrepresentations to the OAE, such as his claim that he had discussed the unemployment benefits with BHA's various lawyers.

Respondent did not violate RPC 1.1(a) or RPC 1.3, however. None of the facts alleged support a finding that respondent exhibited gross neglect or a lack of diligence in representing Figueroa. Therefore, we dismiss those charges.

COUNT TWO: XIV-2017-0586E (Mortgage Plus Matter)

In this matter, the OAE charged respondent with knowing misappropriation of escrow funds due to his failure to maintain $6,781.09 intact (RPC 1.15(a) and the principles of Wilson and/or Hollendonner); commingling personal and client funds (RPC 1.15(a)); failure to promptly disburse the monies to Mortgage Plus (RPC 1.15(b)); misrepresentations to the OAE during the investigation of the grievance (RPC 8.1(a) and RPC 8.4(c)); and recordkeeping violations (RPC 1.15(d)).

Respondent represented Danielle Carreno, the purchaser of a South Plainfield property, and served as the settlement agent at the May 21, 2009 closing. Thomas J. Bock, the owner of Mortgage Plus, Inc. (Mortgage Plus),

obtained a mortgage for Carreno with Security Atlantic Mortgage Company (Security Atlantic).

On April 13, 2009, Carreno and Mortgage Plus entered into a written loan origination agreement. Security Atlantic's closing instructions listed $6,781.09 in fees due to Mortgage Plus, which were to be disbursed from respondent's trust account, either at the closing or shortly thereafter.[8] On May 22, 2009, the day after closing, respondent deposited in his old BCB trust account $281,142.68 in proceeds.[9] He disbursed all funds, in accordance with the HUD-1 settlement statement, except for the $6,781.09 due to Mortgage Plus. Respondent acknowledged that the funds should have remained in the trust account.

According to the complaint, the trust account funds did not remain intact, despite respondent's claim to the contrary. At the OAE's direction, respondent finally disbursed the monies due to Mortgage Plus, on September 22, 2012, more than three years after the closing. The road to that point, however, was long.

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[8] The fees comprised the loan origination fee ($2,800), a credit report ($24.84), an application fee ($395), a broker commitment fee ($550), and a yield spread premium ($3,011.25).

[9] The BCB trust account ending in 614 is the "old BCB trust account." The BCB trust account ending in 7288 is the "new BCB trust account."

On June 11, 2009, Bock requested from respondent a signed copy of the note, mortgage, and HUD-1. He also requested payment of the $6,781.09 due to Mortgage Plus.

On June 26, 2009, respondent informed Bock that the closing instructions did not refer to any payment owed to Mortgage Plus. According to respondent, the origination, application, and broker fees were prepaid finance charges and the yield spread premium (YSP) fee was to be paid by the lender to the broker.

On that same date, Bock replied that the settlement statement correctly listed the $6,781.09 in fees due to Mortgage Plus. He also stated that a prepaid finance charge is not a charge paid outside of closing and, further, the YSP fee had been included in the wire transfer to respondent.

On July 30, 2009, Bock complained to respondent that, after the closing, he had called the Cresci firm "numerous times" seeking assistance, and requested that respondent remit the funds to Mortgage Plus immediately.

On August 6, 2009, Bock offered to meet with respondent to discuss the matter, but respondent would agree only if Bock paid him for his time. The next day, respondent told Bock that he would try to resolve the issue by August 12, 2009, but failed to do so. Although respondent acknowledged to

the OAE that he understood that an attorney must hold intact disputed funds, the $6,781.09 did not remain intact in the trust account.

On December 24, 2009, respondent issued an old BCB trust account check, payable to the Cresci firm, in the amount of $3,105.13. This check closed the old trust account, which should have held at least $6,781.09 at that time, representing a $3,679.96 shortage in the "disputed" Mortgage Plus funds. On that same date, respondent deposited the check into the Cresci firm's new BCB trust account.

On February 21, 2011, Bock filed a grievance against respondent. During the OAE's September 22, 2011 demand audit, respondent did not disclose to the OAE that, when he opened the new BCB trust account, he already had invaded the $6,781.09 that he should have been safeguarding for Bock. Even though the OAE's review of the Cresci firm's records uncovered the $3,679.96 shortfall, respondent stated falsely that he was still holding the full amount and that he was unaware that he had invaded the funds.

Respondent informed the OAE that his practice was to review his trust account bank statement, checkbook, and online account to keep track of the trust account activity. He admitted that he did not prepare monthly three-way reconciliations of the new trust account.

As of March 15, 2010, the new BCB trust account balance was $1,031.48, leaving the account short by at least $5,749.61 in the Mortgage Plus matter.[10] On March 18, 2010, respondent deposited $4,401.76 in his new BCB trust account, which represented the value of twenty-five United States Savings Bonds. The $4,401.76 deposit increased the new BCB trust account balance to $5,433.24, but the account was still $1,347.85 short in Mortgage Plus funds.

By March 17, 2011, the balance in the new BCB trust account was only $34.73, which was $6,746.36 less than the (disputed) amount that respondent should have been safeguarding for Mortgage Plus, and, as shown later, at least $3,278.64 less than he should have been safeguarding in the Bartosiewicz matter.

By letter dated July 20, 2012, the OAE asked respondent to explain what had happened to the Mortgage Plus funds. He did not reply.

Respondent's bank records showed that, from December 8, 2009 through November 22, 2011, he transferred a total of $135,231.39 from the new BCB trust account to the business account, including a number of transfers without

[10] As discussed below, the trust account also was short by $3,278.64, which respondent should have been safeguarding in the Bartosiewicz matter, the subject of count four of the ethics complaint.

client references. Because respondent did not produce client ledger cards, the OAE could not determine whether the funds transferred were earned legal fees and, if so, the client matters to which they were attributable.

By January 25, 2012, the new BCB trust account balance was $33,559.73.[11] According to the OAE, this total now included the $6,781.09 Mortgage Plus funds. The next day, respondent disbursed the funds (with the exception of $10,000 related to another matter) from the new BCB trust account to another trust account at Valley National Bank (VNB trust account). By June 4, 2012, the remaining $10,000 had been disbursed, thus zeroing out the BCB account.

During the OAE's September 22, 2011 demand audit, respondent admitted that Bock may have been entitled to the $6,781.09, but questioned whether Carreno was obligated to pay the monies to Bock. At a March 22, 2012 demand interview, the OAE informed respondent that, based on its review of the mortgage loan origination agreements, the $6,781.09 in disputed funds belonged to Bock. Respondent replied that he had already disbursed the funds to Carreno, on January 25, 2009.

[11] The complaint does not identify the source of the funds.

