Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-143
District Docket No. XIV-2015-0139E

In the Matter of	:
Wayne A. Schultz	:
An Attorney at Law	:

Decision

Argued: June 20, 2019

Decided: December 5, 2019

Timothy J. McNamara appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a recommendation for a six-month suspension filed by Special Ethics Master Eric S. Solotoff. The formal ethics complaint charged respondent with knowing misappropriation of client and/or

escrow funds, in violation of RPC 1.15(a) (failure to safeguard funds) and the principles set forth in In re Wilson, 81 N.J. 451 (1979), and/or In re Hollendonner, 102 N.J. 21 (1985), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 1.7(a)(2) (concurrent conflict of interest); RPC 1.8(a) (improper business transaction with a client); RPC 1.15(b) (failure to promptly deliver to the client funds that the client is entitled to receive); RPC 1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6); RPC 8.1(a) (knowingly making a false state of material fact to a disciplinary authority); RPC 8.4(c); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to impose a six-month suspension.

Respondent was admitted to the New Jersey bar in 1975. At the relevant times, he maintained an office for the practice of law in Oxford, New Jersey.

On February 14, 1995, respondent received a private reprimand (now, an admonition) for his misuse of accumulated interest on client funds in his attorney trust account. In the Matter of Wayne A. Schultz, DRB 93-157 (February 14, 1995).

This case arises out of respondent's alleged failure to repay three commercial notes issued to JoAnn Mesyna by Wealthvest Financial Services,

Inc. (Wealthvest), a shell corporation owned by respondent. The notes were issued in 1996, 1998, and 2001 and, collectively, totaled $32,000 in principal. By 2010, accounting for renewals and interest, respondent's indebtedness to Mesyna had grown to $64,644.45.

During the ethics hearing, respondent claimed that the notes memorialized personal loans from Mesyna to him, which, they later agreed, he would "work off" by providing legal services to her. In turn, the Office of Attorney Ethics (OAE) asserted that respondent had "hoodwinked" Mesyna, by providing her with commercial notes issued by a defunct corporation. According to the OAE, respondent's failure to repay the loans, thus, constituted the knowing misappropriation of Mesyna's money.

Mesyna died on August 25, 2013, at the age of 73. At the time, she was a widow and retired hairdresser, living on a fixed income supplemented by an inheritance of an unidentified amount received from her sister.

Grievant Brian Staples was Mesyna's grandson and the executor of her estate. Staples grew up in Mesyna's house, where he had lived from 1990 until 2009 and, again, from 2011 until she died. According to Staples, Mesyna was of sound mind and was cognizant of her financial and business matters. Although Staples' opinion was not confined to any particular period in Mesyna's life, there is no evidence that she was not competent at any time prior to her death.

On September 4, 2013, Staples retained respondent to represent Mesyna's estate and him, as executor. Shortly thereafter, Staples and his girlfriend, Jordan Cresitello, found commercial notes issued, on October 1, 2010, to Mesyna by Wealthvest: (1) Note No. 91E, in the amount of $14,426.26; (2) Note No. 72H, in the amount of $23,263.47; and (3) Note No. 61H, in the amount of $26,954.92. Wealthvest's purported treasurer, Andrew Wilson, had signed all three notes, which reflected a five-and-a-half percent interest rate per annum, and a maturity date of October 1, 2013.

Staples and Cresitello searched Wealthvest on the internet and determined respondent's connection to the entity. When they asked respondent, however, about accessing the Wealthvest funds to pay Mesyna's funeral expenses and other bills, he advised them that Staples would incur a penalty if he did that. The face of the notes contained no such language, and respondent provided no further explanation for his representation.

As it turned out, respondent was Wealthvest. In 1992, he became a registered representative pursuant to a Series 6 securities license issued by the Financial Industry Regulatory Authority (FINRA), a self-regulating authority

under the Securities and Exchange Act of 1934.[1] After respondent obtained the license, he spent the next fifteen years working as a registered representative for Your Money Matters, Inc. (YMMI), a securities broker/dealer founded by his brother.

On April 13, 1993, respondent incorporated Wealthvest, as a shell corporation, formed for the purpose of training sales representatives and selling securities and insurance. The company was unsuccessful, and, on August 23, 1998, the State of New Jersey Department of the Treasury revoked its charter. Respondent claimed that he was unaware of the revocation.

Contrary to Staples' and Cresitello's testimony that they had brought the notes to respondent's attention, respondent claimed that, after Mesyna passed away, he had raised the issue of the notes with Staples and suggested that they meet to discuss the notes and other estate matters. It is undisputed, however, that respondent did not disclose to Staples that he was Wealthvest.

Cresitello conducted a broker check, through FINRA, and learned that, when respondent issued the 2010 notes to Mesyna, he was employed by

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[1] According to Investopedia, a Series 6 license entitles the holder to register as a company's representative and to purchase or sell mutual funds, variable life insurance, municipal fund securities, variable annuities, and unit investment trusts.

Tomorrow's Financial Services, Inc. (TFS).[2] TFS representatives, however, informed Cresitello that TFS had not authorized the sale of the notes.

