Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-191
District Docket No. XIV-2017-0011E

In the Matter of	:
Dominic V. Caruso	:
An Attorney at Law	:

Decision

Argued: January 21, 2021

Decided: April 30, 2021

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

John M. Carbone appeared on behalf of respondent.

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

This matter was before us on a recommendation for a private reprimand (now an admonition) filed by a special master. The formal ethics complaint charged respondent with having violated RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985) (two instances) (knowing misappropriation of client and escrow funds); RPC

3.3(a)(1) (false statement of material fact or law to a tribunal); RPC 8.4(b) (commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer – misapplication of entrusted property, contrary to N.J.S.A. 2C:21-15); and RPC 8.4(c) (two instances) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine to recommend to the Court that respondent be disbarred.

Respondent was admitted to the New Jersey bar in 1979 and to the New York bar in 1985. At the relevant time, he maintained a solo practice of law in Clifton, New Jersey. Respondent has no ethics history.

The majority of the facts of this case are undisputed. During the relevant time frame, respondent maintained, at Valley National Bank (VNB), his attorney trust account (ATA), his attorney business account (ABA), and a personal account. In 2015, the Office of Attorney Ethics (OAE) conducted a random audit of respondent's financial records, which was completed on September 18, 2015. Following the audit, the OAE asserted that, in one matter, respondent had invaded both escrow and client funds entrusted to him that should have remained inviolate, and that, in a second matter, respondent had improperly disbursed a legal fee to himself, prior to court approval, in connection with his service as an attorney-trustee.

The OAE, thus, opened a disciplinary investigation into respondent's conduct.

During the ethics hearing, respondent acknowledged that he previously had been the subject of a random audit and, thus, was aware of his obligation to conduct monthly reconciliations of his ATA. He could not recall exactly when he had ceased conducting required, monthly three-way reconciliations of his ATA.[1]

The Coining MFG LLC Matter

Respondent represented Ed Farley and John Lipari, and previously had successfully defended one of their companies, Precision Metal Manufacturing, Inc. (PMM), in a trial that lasted three or four months. The litigation involved claims made by the clients' prior employer and plaintiff, Coining Technologies, Inc. (Coining Tech), including unfair competition and breach of contract. Respondent subsequently formed a new company for Farley and Lipari – Coining MFG LLC (MFG) – and represented it in its purchase of the corporate assets of the former plaintiff, Coining Tech. According to respondent, once Farley and Lipari prevailed in the lawsuit, the principals of Coining Tech unexpectedly contacted them and proposed

[1] The OAE did not charge respondent with having violated RPC 1.15(d) (recordkeeping).

the transaction.

Respondent testified that MFG and Coining Tech notified the State of New Jersey, Department of the Treasury, Division of Taxation (the Division) of the pending transaction and bulk sales implications, as the law requires, and submitted a copy of the purchase and sale agreement between the parties. Prior to the closing, by letter dated March 19, 2014, the Division directed that MFG place $56,000 in escrow, for potential bulk sales taxes, "to protect the interests of the purchaser and the State of New Jersey for any unpaid tax liabilities."[2] The letter further warned that the funds escrowed and earmarked for bulk sales taxes should not be disbursed until the Division issued a clearance letter to MFG. Respondent testified that he had prior experience with bulk sales tax issues, and that he previously had served as the escrow agent in bulk sales tax scenarios, on "both sides" of such transactions.

On April 10, 2014, MFG wired $566,000 to respondent's ABA,

[2] According to the Division's website, a bulk sale is the sale of an individual's or company's business assets, in whole or in part. The purpose of the Bulk Sale Statute is to protect a purchaser from inheriting any tax debt from a seller of business assets. When a bulk sale of business assets occurs, the Division must be notified so it can collect any taxes owed. In order to comply with the law, the purchaser or the purchaser's escrow agent must hold the required amount in escrow, and the Division must be considered an express party to that escrow. Once the Division is assured that all Division tax obligations of the seller have been met, it will issue a clearance letter to the purchaser or his/her agent allowing the purchaser to release the balance of the escrow to the seller.
(See https://www.state.nj.us/treasury/taxation/faqbulksale.shtml).

representing the funds required to complete the purchase of the assets of Coining Tech (the Purchase Funds). That same date, VNB provided to respondent a "Funds Transfer Notice" confirming deposit of the Purchase Funds in his ABA. Respondent explained that, although he had requested that MFG wire the Purchase Funds to his ATA, MFG mistakenly wired the Purchase Funds to his ABA, because his clients' parent company, PMM, previously had wired funds to his ABA "on several occasions, probably more than several occasions," toward payment of his legal fees during the aforementioned litigation with Coining Tech.

When respondent's secretary informed him that MFG had wired the Purchase Funds to his ABA, respondent contacted Farley, who was unwilling to execute an additional transfer because of the impending closing; respondent claimed that he, too, determined not to transfer the funds to his ATA, but decided to close the transaction via his ABA, because the contract failed to specify that the funds had to be wired from a specific account, and stated only that they had to be wired to respondent from the purchaser.

The next day, April 11, 2014, MFG and Coining Tech executed an escrow agreement (the Escrow Agreement), which required that the $56,000 bulk tax escrow (the Escrow Funds) be withheld from Coining Tech's sale

proceeds and held by respondent in his ATA at VNB; the escrow agreement expressly identified respondent as the escrow agent and, during the ethics hearing, respondent acknowledged that the escrow "had been established by the State of New Jersey." The agreement further required that respondent "preserve the [Escrow Funds] pending receipt of further instructions for the disposition of such funds from the Division of Taxation." Finally, the Escrow Agreement stated that "[t]he Escrow Agent shall have no duty to act upon notice or instructions from either party without the consent of the NJ Division of Taxation . . ." Farley signed the agreement as Managing Member of MFG, Martin Rosansky signed the agreement as President of Coining Tech, and respondent signed the document as escrow agent.