On September 21, 2012, respondent told the OAE that he had disbursed the funds to Carreno on the advice of "several counsel." At a May 10, 2016 demand audit, respondent stated that he had disbursed the funds to Carreno because she and her husband were first-time home buyers and lifetime friends, Bock had been calling the Carreno residence and leaving messages about the disputed funds, and respondent wanted the Carrenos to have a "good experience." As stated previously, at the OAE's direction, respondent disbursed $6,781.09 to Mortgage Plus, on September 22, 2012, more than three years after the closing.

The complaint asserted a number of facts allegedly establishing that respondent also commingled personal and client funds, and failed to safeguard funds. Specifically, in 2009, the Cresci firm ran out of business account checks. Thus, until the firm received more checks, "'a couple of months'" later, respondent deposited $29,809.48 in non-client funds in his old BCB trust account, which he then used to pay business expenses. When respondent made those disbursements, he crossed out the words "Attorney Trust Account" on the checks to indicate that the disbursement was for a business expense. In all, between January and December 2009, respondent issued trust account checks, totaling $117,918.84, to pay business expenses.

Respondent also commingled personal and client funds in the new BCB trust account. Specifically, on January 5, 2010, he deposited a $5,000 personal check in the new trust account, which raised the balance from $4,991.39 to $9,991.39. On January 6, 2010, respondent electronically transferred $4,750 of the commingled funds from the new trust account to the firm's new business account (which had previously held a balance of $1,601.40) and immediately issued and negotiated a $5,000 business account check payable to cash.

On March 18, 2010, respondent commingled the $4,401.76 in savings bonds proceeds, by depositing the monies in the new trust account. According to the complaint, the purpose of the deposit was to replenish the shortage in Mortgage Plus funds.

On June 27, 2011, respondent transferred $22,500 from an unidentified attorney business account into his new trust account. According to respondent's counsel at the time, E. Carr Cornog, III, Esq., the funds were distributed to three individuals in the Bartosiewicz matter.

Finally, the complaint alleged that respondent's attorney books and records were in violation of the following recordkeeping rules:

- No proper old or new BCB ATA three-way reconciliations for 2009-2012, in violation of R. 1:21-6(c)(1)(H);
- Failure to provide the OAE with properly constructed client ledger cards, in violation of RPC 8.1;

- Electronic transfers of legal fees out of the ATA without signed, written instructions from the attorney, in violation of R. 1:21-6(c)(1)(A);

- No proper ledger card identifying attorney funds for bank charges, in violation of R. 1:21-6(d);

- Earned legal fees not disbursed from the ATA timely, in violation of R. 1:21-6(a)(2);

- Legal fees not deposited into the ABA, in violation of R. 1:21-6(a)(2);

- Funds unrelated to the practice of law deposited into the ATA, (commingling personal funds in the ATA), in violation of RPC 1.15(a) and R. 1:21-6(a)(1); and

- Attorney trust funds for bank charges exceed $250.00, in violation of RPC 1.15(a).

COUNT THREE: XIV-2017-00586E (Failure to Cooperate – Mortgage Plus)

Count three of the complaint charged respondent with failure to cooperate in the OAE's investigation of Bock's grievance (RPC 8.1(b)). Specifically, on July 20, 2012, the OAE requested that respondent produce, by August 6, 2012, all client ledgers from January 1, 2009 to March 2012. Respondent ignored this letter, as well as follow up letters dated August 22 and September 13, 2012. Four years later, on June 9, 2016, he finally produced improperly-constructed ledger cards, but only for the year 2012.

Meanwhile, on May 17, 2016, the OAE requested, through Cornog, respondent's counsel, that respondent produce three-way trust account reconciliations for the period encompassing January 2009 through December 2012. Respondent did not comply with the OAE's request. On June 16, 2016, the OAE renewed its request and further requested the production of bank statements, canceled checks, deposit slips, and client ledger cards by June 27, 2016. Respondent only partially complied with the requests.

On June 29, 2016, the OAE renewed its request for properly-constructed three-way reconciliations and client ledger cards for the years 2009 through 2012. On July 11, 2016, respondent produced VNB trust account three-way reconciliations, but only for the year 2012. According to Cornog, respondent had not prepared reconciliations for the years 2009, 2010, and 2011. Respondent never produced properly constructed client ledger cards for those years.

On July 14, 2016, the OAE requested that Cornog direct respondent to provide written confirmation that he had not constructed ledger cards that complied with the recordkeeping rules. On July 19, the OAE requested three-way reconciliations for the new trust account for 2012. On July 22, 2016, the OAE requested that respondent provide eight client files by August 5, 2016.

By that date, the OAE had received nothing from respondent, and Cornog informed the OAE that he had been unable to contact respondent.

On August 9, 2016, the OAE gave respondent a final extension to August 15, 2016. On that date, Cornog informed the OAE that respondent had informed him that the United States District Court for the District of New Jersey had accepted jurisdiction "on all matters being investigated by the OAE."

On August 16, 2016, the OAE informed Cornog that respondent had three days to provide all authority, including court orders, on which he was relying to ignore the OAE's requests for information. Cornog referred the OAE to 28 U.S.C. § 1331, which grants to federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

On September 20, 2016, Cornog informed the OAE that, "for the time being," further communication between him and the OAE had to be in writing. The next day, the OAE told Cornog that respondent had until September 23, 2016 to provide the information requested in the August 16 letter. Also, on September 21, 2016, the OAE filed a petition for respondent's temporary suspension based on his failure to cooperate with the investigation. On November 17, 2016, the Court temporarily suspended respondent.

Based on these facts, the complaint charged respondent with having violated RPC 8.1(b).

In addition to multiple other violations, the allegations in count two of the complaint establish, clearly and convincingly, that respondent knowingly misappropriated $6,781.09 in monies due to Mortgage Plus. Respondent should have been holding that amount in his trust account, intact, until the "dispute" between respondent and Mortgage Plus was resolved. Instead, he disbursed the funds to Carreno.

Mortgage Plus was entitled to the $6,781.09, which was to be paid from the proceeds collected by respondent at the closing. Documents that Bock provided establish that none of the costs were to be paid outside of closing because they were included within the amount wired from Security Atlantic to respondent. At the least, respondent should have segregated the funds, but he did not. Moreover, when he closed the old BCB trust account, in which the funds had been located, the account balance was only $3,105.13. By March 15, 2010, the new BCB trust account balance had decreased to $1,031.48. A year later, it had fallen to $34.73.