In a letter dated February 25, 2014, but not mailed until March 10, 2014, Staples asked respondent for information about the procedure for liquidating the notes, and whether Mesyna had other investments with respondent. Meanwhile, on March 5, 2014, respondent informed Staples, in writing, that he was withdrawing from the representation of the estate and Staples, as the executor, due to Staples' failure to cooperate with him. The letter also stated:

> I have included my statement for legal services with this letter. I have also included statements for legal services rendered to JoAnn during the past few years. JoAnn had repeatedly promised to pay these and I continued to carry them in an effort to help her. However I must now provide these and assert a claim against them as claims against the estate. I urge you to seek other counsel and have that counsel contact my office for release of my file in this matter. Upon contact by new counsel, accompanied by an executed Substitution of Attorney and cashier's check for my

[2] From 2009 until late 2010, respondent worked as an independent contractor for TFS.

> statement in this matter, I will forward the file to the new counsel.
>
> [Ex.P8.][3]

On that same date, respondent filed a claim against the estate with the Morris County Surrogate. The claim stated:

> THE UNDERSIGNED CLAIMANT is due the sum of Fifty Seven Thousand Seven Hundred Four Dollars and Ninety Two Cents ($57,704.92) from this Estate. The basis for this Claim is fees due for legal services rendered and never paid and still outstanding. The files for which the said fees are due are files 1481, 1484, 1489, 1507, 1516, 1517, 1574, and 1580.
> Claimant has given credit to the Estate for all payments to which it is entitled; and the balance claimed herein is justly due.
>
> The undersigned certifies that the matters set forth above are true and correct. The undersigned is aware that any statement that is deliberately false will subject the undersigned to punishment.
>
> [Ex.P10.]

The invoices on which the claim against the estate was based contained only a summary of the services provided and an amount due. The invoices did not set forth other key details, such as the dates of the services provided, the amount of time devoted to the task, or the rate charged.

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[3] "Ex." refers to the exhibits admitted during the hearing. "1T" refers to the August 3, 2017 hearing transcript. "3T" refers to the November 1, 2017 hearing transcript.

Cresitello testified that, during respondent's representation of the estate, he had never mentioned a claim against the estate for unpaid legal fees. Respondent conceded that, prior to his termination of the representation, he had not told Staples about the commercial notes or Mesyna's outstanding legal fees, claiming that he "couldn't meet with the man, [he] couldn't sit down and meet with him."

Respondent testified that, initially, Staples had been cooperative, but that "it tapered off, to the point where I couldn't get a hold of him." Indeed, due to his unavailability, Staples had authorized Cresitello to handle the estate. According to respondent, even she complained about Staples' lack of attention to the matter.

Respondent testified that, prior to his withdrawal from the representation, he had met with Staples no more than two or three times. Staples admitted that he was not always available. Later, however, Staples asserted that he had never scheduled a meeting with respondent because he was trying to access Mesyna's investments. During that time, Staples claimed, he and Cresitello were asking others "questions about this situation." By March 5, 2014, respondent had not heard from Staples and, thus, wrote the letter withdrawing from the representation.

Through his billing statement for the estate, respondent claimed that, during the representation, he had at least thirty contacts with Staples and/or Cresitello. The billing statement, however, made no reference to the commercial notes or loans. When the special master asked respondent why he had not written a letter to Staples about the notes, respondent replied that it had not occurred to him, because he wanted to meet with Staples in person. He had handled many matters for Mesyna, he maintained, and claimed that he wanted to explain them to Staples in a comprehensive manner.

Staples knew that respondent had provided Mesyna with legal representation, including a car repossession matter in which Staples was a co-defendant. Staples also claimed that Mesyna had invested money with respondent. He testified that, although Mesyna did not complain about the legal services provided by respondent, she would become upset and cry when she would try to access the money that "she said [he] had set away for her." On this point, however, the special master found Staples' testimony lacked credibility.

Although the face value of the three 2010 notes totaled $64,644.45, Staples never received any funds from respondent, who never gave Staples a reason for failing to turn the monies over to the estate.

During the ethics hearing, the OAE asserted that respondent had served as Mesyna's financial advisor, and that the commercial notes represented

investments in Wealthvest. In turn, respondent claimed that the notes represented personal loans, which became retainers for substantial legal services he had provided to Mesyna, over a period of sixteen years. Respondent denied that the commercial notes were investments or that he had tried to lead Mesyna to believe that she was investing in a corporation. Rather, he claimed that she knew that she was lending money to him.

Respondent's characterization of the notes, however, had evolved over the course of the disciplinary proceedings against him. In his January 13, 2015 written reply to the ethics grievance underlying this matter, respondent referred to the commercial notes as retainers. According to respondent, when he met Mesyna, she required "extensive legal representation," and, thus, wanted to have him "on retainer for future legal representation and legal matters." He maintained that, until such time as the services were rendered, she wanted to earn interest on the monies advanced to him.

Respondent claimed that he had discussed Mesyna's proposal with several unidentified certified public accountants, who suggested that he

> deposit the retainer into a corporate account controlled by me and that the corporation pay Ms. Mesyna interest on the balance, and I pay interest to the corporation, thus allowing me to have the security of a retainer and at the same time not be required to report the same as income, but rather as a loan, until such time as the fee was earned. In essence, in order to satisfy Ms. Mesyna's

> request that she earn interest on the retainer until it was used up, she paid the funds to my corporation, my corporation paid her interest, and I paid interest to the corporation. At no time were the funds anything other than a retainer for legal services to be rendered by me. Again, as I stated above, over 17 years I handled 21 different cases for Ms. Mesyna, and used the retainer as compensation for my services.
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> [Ex.P12,p.2.]