Also on April 11, 2014, the transaction closed, and respondent issued a closing statement, signed by respondent and Farley, which detailed the disposition of the Purchase Funds in the transaction, including respondent's retention of the $56,000 in Escrow Funds and the $504,840.92 in net proceeds due to Coining Tech. That same date, respondent wired $504,840.92 from his ABA to Coining Tech, leaving a balance of $61,159.08 of the Purchase Funds/Escrow Funds in his ABA on account of the parties and the Division. That same date, VNB provided to respondent a "Funds Transfer Notice," confirming the $504,840.92 transfer to Coining

Tech.

As previously detailed, pursuant to the Division's March 19, 2014 letter, as memorialized by the April 11, 2014 escrow agreement, respondent was required to transfer the $56,000 in Escrow Funds to his ATA. As of April 11, 2014, respondent held sufficient Purchase Funds in his ABA ($61,159.08) to cover the required transfer of the $56,000 in Escrow Funds; yet, he admittedly failed to execute the transfer to his ATA. Respondent, thus, left the $61,159.08 in Purchase Funds/Escrow Funds in his ABA, resulting in a total balance, as of April 11, 2014, of $70,320.71. On cross-examination by respondent's counsel, an OAE auditor testified that the $56,000 in bulk sales taxes was an estimate made by the Division, and that the ultimate, actual tax liability could have been greater. During his testimony, respondent agreed with that premise.

In an April 12, 2014 invoice, respondent billed $15,600 in fees to Coining MFG, despite knowing that, at that time, (1) he held only $61,159.08 in Purchase Funds/Escrow Funds in his ABA, and (2) that disbursing such a fee to himself, from the Purchase Funds/Escrow Funds, would cause a $10,440.92 shortage in the required Escrow Funds. During his testimony, respondent stated that, at the time, he believed he would be creating an $11,000 shortage in the Escrow Funds. Nonetheless, that same

date, respondent transferred $15,000 from his ABA to his personal VNB account, representing the vast majority of his claimed $15,600 fee, and, thus, admittedly caused a $10,440.92 shortage in the Escrow Funds. Even considering other funds, unrelated to the MFG transaction, that respondent held in his ABA at the time, he caused at least $679.29 shortage in the Escrow Funds by taking his $15,000 fee. Respondent conceded that he had failed to wait for MFG to pay his $15,600 invoice, with funds independent of the Purchase Funds/Escrow Funds, before he withdrew that $15,000 fee from the Purchase Funds/Escrow Funds. Respondent further admitted that he did not, at any point, deposit personal funds in his ABA to cure the shortage of $11,000 Escrow Funds that he knew he had caused.

Rather, respondent claimed that, on April 14, 2014, because he knew he had caused a shortfall in the Escrow Funds, he requested that Farley, at MFG, wire $11,000 in additional funds to him to cure the shortage; he testified that he actually sent MFG a pre-printed wire transfer request. Respondent admitted, however, that he subsequently "did nothing" to verify that MFG had either received his request or sent the required funds, but, rather, "dropped the ball on this one." During the ethics hearing, respondent maintained that he recognized no issue with his having created what he believed, at the time, would be a temporary, $11,000 shortage in the Escrow

Funds, stating that he was "fully confident that Mr. Farley and Mr. Lipari would [cure] the shortfall in due course and that I would be able to have not only the deposit, for the escrow for the bulk sale transfer, but also be paid for my services."

Respondent admittedly used the $15,000 fee disbursement to pay his personal, federal income tax obligations and, between April 15 and April 30, 2014, further reduced the balance of the Purchase Funds/Escrow Funds in his ABA to $47,974.67, by making additional disbursements that were neither authorized by the parties to the Escrow Agreement nor related to the transaction between MFG and Coining Tech.

On May 1, 2014, respondent transferred only $45,000 of the remaining Escrow Funds from his ABA to his ATA, leaving a balance of $2,974.67 of the Escrow Funds in his ABA. Respondent admitted, and the OAE auditor confirmed that, by May 20, 2014, respondent had spent the remainder of the Escrow Funds he had left in his ABA, and had, thus, created a shortage of $11,000 in respect of the Escrow Funds.

The following year, by letter dated February 23, 2015, the Division directed MFG to remit the $56,000 in Escrow Funds to the State of New Jersey within fifteen days, for the Coining Tech bulk sales taxes owed, and further directed that any funds beyond the $56,000 were to be held intact

until a clearance letter was issued by the Division. Almost a month later, on March 20, 2015, respondent remitted the $56,000 to the Division, via an ATA check containing the memo "Coining Technologies." By way of an April 13, 2015 clearance letter, the Division informed respondent that all bulk sales tax obligations had been satisfied by the $56,000 payment and, thus, there was no longer any requirement to hold, in escrow, potential bulk sales tax funds.

The OAE asserted, regarding the Wilson charge, that, because respondent had transferred only $45,000 of the Escrow Funds from his ABA to his ATA, when, on April 20, 2015, the Division negotiated the $56,000 check, $11,000 in client funds held in respondent's ATA, which were unrelated to the MFG/Coining Tech transaction, were invaded. Indeed, respondent conceded that the OAE's reconciliation of his ATA for April 2015 established a $12,866.41 shortage in his ATA, the vast majority of which was the $11,000 Escrow Funds shortage. Respondent finally rectified the Escrow Funds shortage on September 10, 2015, when he requested, and MFG immediately wired, the sum of $11,045 ($11,000 + a $45 wire transfer fee) to respondent's ATA; that same date, VNB provided to respondent its customary "Funds Transfer Notice," confirming receipt of the $11,045 deposit in his ATA.