Respondent invaded Mortgage Plus's funds and disbursed them to Carreno, despite Bock's repeated demands for the monies. Respondent, thus, violated the Hollendonner principle and RPC 1.15(a) and (b).[12]

Respondent also violated RPC 8.1(a) and RPC 8.4(c) when he made multiple misrepresentations to the OAE during its investigation by, for example, telling the OAE that, despite its discovery that he had invaded the $6,000+, he had kept the full amount intact and was unaware of any invasion of funds.

Finally, respondent committed all of the recordkeeping violations identified in paragraph 167 of the complaint, including the commingling of personal and client trust funds, which was the subject of paragraph 153.

The allegations in count three clearly and convincingly establish that respondent failed to cooperate in the OAE's investigation of Bock's grievance filed in behalf of Mortgage Plus. He never provided properly-constructed client ledger cards, and he submitted three-way reconciliations for only one year out of four.

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[12] In Hollendonner, the Court held that the Wilson principle also applies to other funds that an attorney must hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21.

COUNT FOUR: XIV-2017-0589E (Bartosiewicz Estate Matter)

Margaret Bartosiewicz died on September 4, 2005. Her son, John Bartosiewicz (Bartosiewicz), was the executor of her estate. He and his siblings, James Bartosiewicz and Irene Schultz, were the beneficiaries.

On September 16, 2005, Bartosiewicz retained respondent to assist him in his duties as executor, at a rate of $275 an hour. Ten years later, Bartosiewicz filed a grievance against respondent.

Margaret's estate comprised two bank accounts, totaling $111,484.46, Margaret's home, and nine different stocks. Since Margaret's death, the home and "approximately half the stocks" had been sold.

As shown below, respondent recovered $251,144.22 in estate assets, but distributed only $116,289.63 to the beneficiaries. The beneficiaries have received no further distributions, including "some dividends" and the balance of the estate's bank accounts. Further, four stocks (Host Marriott, PSE&G, Verizon, and Lucent) have not been settled.

As stated above, when Margaret died, she had two bank accounts with a total balance of $111,484.46. In approximately December 2005, respondent received the $21,287.79 balance in a Provident Bank checking account, which was then closed. Margaret's other account was a savings account with North Fork Bank, which had a $90,196.67 balance.

On January 24, 2006, respondent requested North Fork to release at least half the balance so that inheritance taxes could be paid. On February 3, 2006, respondent confirmed to North Fork that he had received the bank's $55,207.16 cashier's check and requested that the bank forward the balance to him. Presumably, the bank complied with respondent's request.

Even though respondent had received $111,484.46 from both banks, he distributed to the beneficiaries a total of $75,000 in March 2006 and a total of $22,500 in June 2011, leaving an undistributed balance of $13,984.46. Yet, at the May 2016 demand interview, respondent stated that he had no idea why Bartosiewicz had claimed that not all of the bank account monies had been distributed.

In addition to Margaret's bank accounts, at the time of her death, she held stock in several entities. Between February 12 and August 25, 2009, respondent deposited a total of $37,667.35 in the old BCB trust account. The deposits included $235.69 in Verizon dividends, $5,587.64 in Verizon stock proceeds, $307.50 in Host dividends, $12,272.70 in Host stock proceeds, $454.40 in Middlesex Water Company (MWC) dividends, $18,789.63 in MWC stock proceeds, a $12.32 Idearc dividend, and a $7.47 Lucent dividend. Of

these deposits, respondent recorded on the estate's "first" ledger card only the $18,789.63 MWC stock proceeds.[13]

The new BCB trust account bank records show that, on November 18, 2009, respondent deposited $202.54 in PSE&G dividends and $5.38 in Host dividends. Respondent did not record these deposits on the ledger card, disburse the funds to the beneficiaries, or identify the funds in any letter to the beneficiaries.

Between December 1 and 21, 2009, respondent deposited in the new BCB trust account $101,784.51 in estate monies, representing a $211.97 Host dividend, $65,438.34 in Host stock proceeds, $111.20 in Lucent stock proceeds, $1,335.74 in AT&T dividends, $8,174.74 in AT&T stock proceeds, and $26,512.52 in PSE&G stock proceeds. Respondent failed to record any of these deposits on the estate's client ledger card. Instead, he recorded two undated, unidentified deposits, totaling $93,397.80, representing all but the deposit of the $8,174.74 in AT&T stock proceeds and the $211.97 Host dividend.

Based on the above, in 2009, respondent deposited $37,667.35 in the old BCB trust account and $101,992.43 in the new BCB trust account, for a total

[13] Respondent maintained more than one ledger card for the estate.

of $139,659.78 in stock dividends and sale proceeds. Yet, his ledgers reflected only $112,187.43 in total deposits.

Respondent disbursed some of the dividends and stock sale proceeds to the beneficiaries. On August 18, 2009, he issued separate old BCB trust account checks to the three beneficiaries, each in the amount of $6,263.21. These payments represented distribution of the $18,789.63 in MWC stock sale proceeds, which was the only asset that respondent had recorded on the estate's "first" ledger card. However, instead of recording a $6,263.21 distribution to each beneficiary, he recorded $6,000. Thus, respondent had recorded $789.63 less than the actual amount of distributions. To zero out the ledger card, respondent disbursed $789.63 to the Cresci firm, without reference to a check number.

On December 4, 2009, respondent distributed from the new BCB trust account $25,000 to each beneficiary, which, he claimed, in a December 18, 2009 letter to Bartosiewicz, represented stock proceeds totaling $75,060.02. In the letter, respondent itemized the proceeds as follows: $65,438.34 in Host stock proceeds, $8,174.74 in AT&T stock proceeds, $111.20 in Lucent stock proceeds, and $1,335.74 in AT&T dividends. Respondent did not mention the $26,512.52 in PSE&G stock proceeds or the $211.97 in Host dividends.

Respondent's records demonstrated that, contrary to his representation in the letter, the $8,174.74 in AT&T proceeds were not included in the $75,000 distribution. Although these proceeds and dividends were included in the $101,784.51 deposited in December 2009, both were omitted from the estate's "second" ledger card, resulting in the entry reflecting $93,397.80 in total monies deposited. After respondent had deducted the $75,000 in distributions to the beneficiaries, on the second ledger card, the balance was $18,397.80, which he mistakenly recorded as $18,497.80. To zero out the second ledger card, respondent recorded, without reference to a check number, an $18,497.80 disbursement to the Cresci firm, noted as reimbursements, expenses, and fees.

At the May 10, 2016 demand interview, respondent told the OAE that the purpose of the December 18, 2009 letter was to confirm that each of the beneficiaries had received a $25,000 distribution from the sale proceeds of the Host, AT&T, and Lucent stocks, in addition to the AT&T dividends. Respondent claimed that, when he distributed the funds, he relied on the estate ledger cards, which recorded the deposits, distributions, and the payment of fees and reimbursement of expenses to the Cresci firm.