Respondent, thus, claimed that the commercial notes served as receipts for the retainers.

On July 13, 2015, at respondent's first OAE interview, he maintained his position that each note was a retainer, which he had characterized as a loan rather than income; that each note functioned as a receipt for the retainer, and a mechanism by which respondent would pay interest to Mesyna; and that the interest also would be applied toward his legal fees.

Respondent denied that Mesyna had simply lent him money, explaining:

> I characterized it as a loan and I put her down as a lender. I did all of this so it did not have to be reported as income at that time. That's why I did it.
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> [Ex.P11,p.91.]

At respondent's second OAE interview, on March 24, 2016, he continued to maintain that the notes were retainers and that the retainers were treated as loans. Thus, respondent explained, he had "worked off" the loans by performing

legal services for Mesyna. According to respondent, he and Mesyna had agreed that, when the notes matured, they would "net everything out," and, if Mesyna wanted to end their attorney-client relationship, he would return any excess funds. He claimed a belief that their arrangement was legitimate, so long as he paid interest to her.

Respondent had no records to show that the notes were retainers, but he claimed that Mesyna's course of conduct established that fact. He explained:

> But if you look at her course of conduct over 15 years, I think it's very evident that she wanted to continue our relationship the way it was. And furthermore, I have asked if Mr. Staples has any evidence that she paid me that full amount in some other way, let me know.
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> [1T105-6 to 10.]

In addition to a lack of records corroborating his assertion that the notes were retainers, respondent had no records indicating how or when he drew upon the funds, claiming that he had lost many of his records in a flood caused by Hurricane Irene.

Moreover, contrary to respondent's claim that the commercial notes acted as retainers, during the disciplinary hearing, he openly admitted that he had borrowed money from Mesyna and that the notes were loans, which eventually became retainers. In addition to this change in position, respondent produced

three documents that the OAE had not seen previously. According to respondent, he had located the documents only the day before the hearing.

Two of the documents purported to be the original Wealthvest notes, both of which respondent had signed, as president: No. 61, dated March 1, 1998, in the amount of $8,000, and No. 91, dated April 1, 2001, in the amount of $16,000. A third note, No. 28, dated August 1, 1996, in the amount of $8,000, was not produced. Instead, respondent turned over a spreadsheet, which he claimed showed the issuance of the note and its subsequent renewal history.

At the hearing, respondent testified that he had met Mesyna in the early 1990s through a mutual acquaintance, and that, over the years, they became friends. In 1997, he began to perform legal services for her.

Respondent testified further that, in August 1996, prior to any attorney-client relationship between them, respondent needed a personal loan, and Mesyna offered to lend him money. On the first of that month, she lent $8,000 to him. Initially, respondent intended to give Mesyna a personal "IOU" for the loan, but, as detailed above, he claimed some unidentified CPAs had advised him, albeit informally, to use a shell corporation and to issue the "IOU" from that company. Respondent maintained that he, thus, issued Wealthvest Commercial Note No. 28, which he signed as president. The note was due on July 31, 1997.

On March 1, 1998, respondent again needed financial help, and Mesyna lent him another $8,000. He asserted that he issued Wealthvest Commercial Note No. 61 for that amount.

Thus, respondent admitted that the first two commercial notes represented loans that he had received from Mesyna due to financial need. The spreadsheets accompanying each note show the number of renewals over the years. He testified that the 2010 notes represented continuations of existing debt.

In April 2001, Mesyna lent respondent an additional $16,000, for which he issued another corporate note. By this time, the State had revoked Wealthvest's charter, but respondent maintained that he was not aware of the revocation.

Respondent entered into an attorney-client relationship with Mesyna in December 1997, when she asked him to represent her in respect of a mortgage extension. Respondent claimed that he told Mesyna that he required a significant retainer, and so they agreed that he would "work off the loan through [his] legal services." They did not, however, enter into a retainer agreement. Respondent continued:

> We also agreed that, if I did any further work, we would review the loan balances periodically, and at those times, she alone would determine if she wanted to net out my service bill, versus the outstanding loan balances, and be paid off, or continue receiving interest

> on the loans, and continue to have me work off the loan balances.
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> I continued to provide legal service to her over a period of 16 years, on different legal matters. The cases ranged from Municipal Court matters to extensive litigation, including a suit against a major car dealer, and defense against Wells Fargo of her house foreclosure and a mortgage restructure under the federal HAMP program.
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> [3T24-2 to 15.]

Respondent could not recall whether, at the time Mesyna first lent monies to him, he had advised her to seek advice from independent counsel. He claimed, however, that once Mesyna's legal problems had become more complex, he asked her whether she wanted to have another attorney "look at things." He maintained that she declined. He testified that he was not certain whether he had put that suggestion in writing, but conceded that he had no copy of any such letter. Respondent also admitted that he did not have Mesyna's signed, written consent to the essential terms of the transaction.

Respondent denied that he had filed the $57,704.92 claim against the estate in response to Staples' request for money. He asserted that he had filed the claim because he wanted to memorialize the work that he had done, and the amount owed for that work, which would be offset by the loan. Thus, he contended, it was not dishonest of him to tell the Surrogate that the estate owed money to him.