By letter dated March 6, 2017, the OAE notified respondent that it had docketed an investigation against him to determine whether or not he had knowingly misappropriated the Escrow Funds, in violation of Hollendonner, and that a demand audit was scheduled for April 4, 2017, at which respondent was required to produce certain financial records. During the demand audit, respondent acknowledged that he understood that the $56,000 in Escrow Funds "had to be held in escrow . . . for the State."

By letter dated April 11, 2017, the OAE requested a written explanation from respondent as to why he had disbursed his $15,000 attorney's fee from the $61,159.08 in Purchase Funds/Escrow Funds, then held in his ABA, when he was required to hold $56,000 in Escrow Funds inviolate. By letter dated April 27, 2017, respondent disputed the OAE's allegation that his disbursement from his ABA was connected to the Escrow Funds, and emphasized that he had requested that his clients cure the known Escrow Funds shortage:

> I reject your attempt to associate a legitimate draw from my business account with the Coining PMM bulk sales escrow. My office requested PMM to forward the balance of the funds required to complete the escrow and since the bulk sales escrow was for the protection of PMM – there was no risk in having PMM provide the balance **after the closing**. (emphasis added)

[C¶72,Ex.P-24.][3]

Respondent conceded, however, that he had no authority from MFG, Coining Tech, or the Division to disburse any of the Escrow Funds to himself, and that he had no authority, from any of the clients whose ATA funds ultimately were affected by the negotiation of the $56,000 check by the Division, to use their entrusted funds. In a November 9, 2015 e-mail to the OAE, Coining Tech's attorney confirmed that respondent had no authority to disburse the Escrow Funds, except as the Division directed.

Respondent admitted that, between April 14, 2014 and September 10, 2015, he did not discuss the Escrow Funds shortage with MFG, because he assumed that they had made the transfer. Respondent claimed that he only realized that MFG had not transferred the funds when the September 2015 OAE random audit revealed the shortfall, more than sixteen months after respondent had caused it.

Respondent acknowledged that the OAE random audit further revealed that he had not been properly reconciling his ATA. Per the OAE's request, respondent created monthly reconciliations for his ATA from 2014 forward, which he knew he had been required to do, but performed a bank

[3] "C" refers to the August 23, 2018 formal ethics complaint and "Ex.P" refers to the presenter's exhibits admitted during the hearing.

statement reconciliation, rather than the required three-way reconciliation.

Based on the foregoing facts, the complaint alleged that respondent violated RPC 1.15(a) and the principles of Wilson and Hollendonner, RPC 8.4(b), and RPC 8.4(c).

The Michael A. Rowek / Attorney – Trustee Matter

On December 1, 2014, the Hon. Ernest M. Caposela, A.J.S.C. appointed respondent to serve as the attorney-trustee for the practice of Michael A. Rowek, an attorney who had been suspended by the Court, effective September 24, 2013. By Rule, as an attorney-trustee, respondent was entitled to fees earned in that role. It is undisputed that respondent had multiple discussions with Rowek regarding his pending client matters and competently performed the work required of him as attorney-trustee.

On August 6, 2015, respondent filed a certification with Judge Caposela, stating that he held $54,731.61 in his attorney trust account on behalf of Rowek; advising that he had issued Rowek a $29,501.09 check, representing fees Rowek had earned in the Rynkiewicz matter; and requesting that he be awarded $5,400 in fees, plus $167.58 in costs, as detailed in an affidavit of services accompanying the certification.

By order filed September 8, 2015, Judge Caposela awarded to

respondent fees and costs totaling $5,567.58 and directed respondent to disburse to Rowek the sum of $24,582.02.

Despite having certified to the court, on August 6, 2015, that he held $54,731.61 in his ATA on account of Rowek, respondent failed to disclose to the court that he previously had disbursed a $3,000 fee to himself, on April 30, 2015, purportedly with the permission of either Rowek or Rowek's sister, Renee Michaud, but without the permission of the court. April 30, 2015 was the very day he had transferred Rowek's attorney trust account funds to his own ATA. Thus, at the time he submitted the certification to Judge Caposela, he held only $51,731.61 in his ATA on behalf of Rowek. Ultimately, respondent only took the fees and costs that Judge Caposela had awarded to him; in other words, following the judge's award of fees and costs, he accounted for and setoff the $3,000 he had previously disbursed to himself.

In defense of the inaccurate certification, respondent claimed that his secretary had prepared it, in reliance on respondent's handwritten notes, as she had done in the past with prior certifications; respondent then "briefly" reviewed the certification, signed it, and submitted it to the court. Respondent admitted that he "did not go through [the certification] with a fine-tooth comb," but, rather, focused on confirming that the time he had

spent as attorney-trustee was accurately reflected. Respondent testified that when he reviewed his certification, he was not thinking of the prior $3,000 disbursement he had made to himself, and that his secretary likely did not know that he had previously made that disbursement.

In the Rowek matter, the complaint alleged that respondent had concealed the prior, $3,000 disbursement from the court and had provided false information in his certification, in violation of RPC 3.3(a)(1) and RPC 8.4(c).

The Parties' Post-Hearing Submissions

In its written summation to the special master and its brief to us, the OAE argued that it had proven all of the charges set forth in the complaint by clear and convincing evidence. Specifically, in respect of the MFG/Coining Tech matter, the OAE asserted that respondent committed knowing misappropriation of the Escrow Funds and unrelated client funds, in violation of RPC 1.15(a), the principles of Wilson and Hollendonner, and RPC 8.4(b) and (c), by failing to hold, inviolate, the $56,000 in Escrow Funds, improperly using at least $11,000 of the Escrow Funds to pay his personal taxes, and invading other clients' funds by issuing the $56,000 check to the Division, when he had transferred only $45,000 of the Escrow

Funds to his ATA. The OAE emphasized that, despite his prior experience with bulk sales taxes and as an escrow agent, respondent neither sought nor obtained the permission of the parties interested in the Escrow Funds – which included his own clients, Coining Tech, and the Division – prior to using the Escrow Funds, in clear violation of the mandate of Hollendonner.