Respondent could not explain why the December 18, 2009 letter to Bartosiewicz identified proceeds other than the amounts actually distributed to the beneficiaries at that time (i.e., the $8,174.74 in AT&T proceeds). He did

state, however, that the $18,497.80 withdrawal on the second client ledger card corresponded to two of Margaret's bills from the Hamilton Park Nursing and Rehabilitation Center, charges for the "Gold Medallion" program, which "certifies Fed Exes, things of that nature," and the Cresci firm's "time."

In addition to the stock sale and dividend proceeds that were distributed, as described above, there were stock sale and dividend proceeds that respondent did not distribute to the beneficiaries. As shown above, of the $37,667.35 deposited in the old BCB trust account in 2009, respondent's ledger card reflected the distribution of only the $18,789.63 MWC stock proceeds. According to the ethics complaint, the old BCB trust account records did not reflect any disbursement of the remaining $18,877.72, representing the $12,272.70 Host stock sale proceeds and the $5,587.64 in Verizon stock sale proceeds, which respondent had deposited in the old BCB trust account in August 2009.

Other dividends deposited in the old BCB trust account, in 2009, were neither recorded on the client ledger card nor distributed. They are Host's $307.50, Verizon's $235.69, MWC's $454.40, Idearc's $12.32, and Lucent's $7.47.

In respect of respondent's new BCB trust account, he failed to distribute the $8,174.74 in AT&T stock sale proceeds and the $211.97 Host dividend. Moreover, he never recorded these deposits on the client ledger cards.

At the May 2016 demand interview, respondent was unable to explain his statement to Bartosiewicz, in the December 2009 letter, that he had distributed the $8,174.74 in AT&T stock proceeds. Further, in his June 2016 letter, Cornog stated that, according to respondent, he had distributed the AT&T proceeds "after his expenses and fees were remitted." Respondent asserted that paragraph seven of the retainer agreement permitted him to retain proceeds to pay fees.[14]

Despite respondent's claim that he was attempting to retrieve estate records, he never submitted billing records to support what the OAE characterized as the appropriation of the $8,174.74.

Bartosiewicz claimed that, when Margaret died, she owned 180 shares of Lucent stock. A Lucent stock certificate confirmed the number of shares, as of April 19, 1999, which was six years prior to her death.

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[14] Paragraph seven permitted respondent to retain attorney fees from the estate's assets, plus costs and advanced expenses, prior to distributing the assets to the beneficiaries.

On November 30, 2006, Lucent merged with Alcatel Corporation, resulting in Margaret's receipt of thirty-five shares of Alcatel stock. Although respondent deposited $111.20 in Lucent stock sale proceeds in the new BCB trust account in December 2009, and distributed the proceeds to the beneficiaries as part of the $75,000 distribution that month, Bartosiewicz claimed that the beneficiaries had received the proceeds only from the sale of the thirty-five Alcatel shares, not the Lucent shares. The argument appears not to appreciate the merger.[15]

To summarize the issue of the stock proceeds and dividends, according to the complaint, respondent recovered a total of $139,659.78 in stock dividends and proceeds, but distributed only $93,789.63, leaving a balance of $45,870.15 unpaid. He recovered $111,484.46 in bank account funds, but distributed only $97,500, leaving a balance of $13,984.46. Thus, respondent should have continued to hold $59,854.61 in estate assets.

Bartosiewicz's grievance alleged that respondent failed to prepare and provide him with a final accounting of the estate. Respondent denied this claim, asserting that, on February 24, 2011, Bartosiewicz had signed a

[15] Lucent shareholders received 0.1952 shares of Alcatel stock for each share of Lucent stock. Thus, Margaret's 180 shares of Lucent stock converted to 35.136 shares of Alcatel.

certification of the "Closing of the Estate of Margaret Bartosiewicz," which, together with the estate tax return, comprised the accounting. According to respondent, the purpose of the certification was to obtain Bartosiewicz's acknowledgement that, to the best of his knowledge, all debts and expenses of the estate had been paid and all property distributed. Moreover, respondent asserted, the certification "noted" that the estate was "officially closed."

Despite respondent's testimony, he admitted that, notwithstanding the certification, the estate did have assets that could not be located and that other stocks had escheated to the State of New Jersey. Yet, he still included in Bartosiewicz's certification the representation: "I know of no other property of the estate outstanding."

Respondent did not know whether any final accounting paperwork had been filed with the Surrogate's Office. The Surrogate's Office "Will Book" did not contain a final accounting of Margaret's estate.

When Bartosiewicz signed the February 24, 2011 certification, he understood that additional assets had not yet been distributed, based on paragraph three, which stated that "the remaining Estate property will be distributed to the appropriate beneficiaries via certified mail, FedEx or hand delivery."

On March 31, 2014, Bartosiewicz signed a second certification. Thereafter, he met with respondent on the belief that he would receive any remaining proceeds of the estate. Respondent was unable to "fully explain and confirm" that all assets of the estate had been collected and distributed. Thus, Bartosiewicz directed him to destroy the second certification, as respondent had failed to account for all the stocks and dividends, including his distribution of the funds. Specifically, Bartosiewicz maintained that the estate still held shares of stock in Host, PSE&G, Verizon, and Lucent. Although respondent stated that he would look into the status of the stock, he never reported back to Bartosiewicz. Respondent neither accounted for his attorney fees, nor produced estate closing accounting documents.

Respondent denied that Bartosiewicz had instructed him to destroy the second certification. By that time, respondent was under investigation by the OAE and, thus, he wanted Bartosiewicz to certify that he had handled the estate properly.

Despite Bartosiewicz's February 2011 certification, respondent met with Bartosiewicz and James, in August 2014, to discuss closing the estate, as well as the stocks and monies that "were still out there."

Neither Bartosiewicz nor respondent produced copies of the $25,000 checks paid to each of the beneficiaries in 2006. However, Bartosiewicz

supplied the OAE with a copy of a March 3, 2006 letter from respondent, in which he enclosed a $25,000 "interim" check and a Refunding Bond & Release form, identifying the distribution, and directed Bartosiewicz to return the completed form to respondent's office after it had been signed and notarized. Respondent also stated in the letter that no federal estate tax was due on the distribution and that the estate would pay the tax owed to the State of New Jersey. On March 9, 2006, Bartosiewicz signed the form and had it notarized.

Bartosiewicz also provided the OAE with a copy of the Refunding Bond & Releases signed in 2006 and 2011, both of which were executed in respect of the monies released from Margaret's bank accounts. Although the 2006 release did not identify the distribution as proceeds from a bank account, the 2011 form did.