Respondent also sent a bill to Staples for the services he had provided to Mesyna, and asked Staples whether he had evidence that Mesyna had made any payments for the legal services. Staples did not. Respondent explained his purported quandary:

> All I know is that this was the amount for the work I did. As far as what the notes are, if I still owe money, great, I'll pay them the money. But those notes were evidence of a loan; these bills were evidence of work done. The two had never been netted out against each other.
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> [1T239-11 to 16.]

Respondent acknowledged that, prior to the ethics hearing, he did not tell the OAE that he had borrowed money from Mesyna because, in his view, the OAE's questions pertained solely to his attorney-client relationship with Mesyna.

Despite respondent's ultimate position, during the ethics hearing, that the loans were retainers, he admitted that Mesyna had paid him legal fees in certain matters, albeit "very, very minor, other amounts," which were "nothing compared to the work [he] did." He also had written retainer agreements with Mesyna in some matters. As for the matters that had no written agreements, respondent pointed out that, because he had an ongoing relationship with

Mesyna, it was not necessary to have a retainer agreement for each and every matter.

Respondent provided a list of twenty-two matters that he had handled for Mesyna, from 1997 until 2013. According to respondent, if one did not accept that the notes had become retainers, then one would have to believe that all legal services provided by respondent to Mesyna had been gratuitous. Indeed, according to respondent,

> the reason she continued to renew the notes is because she wanted to continue to build up the interest on them. And that's why, on a loan of $32,000, she got nearly $70,000 worth of legal work.
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> [1T112-14 to 18.]

To keep track of the loan balances and the value of the legal services provided, respondent gave Mesyna statements of legal services and statements of interest, which permitted her to see the loan balance "versus the balance she owed . . . for the legal services." He explained:

> I did that for a matter of planning of her and I [sic]. At those times that the notes renewed, the purpose of the renewal was to give her the opportunity to say, okay, I want to net things out now, or no, I don't want to net them out now.
>
> That's why we periodically – why would I renew notes periodically for an existing loan. We did it to give her the opportunity that she could say, okay, let's net it out,

> and the loan relationship. That's the purpose of the renewals.
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> [1T108-4 to 13.]

Just before the notes would mature, Wealthvest's "Note Department" would write to Mesyna, advise her of the upcoming event, and provide her with options for the disposition of the monies. Respondent testified that she always chose the option of rolling the principal and interest into a new note, and that he always "observed formalities because [he] didn't want the corporate veil pierced and the IRS coming in and saying, oh, there's something wrong here."

According to respondent, the original notes increased from $32,000, in the 1990s, to $64,644.65, in 2010, because Mesyna continually renewed them in order to keep earning interest. According to respondent, his fees were never applied to reduce the balance, because he did not have "the wherewithal to say to her, no, that's too bad, you're out of luck, we're going to square it up now."

Respondent acknowledged certain irregularities in respect of the commercial notes. Specifically, the 2010 notes were signed by Andrew Wilson, as treasurer, rather than respondent, as president. Wilson was not a legitimate corporate officer, however, and respondent could not even recall Wilson, but surmised that he may have been an intern or an accountant.

Moreover, as stated previously, the face of the commercial notes provided that Mesyna had lent money to Wealthvest. The notes did not indicate that the loans were to respondent, that they would or had become retainers, that respondent could repay the loans by providing legal services, or that respondent and Mesyna had agreed to "net out" the loan balances against the value of legal services that respondent had provided to Mesyna.

Further, respondent was employed as a financial advisor with YMMI, and, later, TFS. Despite his claim that he was not Mesyna's financial advisor, there were many letters from YMMI to Massachusetts Financial Services Service Center, Inc. (MFS), transmitting payments from Mesyna for deposit into a mutual fund account with MFS. Although the letters were written on respondent's YMMI stationery, respondent testified that YMMI staff completed these transactions, as a courtesy to Mesyna, and, thus, the letters did not prove that respondent had engaged in business transactions with her. According to respondent, in the securities business, an advisor "doesn't do routine things like this; staff does routine things like this." Indeed, respondent pointed out that all the letters were either unsigned or signed by someone else.

Moreover, YMMI was a direct subscription broker and, thus, did not handle Mesyna's account or earn money from the transmittals, which were a courtesy extended to Mesyna. Instead of sending the money directly to the

mutual fund company, Mesyna would stop in YMMI's office, chat with his staff, and ask someone to send the funds for her. Respondent claimed it was the equivalent of being asked to drop a letter in the mailbox for someone.

Although respondent testified that he was an independent contractor with YMMI, he signed letters as Regional Vice President. According to respondent, however, he was never formally made a Regional Vice President. Rather, he contended that the position was simply a title given to YMMI independent contractors. Respondent conceded, however, that he had served as legal counsel to and president of YMMI "just before they closed down," due to financial difficulties.

While respondent was with YMMI, he had issues with FINRA. Specifically, in 2007, respondent and YMMI were ordered to pay $29,758.92 in damages to a client who claimed that respondent had recommended an unsuitable stock investment. YMMI paid the award.