The OAE distinguished respondent's conduct from that of the attorney in In re Silverman, 240 N.J. 51 (2019), a case that the special master had specifically instructed both parties to address in their summations (discussed in detail below).

In the Rowek matter, the OAE argued that respondent made a misrepresentation in his certification to Judge Caposela, by knowingly and falsely stating that he held $54,731.61 in his ATA on account of Rowek, when he had already disbursed $3,000 to himself, reducing that balance to $51,731.61. The OAE emphasized that, based on respondent's own affidavit of services, which was appended to the certification, at the time he took that $3,000 fee, he had performed only $1,260 of work as Rowek's attorney-trustee.

In respondent's February 5, 2020 post-hearing submission, he asserted that the OAE had failed to meet its burden of proof with respect to any of the charged RPC violations. Respondent urged the special master to

conclude that the testimony of the OAE auditor was not credible and added "nothing to the proofs required" of the OAE.

In respect of the charge that respondent's use of the Purchase Funds/Escrow Funds violated Wilson and Hollendonner, respondent asserted that the OAE had failed to prove knowing misappropriation, and cited disciplinary precedent where a special master and the Board had found knowing misappropriation, but the Court subsequently had ruled that the misconduct constituted negligent misappropriation; that precedent is addressed in the below analysis.

Respondent emphasized that he requested the Purchase Funds for the closing, which the client mistakenly transferred to his ABA; properly paid himself his legal fees from the Purchase Funds/Escrow Funds remaining in his ABA after the closing; recognized the $11,000 shortfall he had created in the Escrow Funds and promptly requested, in writing, that his client wire additional funds to cure the shortage; reasonably expected that the client had provided the additional funds; and continued, for more than a year, to rely on the mistaken belief that the Escrow Fund shortage had been cured. Respondent asserted that he had reasonably relied on Farley to transfer those funds based on past practice between the parties, and merely failed to confirm that the transfer had been executed.

Respondent, thus, argued that the OAE did not prove his knowing misappropriation of funds entrusted to him by clear and convincing evidence, but that, at worst, respondent was guilty of negligent oversight by failing to confirm the transfer of funds. He conceded that "[p]erhaps a finding of negligence but not intentional or willful wrongful conduct of misappropriation had occurred," although he maintained that the record does not support a finding of negligent misappropriation and that all charges should be dismissed. Respondent argued that, if negligent misappropriation were found, even coupled with companion ethics charges, a reprimand would be the appropriate sanction.

In respect of the Rowek matter, respondent maintained that his failure to disclose to the court the prior, $3,000 payment toward his legal fee was neither knowing nor material, but was, at worst, negligent. He further emphasized that it was undisputed that he received only the fees that the court ultimately approved, and nothing in excess of that amount.

In addition, respondent asserted the following mitigation: he has no ethics history; he has taken corrective, remedial action to bring his recordkeeping into compliance with the Rules; his misconduct was an isolated incident and will not likely be repeated; he cooperated with the investigation; he has an impeccable character and reputation; and he readily

admitted his negligent conduct and expressed contrition and remorse in respect of his recordkeeping obligations and financial obligations in some instances.

Moreover, respondent noted that he has performed extensive service to the community as Past-president of the Passaic County Bar Association (2005); Trustee of the New Jersey State Bar Association (NJSBA) (2010-2016); Co-Chair of the NJSBA Judicial Administration Committee; current and past member of the NJSBA Judicial and Prosecutorial Appointments Committee; Officer, Master, and Lecturer with the Justice Robert L. Clifford Inn of Court and former member of the Supreme Court Model Jury Charge Committee (Civil); former Chairman of the Supreme Court Fee Arbitration Committee for Passaic County; currently a New Jersey State approved Foreclosure Mediator; 2010 Professional Lawyer of the Year; 2012 Distinguished Civil Practitioner of the Year from the Passaic County Bar Association; rated consistently as one of New Jersey's Top Attorneys as published in New Jersey Monthly Magazine; certified by the Supreme Court as a Trial Attorney in 1986, 1993, 2000, 2010, and 2015; and appointed by the Italian Ministry of Foreign Affairs to the diplomatic post of Honorary Consul for the Republic of Italy tasked with providing consular services.

The special master determined that there was clear and convincing evidence to support only one of the charges in the complaint – that respondent violated RPC 8.4(c) in the Rowek matter. The special master, thus, recommended the dismissal of the remaining charges against respondent.

In respect of the Rowek matter, the special master found that respondent's certification, which his secretary prepared based on his notes, was not accurate. Respondent conceded that he reviewed the certification, but "did not go through it with a fine-tooth comb." The amount respondent received, $5,400 ($3,000 on April 30, 2015 and $2,400 after the order was signed), was the amount the Court awarded. Contrary to New Jersey disciplinary precedent, the special master opined that RPC 8.4(c) does not require proof of intent and concluded that, because the certification misrepresented the amount respondent held in his ATA, and failed to include the fact that he had previously issued himself a check for his $3,000 fee, respondent violated RPC 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The special master found that RPC 3.3(a)(1) has a knowing requirement, however, and that the OAE had failed to demonstrate by clear and convincing evidence that respondent engaged in knowing conduct by submitting the inaccurate certification to the court. The special master concluded that

respondent's conduct was at best negligent, and therefore he did not violate RPC 3.3(a)(1).

In respect of the Coining MFG matter, the special master relied on Silverman (discussed in detail below) in dismissing the knowing misappropriation charges, finding that that Rule contained a knowing requirement, and that respondent did not knowingly misappropriate client funds.