Despite the amount of funds recovered for the estate, respondent encountered difficulty with the June 24, 2011 distributions of $7,500 to each of the beneficiaries from the new BCB trust account, which he identified as proceeds from Margaret's bank accounts. At the time respondent issued the checks, the new BCB trust account balance was $3,559.73, which was $18,940.27 less than the $22,500 in checks issued to the beneficiaries. Thus, on June 27, 2011, respondent transferred $22,500 from the BCB business

account to the new BCB trust account so that the three $7,500 checks would be honored.

On June 20, 2013, the OAE requested that respondent provide a detailed explanation regarding the June 24, 2011 distribution of $22,500. Nearly two months later, on August 9, 2013, respondent stated that the checks represented "a fee and expense concession" that he had made after a discussion with Bartosiewicz.

At the May 2016 demand audit, the OAE asked respondent why he had given two different explanations for the $22,500 disbursed to the beneficiaries. He replied that the June 24, 2011 letter was a form letter that his staff had used for prior distributions. The OAE examined the language set forth in the June 2011 letter against the 2006 and 2009 form letters sent to Bartosiewicz prior to the distributions made at that time. The content of the June 2011 letter was not the same as that in the 2006 and 2009 letters.

The complaint alleged that respondent misappropriated estate funds when he zeroed out the estate funds, on January 23, 2012, by issuing a $3,278.64 new BCB trust account check to the VNB trust account. The estate ledger reflected the payment of that same amount directly to Bartosiewicz, on May 7, 2012, by way of VNB trust account check number 1040. Respondent's records also contained an "invoice," dated May 7, 2012, stating that, on

January 24, 2012, $3,278.64 was transferred from the new BCB trust account and turned over to Bartosiewicz on May 7, 2012, via that check. According to the 2012 VNB trust account statements, the VNB trust account check number 1040 identified on the ledger and the invoice was never cashed, however. Thus, respondent should have continued to hold the funds intact.

During the May 2016 demand interview, respondent surmised that check number 1040 could have represented small dividends or life insurance premiums that he had recovered for the estate. The OAE asked respondent to produce a copy of the canceled check, explain what the disbursement represented, and provide billing and any other records that supported the check. He never did.

In Cornog's June 10, 2016 letter, he stated that, according to respondent, the funds represented reimbursement of either a refund from Hamilton Park Health Care Center for overbilling or small dividend checks. On the OAE's follow up, Cornog stated that the funds likely represented dividends. The OAE then asked respondent to identify the proceeds that had been used to fund the $3,278.64 disbursement to Bartosiewicz.

It appears that respondent never located a copy of check number 1040. Thus, according to the complaint, when respondent transferred the funds from

the new BCB trust account to the VNB trust account, on January 23, 2012, he was aware that he still owed the funds to the beneficiaries.

The OAE reviewed respondent's new BCB trust account records and discovered that, prior to the January 23, 2012 transfer of the $3,278.64 from the new BCB trust account to the VNB trust account, and his alleged issuance of check number 1040, on May 7, 2012, respondent already had invaded estate funds. Specifically, as shown in the Mortgage Plus matter, from December 14, 2010 through March 15, 2011, the new BCB trust account balance was only $434.73. By March 17, 2011, the new BCB trust account balance was $34.75, which was $3,243.91 less than the amount respondent should have been safeguarding for the estate.

According to the complaint, the $3,243.91 shortage was "aggravated further" because the $3,278.64 was itself short of the $8,386.71 in funds ($8,174.74 AT&T proceeds and $211.97 Host dividends) that respondent should have had in the trust account in December 2009. Respondent never explained how the estate balance had been reduced to $3,278.64, as of January 24, 2012.

Based on respondent's failure to complete the estate by filing a final accounting, and perhaps, too, his failure to distribute all the funds due to the beneficiaries, he was charged with having violated RPC 1.1(a), RPC 1.3, and

RPC 1.4(b). Although the complaint is unclear, the OAE charged respondent with having violated RPC 1.5(a), presumably because he had failed to support the $18,497.80 fee taken from the estate's funds. Respondent had entered into an hourly fee agreement with Bartosiewicz, but the complaint included a charge of a violation of RPC 1.5(c), which applies only to contingent fee cases.

Respondent's failure to maintain estate funds intact resulted in a knowing misappropriation charge, in addition to failure to safeguard funds and failure to promptly disburse the funds to the beneficiaries, a violation of RPC 1.15(a) and (b). In addition, based on alleged misrepresentations made to the estate's executor and to the OAE, respondent was charged with having violated RPC 8.1(a) and RPC 8.4(c).

Although respondent was charged with RPC 8.4(b), the complaint fails to identify the criminal statute that he allegedly violated. Finally, respondent was charged with having committed unspecified recordkeeping violations, which presumably include the inaccurate entries on the client ledger card.

COUNT FIVE: XIV-2017-0588E (Failure to Cooperate -- Bartosiewicz)

The fifth count of the ethics complaint charged respondent with failure to cooperate with the OAE in its investigation of the Bartosiewicz grievance, a violation of RPC 8.1(b). Respondent's lack of cooperation in the Bartosiewicz

estate matter began in May 2016 and continued through the filing of the motion seeking his temporary suspension. The lack of cooperation took the form of not providing documents requested during the course of the investigation, although respondent did appear for several demand interviews.

Respondent never produced the records, despite follow up requests from the OAE, and his claim that he was looking for them.

In the OAE's May 17, 2016 letter to Cornog, respondent was directed to produce the final accounting submitted to the Surrogate's Office or any court. Cornog replied that respondent had provided a final accounting to Bartosiewicz when he signed the two certifications. Respondent never provided the OAE with a copy of the final accounting, and he never replied to the OAE's request that he explain why the Surrogate's Office had no record of the final accounting.

In its May 17, 2016 letter, the OAE also requested respondent to submit the following: a confirmation letter sent to Schultz, Bartosiewicz's sister, acknowledging that she did not sign a Refunding Bond and Release; his hourly billing records used to support the $18,497.80 in charges to the estate as stated on the 2009 second estate client ledger card; an explanation of how he had disbursed the $8,174.74 in AT&T stock proceeds, as claimed in his December 18, 2009 letter to Bartosiewicz; a copy of the retainer agreement signed by

Bartosiewicz; and a copy of canceled VNB trust account check number 1040, and an explanation of what the $3,278.64 represented, as well as billing and any other records that would explain the issuance of the check. The OAE set a deadline of May 27, 2016.