Staples also filed a complaint against respondent with FINRA, based on the Wealthvest notes issued to Mesyna. Respondent consented to a permanent bar from FINRA, although he suggested that the bar was not due to wrongdoing on his part. Rather, FINRA had requested documents regarding respondent's legal work for Mesyna, which he did not produce, he claimed, due to RPC 1.6 confidentiality concerns. Although Staples signed an authorization permitting

respondent to disclose details about the representation, respondent still refused, because the authorization was not notarized, as respondent had requested, and, thus, in his opinion, did not release him from liability for the disclosures. For the same reason, respondent refused to answer FINRA's questions about his representation of Mesyna. Consequently, on July 19, 2016, the State of New Jersey Bureau of Securities revoked respondent's agency registration, and he was expelled from the National Securities Association.

Respondent denied that a 2002 bankruptcy and the 2007 arbitration award demonstrated ongoing financial problems, which, presumably, would have prevented him from satisfying the commercial notes issued to Mesyna.

On July 13, 2015, OAE Disciplinary Auditor Harry Rodriguez conducted a demand audit of respondent's attorney books and records. The audit revealed the following recordkeeping deficiencies:

- Failure to maintain a ledger card identifying attorney funds for bank charges, in violation of R. 1:21-6(d);
- Failure to prepare three-way reconciliations of the attorney trust account, in violation of R. 1:21-6(c)(1)(H);
- Failure to maintain attorney trust cash receipts and disbursements journals, in violation of R. 1:21-6(c)(1)(A);
- Failure to maintain attorney business cash receipts and disbursements journals, in violation of R. 1:21-

6(c)(1)(A);

- Attorney trust account deposit slips lacked sufficient detail, in violation of R. 1:21-6(c)(1)(A); and

- Failure to deposit all earned legal fees into the attorney business account in violation R. 1:21-6(a)(2).

The OAE's theory underlying the knowing misappropriation charge was respondent's "taking Mesyna's money from the three Commercial Notes and falsely reporting to [Staples]. . . that the Commercial Notes were not loans but were retainers that Mesyna agreed to pay for legal services." Similarly, the complaint charged respondent with having violated RPC 1.15(a) and (b), by not holding intact the $64,644.65 in funds secured by the commercial notes, and by not promptly turning over the funds, plus interest, to Staples upon Mesyna's death.

Respondent denied that, once Mesyna had passed away, he was required to satisfy the commercial notes. He further denied that he had failed to safeguard Mesyna's funds, claiming that they were not her funds. He explained: "When you borrow money from somebody, they cease becoming that person's funds, and they become the borrower's funds." After Mesyna had passed away, respondent reported the retainer as income.[4]

[4] The record does not make clear the amount of income respondent claimed, or whether he reported the income before or after the ethics grievance underlying this matter was filed against him.

The complaint also charged respondent with knowingly making a false statement of material fact to the OAE, in violation of RPC 8.1(a) and RPC 8.4(c), by stating during his interview that the commercial notes were not loans from Mesyna, but, rather, were retainer agreements.

In addition, the complaint alleged that respondent had engaged in two conflicts of interest, in violation of RPC 1.7(a)(2), because there was a significant risk that his representation of Mesyna and, later, Staples and the estate, would be materially limited by his personal interest in the loans that Mesyna had given him, and the disposition of their corresponding commercial notes.

When the special master asked respondent on what basis he believed that it was appropriate to both represent the estate and file a claim against it, respondent stated that he had filed the claim after he had ceased representing the estate. According to respondent, "it was the only way [he] could think of to notify Mr. Staples that there was this outstanding balance for the legal bills that needed to be offset against the notes."

The complaint charged respondent with having violated RPC 1.8(a) because (1) prior to issuing the commercial notes, respondent did not advise Mesyna in writing of the desirability of seeking independent legal counsel, or provide her with the opportunity to do so, and (2) Mesyna had not given

informed, written consent to the transaction and respondent's role in it. In respect of the alleged business transaction, respondent understood that, when an attorney forms a business venture with a client, there needs to be a writing. However, he did not consider "[b]orrowing the money from her as a friend . . . a business venture at the time."

The complaint also charged respondent with another violation of RPC 8.4(c), in addition to RPC 8.4(d), based on his alleged submission of a knowingly false $57,704.92 claim against the estate, which he filed with the Morris County Surrogate after Staples had called in the commercial notes, but without ever telling Staples that the estate owed him any money.

When the presenter confronted respondent with the estate claim, which stated that the services were rendered but the fees were "never paid and still outstanding," respondent replied: "If I did, I shouldn't have worded it that way." Yet, he wanted to memorialize that he had done work, and filing the claim "was the only way I could think of to memorialize the fact that I had done the work." Respondent denied that his claim that the fees were outstanding was false because "the loans were still outstanding." He continued: "If we netted them out, it would be paid, but we hadn't taken that step." In other words,

> the fees were still due, but there was no proof that I had worked them off, other than to offset them against the loans, and that's what I was attempting to convey.

[1T117-20 to 23.]

On conclusion of the disciplinary hearing, the special master found that, prior to respondent's representation of Mesyna, he had borrowed money from her, on three occasions, through the use of commercial notes, which were not issued in his capacity as an attorney, but, rather, in his capacity "as some type of financial advisor." The notes were repeatedly renewed upon expiration. At some point, Mesyna agreed to allow respondent to repay the notes by "working off the balance."