The special master found that, although respondent requested that MFG replenish the Escrow Funds, he did not confirm that the funds had been deposited, and because of his failure to perform proper bookkeeping and reconcile the client ledger, he did not realize that the client never transferred the funds until the audit. The special master determined that, like Silverman, respondent did not knowingly misappropriate client funds, and that at best, he performed poor recordkeeping, which the special master noted may be a RPC 1.15(d) violation, but because it was not charged, it could not be found.

The special master found no aggravating factors. In mitigation, the special master recognized certain mitigating factors set forth in respondent's verified answer, specifically that respondent has no ethics history; the misconduct is an isolated incident and unlikely to be repeated; respondent cooperated with the ethics investigation; and respondent has performed extensive service to the legal

profession and community, and has received multiple accolades for his achievements.

Based on his findings, the special master recommended a private reprimand, a form of discipline eliminated in 1994. R. 1:20-9(d)(3). The special master also failed to address the OAE's primary theory of knowing misappropriation – that respondent's repeated use of the Escrow Funds violated the principles set forth in Hollendonner.

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. We, however, decline to adopt the special master's flawed legal findings.

Respondent's most egregious misconduct occurred in the MFG/Coining Tech matter – specifically, his repeated knowing misappropriation of the Escrow Funds, and his subsequent knowing misappropriation of client funds, in violation of RPC 1.15(a), the principles of Wilson and Hollendonner, and RPC 8.4(b) and (c). That misconduct requires his disbarment.[4]

[4] Although we have not sustained a charged violation of RPC 8.4(b) in every matter where knowing misappropriation has been proven, in this case, we view respondent's invasion of the escrow funds as a criminal offense, given the Division's known interest in those funds, and respondent's knowing misapplication of those funds, which were entrusted to him to fulfill statutory bulk tax sales obligations.

The pertinent facts are as follows. In 2014, respondent represented MFG in its purchase of the assets of Coining Tech. In light of his prior experience with bulk sales tax scenarios, including his previous service as the escrow agent, on "both sides" of such transactions, respondent properly notified the Division of the pending transaction.

In response, on March 19, 2014, the Division directed MFG and Coining Tech to earmark the $56,000 in Escrow Funds "to protect the interests of the purchaser and the State of New Jersey for any unpaid tax liabilities." The Division warned that the Escrow Funds should not be disbursed until the Division issued a clearance letter to MFG. During the OAE's demand audit, respondent acknowledged that he understood that the $56,000 in Escrow Funds "had to be held in escrow . . . for the State"

Accordingly, following respondent's receipt of the $566,000 in Purchase Funds, he and the parties entered into the Escrow Agreement, which required that respondent hold the Escrow Funds, inviolate, in his ATA. Specifically, the Escrow Agreement mandated that respondent "preserve the [Escrow Funds] pending receipt of further instructions for the disposition of such funds from the Division of Taxation," and added that respondent "shall have no duty to act upon notice or instructions from either party without the consent of the NJ Division of Taxation . . ." The Escrow

Agreement, thus, was between respondent; MFG; Coining Tech; and the Division.

Attorneys previously have been disbarred for their unauthorized use of trust funds allocated to satisfy a statutory government lien. See, e.g., In re Hardy, 224 N.J. 557 (2016) (attorney disbarred for knowingly misappropriating escrow funds that he was obligated to safeguard and disburse in accordance with both New Jersey special needs statutory provisions and a Medicaid lien); In re Frost, 171 N.J. 308 (2002) (attorney disbarred for knowingly misappropriating escrow funds that he was obligated to safeguard and disburse to satisfy his client's workers' compensation lien); and In re Quinn, 88 N.J. 10 (1981) (attorney disbarred for knowingly misappropriating settlement funds that he was obligated to safeguard in connection with a Bergen County Welfare Board lien). This case is no different from Hardy, Frost, or Quinn, considering respondent's known fiduciary obligation to the State.

On April 11, 2014, the MFG/Coining Tech transaction closed and respondent issued to the parties a closing statement, wherein he confirmed his duty to retain and safeguard the $56,000 in Escrow Funds; respondent then wired $504,840.92 in sales proceeds from his ABA to Coining Tech, leaving a balance of $61,159.08 of the Purchase Funds/Escrow Funds in his ABA on

account of the parties and the Division. Respondent, thus, held sufficient excess Purchase Funds in his ABA ($61,159.08) to cover the required transfer of the $56,000 in Escrow Funds. Yet, he admittedly failed to promptly execute the transfer to his ATA. Moreover, respondent testified that he was acutely aware that the $56,000 in bulk sales taxes was an estimate made by the Division, and that the ultimate, actual tax liability could have been greater.

Despite his knowledge of the above facts and his prior experience as an escrow agent, in an April 12, 2014 invoice, respondent billed $15,600 in fees to Coining MFG, despite knowing that disbursing such a fee to himself, from the Purchase Funds/Escrow Funds, would cause a shortage in the required Escrow Funds. Indeed, respondent testified that, at the time, he believed he would be creating an $11,000 shortage in the Escrow Funds. Nevertheless, respondent transferred $15,000 from his ABA to his personal VNB account, representing the vast majority of his claimed $15,600 fee, and, thus, knowingly caused a shortage in the Escrow Funds. In the light most favorable to respondent, considering other funds unrelated to the MFG transaction that he held in his ABA at the time, he initially caused at least a $679.29 shortage in the Escrow Funds by taking his $15,000 fee.

Although respondent claimed that, on April 14, 2014, because he knew he had caused a shortfall in the Escrow Funds, he requested that MFG wire $11,000 in additional funds to cure the shortage, he conceded that he had failed to wait for MFG to pay his $15,600 invoice; that he did not, at any point, deposit personal funds in his ABA to cure the shortage in Escrow Funds that he knew he had caused; and that he subsequently "did nothing" to verify that MFG had either received his request or sent the required funds, but, rather, "dropped the ball on this one."