Despite an extension to June 8, 2016, Cornog informed the OAE, on June 10, 2016, that: respondent could not locate a letter sent to Schultz, but, instead, believed that confirmation was done over the telephone; respondent's hourly billing records were determined by multiplying the hourly rate by the number of hours worked on the estate file; the AT&T stock sale proceeds check was disbursed to the estate beneficiaries after expenses and fees were remitted; the $3,278.64 represented either a reimbursement of Hamilton Park Health Care Center's overbilling or small dividend checks; and that a final accounting had been provided to Bartosiewicz the day he signed the two certifications. Cornog also provided a copy of the signed retainer agreement, dated September 16, 2005.

In a June 17, 2016 letter to Cornog, the OAE again directed that respondent provide, by June 30, hourly billing records supporting the $18,497.80 in charges to the estate, as stated on the second estate client ledger card; an explanation of, and the cancelled check(s) showing, the disbursement of the $8,174.74 of AT&T stock proceeds to the estate beneficiaries; a copy of

VNB trust account check number 1040; an explanation as to what proceeds were used to fund the $3,278.64 disbursement to Bartosiewicz; and the final accounting provided to the Surrogate's Office or any court for the estate. Despite another extension, respondent still did not comply with the OAE's directives.

By letter dated July 11, 2016, Cornog replied that respondent was attempting to retrieve the billing records (supporting the $18,497.80 in fees charged to the estate), but respondent's office had changed computers and programs where the billing records were stored from 2005-2011; that the fees included (but were not limited to) a reimbursement to the Cresci firm for payments to the Hamilton Park Nursing Home, on grievant's behalf; and that the date of death bank figures were not the withdrawal figures, as the withdrawal amounts did not account for burial expenses and inheritance taxes paid by respondent. Cornog's letter also stated that respondent was seeking records concerning the $8,174.74 of AT&T stock proceeds from the previously mentioned retired computers; that paragraph seven in the client retainer agreement signed by Bartosiewicz appeared to allow respondent to retain the proceeds for fees as appropriate; that respondent was attempting to obtain a copy of VNB trust account check number 1040 for $3,278.64; and that respondent maintains his position that a final accounting was provided to

Bartosiewicz on February 24, 2011, when Bartosiewicz signed two Certifications as Executor of his mother's estate.

After yet another request from the OAE, on July 15, 2016, for an explanation regarding the transfer of the billing records from the old computer system to the new, the billing records supporting the $8,174.74 in fees, and an explanation for the absence of a recording in the will book, and another extension, on August 5, 2016, Cornog informed the OAE that he could not contact respondent. The OAE granted an additional extension to August 15, 2016.

Having heard nothing, the OAE sought respondent's temporary suspension, on September 21, 2016. After the Court granted respondent numerous extensions of time to file a reply to the petition, which did not result in any filing by respondent or Cornog, the Court granted the OAE's motion and suspended respondent, effective November 17, 2016.

The allegations in count four of the complaint clearly and convincingly establish that respondent captured $251,144.24 in estate assets, but distributed only $116,289.63 to the beneficiaries. It is difficult to determine what happened to the $134,854.61 difference. None of the allegations claim that the disbursements were made to cover Margaret's outstanding debts, expenses, and funeral costs. It is not clear how much respondent was entitled to receive in

attorney fees, because respondent failed to produce the requested records. Despite the omission of these facts, the complaint's allegations establish respondent's failure to distribute certain assets.

Respondent never distributed the $8,174.74 in AT&T stock proceeds or the $211.97 in Host dividends, contrary to his representation in the December 18, 2009 letter to Bartosiewicz. Further, he did not disburse $18,877.72, which comprised $12,272.70 in Host stock proceeds and $5,587.64 in Verizon stock proceeds. Yet, again, there is no explanation for this. Perhaps these funds covered attorney and other fees and costs, plus certain expenses, as described above. There is also the possibility that respondent's failure to record certain deposits resulted in the negligent misappropriation of estate funds.

The complaint does establish that respondent purportedly issued a $3,278.64 check to Bartosiewicz, but it was never cashed, Bartosiewicz denied having received it, and respondent either was unable to or refused to substantiate his claim. Yet, the allegations establish, clearly and convincingly that, as early as March 2011, when the new BCB trust account balance was only $34, the $3,278.64 funds were gone.

"[C]ircumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that client funds were being invaded." In re Johnson, 105 N.J. 249, 258 (1987). Accord In re Cavuto, 160 N.J. 185, 196 (1999)

(noting that the circumstantial evidence clearly and convincingly established that the attorney knew or had to know that he had repeatedly invaded client funds that were to be kept inviolate); In re Roth, 140 N.J. 430, 445 (1995) (observing that circumstantial evidence can add up to the conclusion that a lawyer knew, or had to know, that a client's funds were being invaded); and In re Davis, 127 N.J. 118 (1992) (attorney disbarred for knowing misappropriation of client funds based on "overwhelming" circumstantial evidence involving the absence of deposits in the trust account to cover disbursements, the removal of a legal fee that exceeded the amount of the trust account deposit, and premature disbursements).

In our view, the circumstantial evidence of knowing misappropriation in this case is overwhelming. Respondent offered several stories regarding check number 1040, but, in the end, he was unable to substantiate having issued the check or the purpose of the disbursement. Moreover, the record contains no evidence to establish that the check was ever issued. Given the $34 trust account balance many months prior to, and up until, the alleged issuance of the check, the circumstantial evidence demonstrates that respondent had, at some point, knowingly misappropriated the funds.

To conclude, respondent knowingly misappropriated at least $3,278.64 in trust funds belonging to the Bartosiewicz estate, a violation of Wilson, in

addition to RPC 1.15(a) and (b). He also violated RPC 1.3, by dithering in the completion of the estate; RPC 1.4(b), by failing to keep Bartosiewicz informed about the various distributions and to follow up on promises to investigate various issues; RPC 8.1(a) and RPC 8.4(c), by making various misrepresentations to Bartosiewicz and the OAE; and RPC 8.1(b), by failing to cooperate in the OAE's investigation of the grievance. Indeed, respondent subverted that investigation.

Although respondent acted negligently, in respect of keeping his books and records, he did not exhibit gross neglect. There is no evidence that his fee was unreasonable because the complaint does not allege the amount that respondent charged for fees. Thus, a violation of RPC 1.5(a) cannot be sustained. No contingent fee is at issue and, therefore, RPC 1.5(c) does not apply to this case. Finally, the complaint contains no support that respondent engaged in criminal conduct. Consequently, we dismiss the charges that respondent violated RPC 1.1(a), RPC 1.5(a), RPC 1.5(c), and RPC 8.4(b).