The special master concluded that the record lacked clear and convincing evidence that respondent had knowingly misappropriated funds belonging to Mesyna. The special master emphasized that the first loan was made before Mesyna had become respondent's client; respondent's testimony that Mesyna had agreed to permit him to "work off" the notes, in exchange for interest, was undisputed; there was no dispute that respondent provided legal services to Mesyna; and there was no proof that, other than a municipal court matter, Mesyna had paid respondent for the legal services. According to the special master, respondent could not prove a negative – namely, that Mesyna had paid him nothing over the years. Staples and the OAE, on the other hand, could have obtained Mesyna's bank records to establish that she had paid the fees, but

neither chose to do so.

Because the special master concluded that the funds were provided to respondent as a loan, the monies were not required to be deposited or maintained in respondent's attorney trust account. That the loan allegedly "morphed into a retainer" did not change that fact. The special master reasoned that, although respondent appeared to owe some amount to the estate, the estate's remedy was against him either personally or in his capacity as a financial advisor.

The special master recognized that the charged violation of RPC 1.7(a)(2) was "arguably correct," but he did not make a finding because "the crux of the conflict" was respondent's business relationship with Mesyna. In this regard, the special master found that respondent violated RPC 1.8(a), by undertaking the legal representation of Mesyna "after he already had a separate business relationship with her," without complying with the requirements imposed by RPC 1.8(a). These violations were compounded by respondent's "apparent lack of disclosure" of his roles in Wealthvest and/or YMMI.

In respect of RPC 1.15(a) and RPC 1.15(b), the special master merely stated "[s]ee discussion above as to this point." The special master did not mention the RPC 1.15(d) charge.

As charged in the complaint, the special master found that respondent had violated RPC 8.1(a), by representing to disciplinary authorities that the loans

were retainer agreements. The special master found that respondent violated RPC 8.4(c), by claiming that the loans were retainers, and by filing a frivolous claim against the estate. The special master also found that, by filing a false claim against the estate, respondent additionally violated RPC 8.4(d).

For respondent's ethics infractions, the special master recommended a six-month suspension.[5]

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

The most serious charge brought against respondent is that he knowingly misappropriated an unspecified amount of funds by "taking Mesyna's money from the three Commercial Notes and falsely reporting to [Staples] . . . that the Commercial Notes were not loans, but were retainers that Mesyna agreed to pay for legal services." In our view, the record does not support this charge.

Whether the commercial notes represented loans from Mesyna to respondent, or the advance payment of retainer fees that were unearned, respondent's failure to repay the loans or to return the unearned retainers does

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[5] The special master made additional findings in respect of other statements respondent had made, and additionally potential ethics violations that respondent had committed, but, because those findings did not have corresponding charges in the complaint, we neither mention nor address them.

not amount to a knowing misappropriation of those funds. First, were we to find that the funds represented loans from Mesyna to respondent and, further, that had he failed to repay the monies, his failure to do so would be a breach of contract, not knowing misappropriation of client funds.

Second, if we were to find that the loans were, or had become, the advance payment of a retainer, the unearned portion of which respondent had failed to return, his failure would constitute a violation of RPC 1.16(d) (upon termination of representation, a lawyer shall refund "any advance payment of fee that has not been earned or incurred"), not knowing misappropriation. The Court has "never held that the expenditure of a retainer is a conversion of trust funds." In re Dawn L. Jackson, DRB 09-266 (December 8, 2009) (slip op. at 14). Accord In re Jackson, 201 N.J. 116 (2010), and In re Stern, 92 N.J. 611, 617 (1983) (in which the Court stated "we have never held that the expenditure of a retainer is a conversion of trust funds").

Moreover, because respondent's conduct did not amount to knowing misappropriation of client funds, RPC 1.15(b) does not apply in this case. That Rule provides that, upon receiving funds in which a client has an interest, a lawyer must promptly notify the client and promptly deliver to the client any funds to which the client is entitled to receive. Respondent did not come into

possession of the monies. Rather, Mesyna had given them to him either as a loan or a loan-turned-retainer. We, thus, dismiss the RPC 1.15(b) charge.

We do find that respondent violated RPC 1.15(d), in numerous respects. OAE Auditor Rodriguez testified to several R. 1:21-6 violations committed by respondent. Although respondent refused to admit that he had violated any provision of the Court Rule, he failed to substantively refute, let alone disprove, Rodriguez's expert conclusions.

Respondent engaged in multiple conflicts of interest, in violation of RPC 1.7(a) and RPC 1.8(a). In the absence of informed written consent, RPC 1.7(a)(2) bars a lawyer from representing a client when there is a significant risk that the representation will be materially limited by a personal interest of the lawyer. Here, respondent violated that Rule in two respects. First, by "working off" the loans, he created a significant risk that he could overbill a matter in order to avoid paying cash to Mesyna. Second, respondent's representation of the estate, against which he had a claim, is a clear conflict of interest.

Further, RPC 1.8(a)(2) prohibits a lawyer from entering into a loan transaction with a client, absent the client's informed, written consent to the essential terms of the loan and the lawyer's role in the transaction. See, e.g., In re Torre, 223 N.J. 538 (2015) (lawyer borrowed $89,250 from his client without complying with the strictures of RPC 1.8(a)). Although Mesyna was not

respondent's client when, in 1996, she lent him $8,000, she was his client when she lent him funds in 1998 and 2001, and when she repeatedly renewed the notes. Respondent failed to obtain Mesyna's informed written consent to the terms of the last two loans or the numerous renewals, or with respect to his role in the transactions. He, thus, violated RPC 1.8(a)(2).