Alarmingly, during the ethics hearing, respondent wholly failed to recognize the fiduciary duties attendant to his role as escrow agent in the transaction or the application of the principles of Hollendonner; to the contrary, he testified that he saw no issue with having created what he believed, at the time, would be a temporary, $11,000 shortage in the Escrow Funds, stating that he was "fully confident that Mr. Farley and Mr. Lipari would [cure] the shortfall in due course and that I would be able to have not only the deposit, for the escrow for the bulk sale transfer, but also be paid for my services." Stated differently, respondent believed he could use the Escrow Funds to pay his fee and, subsequently, compel his client to advance the funds necessary to replenish the shortfall.

Respondent admittedly used the $15,000 to pay his personal, federal income tax obligations and, between April 15 and April 30, 2014, further reduced the balance of the Purchase Funds/Escrow Funds in his ABA to $47,974.67, via additional disbursements that were neither authorized by the parties to the Escrow Agreement nor related to the transaction between MFG and Coining Tech. Those additional disbursements further violated RPC 1.15(a), Wilson and Hollendonner, and RPC 8.4(b) and (c).

On May 1, 2014, in apparent recognition that MFG had not cured the $11,000 shortfall in the Escrow Funds he had created, respondent transferred only $45,000 ($56,000 - $11,000) from his ABA to his ATA, leaving a balance of $2,974.67 of the Escrow Funds in his ABA. Respondent admitted, and the OAE's audit confirmed that, by May 20, 2014, respondent had disbursed the remainder of the Escrow Funds left in his ABA, and had, thus, created a shortage of $11,000 in respect of the Escrow Funds. Once again, those additional disbursements further violated RPC 1.15(a), Wilson and Hollendonner, and RPC 8.4(b) and (c).

The following year, on February 23, 2015, the Division directed MFG to remit the $56,000 in bulk sales Escrow Funds to the State, and further directed that any funds beyond the $56,000 were to be held intact until a clearance letter was issued by the Division. Almost a month later, on March

20, 2015, respondent remitted the $56,000 to the Division, via an ATA check containing the memo "Coining Technologies." By way of an April 13, 2015 clearance letter, the Division informed respondent that all bulk sales tax obligations had been satisfied by the $56,000 payment and, thus, there was no longer any requirement to hold, in escrow, potential bulk sales tax funds.

As detailed above, respondent had transferred only $45,000 of the Escrow Funds from his ABA to his ATA and had received no additional funds from MFG. Consequently, when the Division negotiated the $56,000 check, $11,000 in client funds held in respondent's ATA, which were unrelated to the MFG/Coining Tech transaction, were invaded, in violation of RPC 1.15(a) and the principles of Wilson. Indeed, respondent conceded that the OAE's reconciliation of his ATA for April 2015 established a $12,866.41 shortage in his ATA, the vast majority of which was the $11,000 Escrow Funds shortage.

Between April 14, 2014 and September 10, 2015, respondent made no effort to recoup the $11,000 that he claimed MFG owed to him to cure the Escrow Funds shortage he had created. To the contrary, he admitted that he simply assumed that MFG had made the transfer. As the record reflects, however, each time respondent received a deposit of funds in his ABA or

ATA, and each time he disbursed funds from his ABA and ATA, VNB contemporaneously generated a "Funds Transfer Notice," which respondent's office would receive and review. Between April 14, 2014 and September 10, 2015, respondent received no such "Funds Transfer Notice" confirming receipt of the $11,000 in funds he claimed to have requested from MFG. We, thus, find respondent's assumption to be unreasonable and well short of his obligations as a New Jersey attorney and as a fiduciary and escrow agent to MFG, Coining Tech, and the Division.

Respondent conceded that he had no authority from MFG, Coining Tech, or the Division to disburse any of the Escrow Funds to himself, and that he had no authority, from any of the clients whose ATA funds ultimately were affected by the negotiation of the $56,000 check by the Division, to use their entrusted funds to supplement the Escrow Funds. Moreover, in a November 9, 2015 e-mail to the OAE, Coining Tech's attorney confirmed that respondent had no authority to disburse the Escrow Funds, except as the Division directed.

On September 10, 2015, respondent finally rectified the Escrow Funds shortage when he requested, and MFG immediately wired, the very same day, the sum of $11,045 ($11,000 + a $45 wire transfer fee) to respondent's ATA. Notably, that same date, VNB provided to respondent its customary

"Funds Transfer Notice," confirming receipt of the $11,045 deposit in his ATA.

In respect of the Rowek matter, on December 1, 2014, respondent began to serve as the attorney-trustee for the practice of Michael A. Rowek. Of course, as an attorney-trustee, respondent was entitled to fees and costs accrued earned in performance of those duties, and it is undisputed that respondent competently performed the work required of him.

Upon the completion of his duties, on August 6, 2015, respondent filed a certification with the Judge Caposela, stating that he held $54,731.61 in his attorney trust account on behalf of Rowek. More than a month later, Judge Caposela awarded to respondent fees and costs totaling $5,567.58. Despite having certified to the court, on August 6, 2015, that he held $54,731.61 in his ATA on account of Rowek, respondent failed to disclose to the court that he previously had disbursed a $3,000 fee to himself, on April 30, 2015, purportedly with the permission of either Rowek or Rowek's sister, Renee Michaud, but without the permission of the court. Thus, when he submitted the certification to Judge Caposela, he held only $51,731.61 in his ATA on behalf of Rowek. Ultimately, respondent only took the fees and costs that Judge Caposela had awarded to him.