In summary, the allegations of the ethics complaint clearly and convincingly establish that respondent knowingly misappropriated at least $16,675 in the Figueroa matter, $6,781.09 in the Mortgage Plus matter, and at least $3,278.62 in the Bartosiewicz matter. In addition, he committed the following ethics infractions:

Figueroa: RPC 1.4(b), RPC 1.15(a), RPC 1.15(b), RPC 1.5(c), RPC 8.1(a), RPC 8.4(b), RPC 8.4(c)

Mortgage Plus: RPC 1.15(a), RPC 1.15(b), RPC 1.15(d), RPC 8.1(a), RPC 8.1(b), RPC 8.4(c)

Bartosiewicz: RPC 1.3, RPC 1.4(b), RPC 1.15(a) and (b), RPC 8.1(a) and (b), and RPC 8.4(c)

In our view, respondent must be disbarred for knowingly misappropriating client, escrow, and trust funds in the DRB 18-196 matter. Wilson, 81 N.J. at 455 n.1, 461, and Hollendonner, 102 N.J. at 26-27. If the Court determines that respondent did not knowingly misappropriate any funds, we, nevertheless, recommend his disbarment for his cumulative violations in all three matters, as described below.

In the matter docketed at DRB 18-124, we determine that a two-year suspension is sufficient for respondent's practicing while suspended. The discipline imposed on attorneys who engage in such conduct ranges from a lengthy suspension to disbarment, depending on the presence of other misconduct, the attorney's disciplinary history, and aggravating or mitigating factors. See, e.g., In re Nihamin, 235 N.J. 144 (2018) (one-year suspension imposed on attorney who continued to practice law after he received a three-month suspension in New York; even though the attorney did not actively engage in the practice of law during the suspension, he discussed client matters with law firm personnel; prior admonition and three-month suspension arising

from conviction of third degree misapplication of entrusted property); In re Poley, 232 N.J. 195 (2018) (one-year suspension imposed on attorney who, following her suspension in New York for failure to comply with the state's attorney registration requirements, represented a client in a criminal proceeding); In re Phillips, 224 N.J. 274 (2016) (one-year suspension imposed on attorney who represented the wife in a matrimonial matter against her pro se husband; following a 2012 temporary suspension, the attorney obtained the husband's consent to an adjournment of a motion scheduled to be heard while the suspension was still in effect, typed the letter to the court requesting the adjournment, directed the husband to sign and file the request, and delivered "paperwork" to his client at the courthouse prior to the hearing; prepared a cross-motion for her; provided "substantial amounts of information" to her; provided a certification to the court in which he acknowledged assisting his client with the adjournment and her cross-motion; and stated that both parties had dropped off or picked up papers at his law office, including after his date of suspension; extensive disciplinary history); In re Viteritto, 227 N.J. 391 (2017) (default; two-year suspension imposed on attorney who, following a temporary suspension for failure to comply with the determination of a fee arbitration determination, practiced law in four client matters; he wrote three letters in two client matters, and filed a motion to dismiss the complaint in a

third matter, which had to be dismissed given his suspended status; violations of RPC 5.5(a)(1) and RPC 8.4(d); in a fourth matter, he instituted a lawsuit in behalf of a client, with no written fee agreement, and, for six months, participated in the litigation, including the filing of a certification identifying himself as authorized to practice law in New Jersey, a violation of RPC 1.5(b), RPC 3.3(a)(1), RPC 5.5(a)(1), and RPC 8.4(a)–(d); he also failed to file an affidavit of compliance with R. 1:20-20 and failed to cooperate with disciplinary authorities, a violation of RPC 8.1(b) and RPC 8.4(d); although we had determined to impose a one-year suspension, the attorney failed to appear for the Court's order to show cause); In re Saint-Cyr, 210 N.J. 615 (2012) (default; two-year suspension imposed on attorney who, in addition to practicing law while suspended, exhibited gross neglect and lack of diligence, and failed to communicate with the client in one matter, failed to communicate with the client in a second matter, and failed to file a written reply to the grievance in both matters; prior censure in a default); In re Adelhock, 232 N.J. 359 (2018) (three-year suspension imposed on attorney who practiced law following his temporary suspension for failure to cooperate with disciplinary authorities, violations of RPC 5.5(a)(1) and RPC 8.4(b); the attorney sent a letter to a daycare center in behalf of a child's parents, placing the center on notice of potential claims relating to the child's care, and represented co-

owners of a property in respect of a homeowners insurance policy claim; the attorney also had failed to pay state and federal income taxes since 2008; practiced while ineligible, failed to communicate with a client, failed to promptly disburse funds to a client, commingled personal funds and earned fees in the trust account in order to hide personal funds from creditors, including the Internal Revenue Service, failed to comply with the recordkeeping requirements of R. 1:21-6, failed to cooperate with disciplinary authorities, and engaged in a "significant and prolonged course of and dishonesty and fraud"); In re Walsh, Jr., 202 N.J. 134 (2010) (attorney disbarred on a certified record for practicing law while suspended by attending a case conference and negotiating a consent order on behalf of five clients and making a court appearance on behalf of seven clients; the attorney also was guilty of gross neglect, lack of diligence, failure to communicate with a client, and failure to cooperate with disciplinary authorities during the investigation and processing of these grievances; the attorney failed to appear on an order to show cause before the Court; extensive disciplinary history: reprimanded in 2006, censured in 2007, and suspended twice in 2008); and In re Olitsky, 174 N.J. 352 (2002) (disbarment for attorney who agreed to represent clients in bankruptcy cases after he was suspended, did not advise them that he was suspended from practice, charged clients for the prohibited representations,

signed another attorney's name on the petitions, without that attorney's consent, and then filed the petitions with the bankruptcy court; in another matter, the attorney agreed to represent a client in a mortgage foreclosure after he was suspended, accepted a fee, and took no action on the client's behalf; the attorney also made misrepresentations to the court, was convicted of stalking a woman with whom he had had a romantic relationship, and engaged in the unauthorized practice of law; prior private reprimand, admonition, two three-month suspensions, and two six-month suspensions).

Here, despite the somewhat limited evidence that respondent practiced law while suspended, a two-year suspension is appropriate, given respondent's default.

Like this case, the two-year suspension cases both involve defaults. Although respondent's conduct can be described as minor, compared to that of the attorneys in those cases, given his disciplinary history, and the absence of any mitigation weighing in his favor, a two-year suspension is appropriate.