Respondent also committed multiple violations of RPC 8.1(a) and RPC 8.4(c) prior to, and then throughout, the disciplinary investigation. He filed a false claim against the estate, a violation of RPC 8.4(c). Specifically, respondent filed the claim without making any effort to determine the outstanding legal fees against the outstanding loan and, therefore, he did not know the amount, if any, that the estate may have owed him. He denied to the OAE that the commercial notes were loans, in violation of RPC 8.1(a) and RPC 8.4(c).

Finally, although the record established clearly and convincingly that respondent violated RPC 8.4(c) by filing the $57,704.92 claim against the estate, the record does not support the RPC 8.4(d) charge. Although the claim was false, there is no evidence that the Surrogate entertained the claim or that other judicial resources were wasted in any respect, and, thus, there is no basis on which to conclude that its filing prejudiced the administration of justice. Accordingly, we dismiss the RPC 8.4(d) charge.

In sum, respondent is guilty of violations of RPC 1.7(a), RPC 1.8(a), RPC 1.15(d), RPC 8.1(a), and RPC 8.4(c). We dismiss the remaining charges. There remains for determination the appropriate quantum of discipline to impose on respondent for his ethics infractions.

Generally, an admonition is imposed for recordkeeping violations, so long as negligent misappropriation does not result. See, e.g., In the Matter of Andrew M. Newman, DRB 18-153 (July 23, 2018) (attorney failed to maintain trust or business account cash receipts and disbursements journals, proper monthly trust account three-way reconciliations, and proper trust and business account check images; in mitigation, we considered the attorney's unblemished disciplinary record in his thirty-three years at the bar, and his admission of wrongdoing), and In the Matter of Eric Salzman, DRB 15-064 (May 27, 2015) (attorney did not maintain trust or business receipts or disbursements journals, or client ledger cards; did not properly designate the trust account; made disbursements from the trust account against uncollected funds; withdrew cash from the trust account; and did not maintain a business account; in mitigation, we considered the attorney's unblemished disciplinary history and admission of wrongdoing).

Ordinarily, a reprimand is imposed on an attorney who knowingly makes a false statement of material fact to a client, a third person, or a disciplinary authority. See, e.g., In re Kasdan, 115 N.J. 472, 488 (1989) (client); In re

Lowenstein, 190 N.J. 58 (2007) (third party insurance company); In re DeSeno, 205 N.J. 91 (2011) (disciplinary authority).

Similarly, a reprimand is typically imposed on an attorney who engages in a conflict of interest. In re Berkowitz, 136 N.J. 134, 148 (1994). If the conflict involves egregious circumstances or results in serious economic injury to the clients involved, discipline greater than a reprimand is warranted. Ibid. See also In re Guidone, 139 N.J. 272, 277 (1994) (reiterating Berkowitz and noting that, when an attorney's conflict of interest causes economic injury, discipline greater than a reprimand is imposed).

In this case, respondent made multiple misrepresentations and engaged in multiple conflicts of interest. He misrepresented to the OAE that the loans were retainers, and he misrepresented to the Surrogate that the estate owed him close to $60,000 in attorney fees. He engaged in an improper business transaction with Mesyna, and subsequently represented the estate, even though he knew that he had a potential claim against it, without complying with the disclosure and consent provisions of RPC 1.7(b)(1). In addition, he took loans from Mesyna, and renewed the commercial notes, without first complying with the disclosure and consent provisions of RPC 1.8(a)(2) and (3).

The totality of respondent's ethics infractions suggests that, at a minimum, a censure is in order. See, e.g., In re Lauletta, 228 N.J. 155 (2017) (censure

imposed on attorney who engaged in four improper business transactions with a client, in violation of RPC 1.8(a); altered a settlement distribution sheet, in violation of RPC 4.1(a); and made another misrepresentation by silence, in violation of RPC 8.4(c); in imposing the censure, we weighed his unblemished disciplinary history of twenty years and his good character against his lack of remorse and less than forthright testimony) and In re Schwartz, 216 N.J. 167 (2013) (censure imposed on attorney who engaged in three conflicts of interest under RPC 1.7 and RPC 1.8(a); the attorney also violated RPC 1.5(c) by failing to provide the client with a written statement of the outcome of the matter and the net remittance to the client and the method of its determination; in mitigation, the attorney derived no benefit from the transactions and had an unblemished disciplinary record of more than ten years).

Although the record is highly suggestive of self-dealing on respondent's part, we find that, however informal the arrangement between respondent and Mesyna, the record contains no evidence that he took advantage of her in striking that deal. Indeed, Staples testified that Mesyna was cognizant of her financial and business matters and that she was of sound mind.

Further, the record lacks any evidence that the barter arrangement between respondent and Mesyna caused her financial harm. Mesyna lent $32,000 to respondent. He claimed that he had represented her in more than twenty matters

over the years, and that he had provided $70,000 in legal services to her. With two small exceptions, there is no evidence that Mesyna paid him for those services.

The OAE has requested respondent's disbarment based on the venality of his conduct vis-à-vis Mesyna, citing In re Silvia, 152 N.J. 243 (1998), In re Wolk, 82 N.J. 326 (1980), In re Ort, 134 N.J. 146 (1993), In re Zeitler, 182 N.J. 389 (2005), In re Frost, 171 N.J. 308 (2002), and In re Torre, 223 N.J. 538 (2015). We, however, find respondent's misconduct to be significantly less egregious than the conduct addressed in those cases.