In defense of the inaccurate certification, respondent claimed that his secretary had prepared it, in reliance on respondent's handwritten notes, and that he then "briefly" reviewed the certification, signed it, and submitted it to the court. Respondent admitted that he "did not go through [the certification] with a fine-tooth comb." Respondent testified that when he reviewed his certification, he was not thinking of the prior $3,000 disbursement he had made to himself, and that his secretary likely did not even know that he had previously made that disbursement.

Based on these facts, we conclude that there is insufficient evidence to find that respondent's erroneous certification to Judge Caposela violated RPC 3.3(a)(1) and RPC 8.4(c). It is well-settled that a violation of RPC 8.4(c) requires proof of intent. See In re Uffelman, 200 N.J. 260 (2009) (noting that a misrepresentation is always intentional "and does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances," we dismissed RPC 8.4(c) charge against the attorney because his unmet assurances to the client that he was working on various aspects of the case were the result of gross neglect rather than dishonest conduct; we imposed a reprimand for gross neglect, lack of diligence, and failure to communicate with the client).

Likewise, a violation of RPC 3.3(a)(1) requires that the false statement be knowing. Simply put, the record does not support the conclusion that respondent intentionally deceived the court. Accordingly, we determine to dismiss both charges set forth in the Rowek matter – that respondent violated RPC 3.3(a)(1) and RPC 8.4(c).

In sum, in respect of the MFG/Coining Tech matter, we find that respondent repeatedly violated RPC 1.15(a), the principles of Wilson and Hollendonner, and RPC 8.4(b) and (c). In the Rowek matter, we determine to dismiss the charges that respondent violated RPC 3.3(a)(1) and RPC 8.4(c). In light of respondent's knowing misappropriation of both escrow and client funds, disbarment is required.

In Wilson, the Court described knowing misappropriation of client trust funds 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.
>
> [In re Wilson, 81 N.J. 455 n.1.]

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' . . . 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 . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the presenter must produce clear and convincing evidence that the attorney used trust funds, knowing that they belonged to the client and knowing that the client had not authorized him or her to do so.

This principle also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985). In Hollendonner, the Court extended the Wilson disbarment rule to cases involving the knowing misappropriation of escrow funds. The Court noted the "obvious parallel" between client funds and escrow funds, holding that "[s]o akin is the

one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the [Wilson] disbarment rule . . . ." In re Hollendonner, 102 N.J. at 28-29.

The record clearly establishes that respondent committed multiple invasions of the Escrow Funds, in violation of RPC 1.15(a), the principles of Wilson and Hollendonner, and RPC 8.4(b) and (c). Stated bluntly, respondent's use of the Escrow Funds constituted textbook Hollendonner violations, especially in light of his fiduciary duties to MFG, Coining Tech, and the Division, and his lack of authority, from any of the three parties, to disburse those funds. Moreover, by disbursing the $56,000 to the Division from his ATA, despite knowing that he did not have the requisite funds in his ATA on behalf of MFG, respondent once again violated RPC 1.15(a) the principles of Wilson and RPC 8.4(c).

Respondent's argument that his conduct did not constitute any form of knowing misappropriation is without merit. The cases he cited in an effort to escape such a finding are clearly distinguishable and, notably, wholly ignore the primary basis for his disbarment – the application of Hollendonner to his repeated knowing misappropriation of the Escrow Funds. We reject respondent's claim that "[t]he line between negligent and intentional use of

trust funds is not always clear," both generally and with regard to the clear and convincing evidence produced here.

First, respondent cited In re Gold, 115 N.J. 239 (1989). In that case, in February 1984, attorney Stephen Gold pleaded guilty to aiding and abetting embezzlement, admitting that he had done nothing to prevent Michael Gold, his older brother and law partner, from misappropriating public and private clients' funds from their law firm's trust accounts. In re Gold, 115 N.J. 239, 241 (1989). Michael Gold had been responsible for the maintenance of Gold & Gold's books and records. Id. at 242.

In 1978, Stephen Gold had directed the merger of the firm's business and trust accounts because of the serious overdraft conditions in the firm's business accounts caused by his brother's constant withdrawals, which were directed without regard to the balances. Ibid. Specifically, Stephen Gold instructed the bookkeeper to stop using the business accounts and to process all transactions, including the deposit of earned legal fees, through the firm's primary trust account. Ibid.

Thereafter, respondent and his brother issued numerous checks to themselves or to cash, representing payment of both law firm and personal obligations. Ibid. An independent audit of the trust account disclosed that, as early as November 30, 1977, and as late as July 31, 1980, the trust account was

out of balance. Id. at 243. On the latter date, the account had a shortage of at least $125,000. Ibid.

The special ethics master found that the record lacked clear and convincing evidence that Stephen Gold had used clients' funds for his own purposes because "it was nearly impossible to demonstrate that any withdrawals made by [him] during the two year period were against clients' funds rather than earned funds of the partnership." Ibid. In mitigation, Stephen Gold had "pauperized himself in order to make restitution to the victimized clients." Ibid.

A five-member majority of our colleagues was unable to conclude by clear and convincing evidence that respondent had knowingly misappropriated clients' funds. Id. at 244. The majority could not find that respondent had created a system designed to blind him from misuse of trust funds. Id. at 245. Further, the majority noted that, although the last act of misappropriation occurred in 1980 and was, therefore, post-Wilson, respondent's actions, however misguided, had begun long before 1980. Ibid. The majority cited In re Smock, 86 N.J. 426 (1981), which stated that the Wilson rule would not be applied retroactively. Ibid. The majority recommended that respondent's temporary suspension (four years, by that time) be deemed sufficient discipline for his serious inattention to his recordkeeping responsibilities (commingling of client and personal funds, no maintenance of trust account records, etc.). Id. at 246.