In the matter docketed at DRB 18-196, the most serious charge is RPC 8.4(b), which is supported by respondent's conviction of uttering a false document, a fourth-degree crime, arising out of the forgery of Figueroa's signature on the settlement documents. At a minimum, this violation warrants a one-year suspension. See, e.g., In re White, 191 N.J. 553 (2007) (one-year

suspension imposed on attorney who, without her friend's authority, used the friend's credit to apply for a student loan and then forged the friend's signature on the application; the attorney admitted the forgery after she had been charged, in two counties, with forgery and uttering a false document with the purpose to defraud).

In all three client matters, respondent lied to his clients, third parties, and the OAE. Individual misrepresentations to clients, third parties, and the OAE ordinarily result in the imposition of at least a reprimand. In re Kasdan, 115 N.J. 472, 488 (1989) (client); In re Walcott, 217 N.J. 367 (2014) (third party); and In re Sunberg, 156 N.J. 396 (1998) (OAE). In this case, however, respondent did not make a misrepresentation here and there. Rather, he lied repeatedly, when expedient, to Figueroa, Bock, Bartosiewicz, and the OAE.

The extent and degree of respondent's pathological dishonesty alone warrant a two- to three-year suspension. See, e.g., In re Katsios, 185 N.J. 424 (2006) (two-year suspension for attorney who improperly released escrow funds to his cousin, a party to the escrow agreement, and then falsified bank records and trust account reconciliations to mislead the ethics investigator that the funds had remained in escrow); In re Silberberg, 144 N.J. 215 (1996) (two-year suspension imposed on attorney who, in a real estate closing, allowed the buyer to sign the name of the co-borrower; the attorney then witnessed and

notarized the "signature" of the co-borrower; the attorney stipulated that he knew at the time that the co-borrower was deceased; after the filing of the ethics grievance against him, the attorney falsely stated that the co-borrower had attended the closing; on another occasion, the attorney sent a false seven-page certification to the district ethics committee in order to conceal his improprieties); and In re Penn, 172 N.J. 38 (2002) (three-year suspension imposed on attorney who failed to file an answer in a foreclosure action, thereby causing the entry of default against the client; thereafter, in order to placate the client, the attorney lied that the case had been successfully concluded, fabricated a court order, and signed the name of a judge; the attorney then lied to his adversary and to ethics officials; the attorney also practiced law while ineligible).

In Figueroa, respondent settled his client's case, never told her of the settlement, even when she asked him about the status of her case, forged her signature on the settlement documents, fabricated a letter to her, attaching a breakdown of the settlement funds, and repeatedly lied to the OAE about the matter during its investigation.

In the Mortgage Plus matter, respondent lied to the OAE when he stated that he had retained the disputed $6,781.09 in escrow, knowing that he had

invaded the funds and that he was obligated to hold the monies intact until the dispute was resolved.

In Bartosiewicz, respondent not only lied to Bartosiewicz about the status of the estate when he met with him to sign the 2011 certification, but also he strong-armed Bartosiewicz into signing another certification, three years later, so that the OAE would believe that Bartosiewicz was satisfied with respondent's handling of the estate.

The degree and depth of respondent's dishonesty, some – if not all – of which was for the purpose of personal gain, extends well beyond that of the attorneys in the above-referenced cases. Thus, at a minimum, a three-year suspension would be in order for respondent's lies.

The remaining violations call for admonitions or reprimands, at most, and, therefore, do not serve to enhance a three-year suspension any further. See, e.g., In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (admonition for recordkeeping violations); In the Matter of Fred Braverman, DRB 17-015 (April 25, 2017) (admonition for lack of diligence and failure to communicate with the client); In the Matter of Michael C. Dawson, DRB 15-242 (October 20, 2015) (admonition imposed on attorney who failed to reply to repeated requests for information from the district ethics committee investigator regarding his representation of a client in three criminal defense

matters); and In re Mitnick, 231 N.J. 133 (2017) (reprimand imposed on attorney who failed to safeguard funds and committed recordkeeping violations).

The question becomes whether the totality of respondent's misconduct in this matter, plus the misconduct in DRB 18-124 (practicing while suspended, for which we determined to impose a two-year suspension), renders respondent unsalvageable, and, thus, unworthy of continued membership in this State's bar. In our view, it most certainly does, especially when other aggravating factors are taken into consideration.

We have not yet mentioned that, in addition to these matters, docketed at DRB 18-124 and DRB 18-196, respondent defaulted in DRB 18-075, the matter in which the Court recently imposed a censure on respondent. Further, respondent has, over the years, repeatedly filed motions to vacate that do nothing more than parrot the same arguments, regardless of their applicability to the case at hand or our prior rejection of them.

Finally, in further aggravation, it has been nearly two years since respondent's November 2016 temporary suspension, and, yet, he refuses to file the required affidavit of compliance with R. 1:20-20, thus establishing that he has little to no interest in practicing law.

In determining that disbarment is appropriate for the totality of respondent's conduct in both matters, irrespective of the knowing misappropriation charges, we rely on In the Matter of Marc D'Arienzo, DRB 16-345 (May 25, 2017) (slip op. at 26-27) in which we stated:

> Given the contemptible set of facts present in these combined matters, we must consider the ultimate question of whether the protection of the public requires respondent's disbarment. When the totality of respondent's behavior in all matters, past and present, is examined, we find ample proof that he is unsalvageable, and that no amount of redemption, counseling, or education will overcome his penchant for disregarding ethics rules. As the Court held in another matter, "[n]othing in the record inspires confidence that if respondent were to return to practice [from his current suspension] that his conduct would improve. Given his lengthy disciplinary history and the absence of any hope for improvement, we expect that his assault on the Rules of Professional Conduct would continue." In re Vincenti, 152 N.J. 253, 254 (1998). Similarly, we determine that, based on his extensive record of misconduct and demonstrable refusal to learn from his mistakes, there is no evidence that respondent can return to practice and improve his conduct. Accordingly, we recommend respondent's disbarment.

The Court agreed with our recommendation and disbarred D'Arienzo. In re D'Arienzo, 232 N.J. 275 (2018).

Here, respondent has demonstrated, clearly and convincingly, that he is unsalvageable. He should be disbarred for knowing misappropriation of client, escrow, and trust funds. In the alternative, should the Court decline to find that

respondent is guilty of knowing misappropriation, respondent should, nevertheless, be disbarred for his inability or refusal to conform his conduct to the standards required of all members of the New Jersey Bar.

Members Gallipoli and Rivera were recused. Member Hoberman did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Peter Jonathan Cresci
Docket Nos. DRB 18-124 and 18-196

Decided: December 12, 2018

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer	X		
Gallipoli		X	
Hoberman			X
Joseph	X		
Rivera		X	
Singer	X		
Zmirich	X		
Total:	6	2	1

Ellen A. Brodsky
Chief Counsel