Although respondent's behavior was certainly unorthodox, there is no evidence that Mesyna was a vulnerable person or was wholly dependent and reliant on respondent, contrary to the facts in In re Silvia, 152 N.J. at 244, 251 (the client suffered from ill health and required day-to-day assistance); In re Wolk, 82 N.J. at 335 (the attorney overbilled the parents of a paralyzed boy in one matter and took advantage of a widow who was "naïve and inexperienced in business matters" in another matter); and In re Torre, 223 N.J. 538 (the client was eighty-six years old and unsophisticated about financial matters). Rather, Mesyna was in her late fifties and early sixties when she lent the monies to respondent. She was seventy-three when she died. There was no evidence

regarding any ailments that she suffered, and even Staples testified that she was competent.

Further, the record is bereft of evidence that rebuts respondent's contention that Mesyna agreed to permit him to "work off" the loans, by providing her with legal services. See, e.g., In re Ort, 134 N.J. at 152-58 (in representing a widow in the settlement of her husband's estate, and without her permission, the attorney engaged in a number of illicit activities, including obtaining a second mortgage on an estate property, a substantial portion of which was used to pay his excessive counsel fees) and In re Frost, 171 N.J. at 329 (attorney failed to respect the client's hesitancy in lending him money and convinced him to enter into a risky transaction). Respondent provided documents supporting his claim that he had represented Mesyna in multiple matters over the years and that, with two small exceptions, there is no evidence that she had paid him any fees.

Finally, respondent can hardly be described as "'an incorrigible and dangerous attorney and a menace to the public.'" In re Zeitler, 182 N.J. at 400. Although respondent's behavior was less than honorable, it does not warrant stripping him of his license near the end of a nearly spotless career of more than forty years.

In our view, however, respondent's behavior warrants a six-month suspension. See In re Shelly, 140 N.J. 501 (1995). In that case, a clearly outraged Court imposed a six-month suspension on an attorney who had borrowed $40,000 from his client, Concetta Roden, without abiding by the requirements of RPC 1.8(a).

Shelly had represented Roden in several legal matters over a period of nine years. Id. at 507. When she first sought his assistance, Roden was "basically penniless." Id. at 505. By the time their attorney-client relationship came to an end, Shelly had secured $530,000 for her. Id. at 507. Nevertheless, she never overcame her financial instability. Ibid.

As Shelly recovered funds for Roden, he sought and received her permission to take a fee, but he did not reduce the agreement to writing. Id. at 505. Further, over the years, he "borrowed" $40,000 from Roden, comprising the deposit and a portion of the proceeds in a real estate transaction. Id. at 508-510. Shelly did so via a verbal agreement with Roden, confirmed by handwritten notes from Shelly. Id. at 509-510. According to the Court, "based on the extraordinary and unique circumstances that characterized his nine years of financial dealings with Ms. Roden, [he] was justified in assuming that he had [her] consent to borrow from the closing proceeds." Id. at 513. The Court explained:

> [i]n reaching this result, we are swayed by the long-standing and exceedingly informal nature of respondent's professional relationship with Ms. Roden, especially concerning the payment of respondent's fees. We note that over the course of his nine-year representation of Ms. Roden, respondent consistently received payment for his services pursuant to the extraordinarily informal and somewhat haphazard fee arrangement described above. That arrangement, which not only met with Ms. Roden's full approval but benefitted her as well, generated a pattern of practice whereby respondent most often secured payment for legal fees owed to him by Ms. Roden out of monetary distributions that he achieved for her. Each and every time that respondent secured his fees in this fashion, Ms. Roden gave her approval.
>
> The borrowing of the $40,000, with only slight variation, was consistent with respondent's common practice of securing the fees owed to him out of accounts receivable he collected for Ms. Roden.
>
> [Id. at 513-14.]

The Court made it clear, however, that it did not countenance Shelly's conduct:

> Most important, we caution in the strongest terms possible that other members of the Bar should not view this decision as indicating approval of respondent's conduct. Indeed, we cannot emphasize enough the severity with which we disapprove of respondent's informal and careless professional practices. As demonstrated by this case, such careless practices can only result in a waning of attention to the dictates of the ethical rules, and attorneys who engage in such practices run the substantial risk of disciplinary sanctions.

[Id. at 516.]

In our view, respondent's conduct and his unorthodox arrangement with Mesyna, which resulted in multiple conflicts of interest and multiple misrepresentations, are similar to the circumstances in Shelly. Given respondent's nearly spotless disciplinary record in more than forty years at the bar, we determine to impose a six-month suspension.

Chair Clark and member Singer voted for a censure, and filed a separate dissent. Vice-Chair Gallipoli voted for disbarment. Member Joseph 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
Bruce W. Clark, Chair

By: _____
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Wayne A. Schultz
Docket No. DRB 19-143

Argued: June 20, 2019

Decided: December 5, 2019

Disposition: Six-Month Suspension

Members	Six-Month Suspension	Censure	Disbar	Recused	Did Not Participate
Clark		X			
Gallipoli			X		
Boyer	X				
Hoberman	X				
Joseph					X
Petrou	X				
Rivera	X				
Singer		X			
Zmirich	X				
Total:	5	2	1	0	1

Ellen A. Brodsky
Chief Counsel