A four-member minority of our colleagues recommended respondent's disbarment, finding that his guilt was equal to that of his brother. Ibid. In the minority's view, respondent, despite having serious suspicions about his brother's defalcations, chose to remain "ignorant" and decided not to monitor the combined account that he had created. Ibid. The minority cited both In re Fleischer, 102 N.J. 440 (1986) (designing an accounting system that prevents an attorney from knowing whether he or she is using clients' funds is no defense to a knowing misappropriation charge) and In re Skevin, 104 N.J. 476 (1986) (an attorney may be viewed as acting knowingly when he or she is aware of the highly probable existence of a material fact, but chooses to ignore it). Ibid.

The Court agreed with the majority, finding no clear and convincing proof that respondent knowingly had misappropriated clients' funds subsequent to the publication of Wilson (decided December 19, 1979, published in early January 1980). Id. at 250. The Court concluded that, even if, under Fleischer, knowledge that the account was out of trust were imputed to respondent, the evidence did not establish that respondent knew that checks drawn after Wilson became effective were not covered by sufficient funds. Id. at 249. "Absent such a showing, [the Court was] not clearly convinced that respondent, as distinguished from his brother, should be held responsible for any deficiencies in the account. Indeed, the record does not contain any checks drawn by the firm in 1980." Ibid.

Thus, the Court was "disinclined" to disbar Stephen Gold "without more persuasive evidence that after Wilson checks resulting in misappropriations were drawn by him or with his knowledge." Ibid. Consequently, the Court limited respondent's discipline to the period of suspension that he had already served (five years, by that time). Id. at 250.

Second, respondent cited In re Konopka, 126 N.J. 225 (1991). In that case, the attorney agreed to occupy one unit of a two-family home that his parents owned, in exchange for collecting the rent and paying the mortgage and other bills related to that property and another property that his parents owned. He established a trust account for this purpose. Id. at 226-27. Konopka then made disbursements in excess of the amounts on deposit in that account, while, at the same time, creating deficits in the subaccounts of his other clients. Id. at 227. On twenty-six occasions spanning a three-year period, his trust account contained a negative balance, in amounts ranging from $1,461.19 to $6,374.37. Ibid. Although the district ethics committee and we found Konopka guilty of knowing misappropriation, the Court disagreed. Ibid.

We found knowing misappropriation based on the following facts. The Konopka ledger contained the phrase "balance forward from page 22" followed by the balance $153.81; two lines down, two $500 disbursements are listed. Id. at 229. All of these entries were made in the attorney's handwriting. Ibid. Thus,

we found that Konopka knew that he had insufficient funds on deposit when he made the two $500 disbursements against a balance of only $153.81. Ibid.

In another matter, although Konopka should have held $5,000 in trust for a client, Edone, the actual balance was only $3,867.39. Ibid. On the day that Konopka disbursed $5,000 to Edone, he first deposited $1,500 of his own funds to cover the disbursement. Ibid.

The Court, however, disagreed with us, and did not find clear and convincing evidence of knowing misappropriation, asserting that there "is simply no proof of when Konopka made the 'balance forward' entry in relation to the issuance of the checks." Id. at 230. Further, in the Edone matter, the Court stated that Konopka's deposit of funds did not establish knowing misappropriation, pointing out that he retained Edone to reconcile his accounts. Ibid. The Court found it unlikely that Konopka would hire the very client whose funds he had knowingly invaded. Ibid.

Three justices concurred in the result, but advocated exceptions to the Wilson rule. In response to those comments, the majority discussed the level of proof required in knowing misappropriation cases:

> We insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. Obviously, we consider the attorney's records, if relevant, along with all other testimony, but if all we have is proof from the records or elsewhere that trust funds were invaded without

> proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [Id. at 234 (emphasis in original).]

The Court, thus, suspended Konopka for six months. Id. at 260.

Third, respondent cited In re Roth, 140 N.J. 430 (1995). In the first matter under scrutiny in that case, in July 1990, attorney Walter L. Roth, Jr. settled a case for $1,300 and received a check from his clients for that amount but failed to forward it to his adversary. In re Roth, 140 N.J. 430, 433 (1995). As a result, judgment was entered against his clients. Ibid. During a telephone conversation with his adversary, Roth claimed that his secretary had deposited the check in the wrong account but promised that he would forward the check immediately. Ibid. Roth then failed to do so, and his adversary filed a grievance against him. Ibid.

The OAE conducted an audit and instructed Roth to submit a reconstruction of his financial records, with quarterly reconciliations. Ibid. Roth hired an accountant and complied. Ibid. Roth then replenished his trust account, after certain deficiencies were found. Id. at 433-34. He then sent the $1,300 to the adversary. Id. at 434.

The audit revealed that the $1,300 had not been held, intact, in Roth's trust account. Ibid. Roth invaded the funds two weeks after he had received them, by

disbursing funds in excess of the available balance in his trust account. Ibid. The disbursements were unrelated to the clients' matter. Ibid. Roth's bank notified him of a negative balance in his trust account, prompting him to deposit sufficient funds to bring the balance to a positive status. Ibid. On the date of this deposit, however, Roth once again invaded the $1,300 sum, by issuing checks unrelated to the clients' matter. Ibid. Roth claimed that he was unaware of the balance in his trust account because of his failure to reconcile the account. Id. at 435.

In the second matter under scrutiny, Roth received an $8,000 check from a client, which he deposited in his trust account on the same day. Id. at 437. Without waiting for the check to clear, respondent issued a $4,000 check to himself, as fees. Ibid. After Roth made certain additional deposits and withdrawals, the client's $8,000 check was returned for insufficient funds. Ibid. Roth did not return his $4,000 fee to the account, despite being notified of the return of his client's check. Ibid. In fact, he admitted to the OAE investigator that he had already used those funds for personal expenses. Ibid.

At the ethics hearing, Roth gave a different explanation, stating that, because he had monies of his own in the account, and because he was not reconciling the trust account, he was unsure of its balance. Id. at 437-38. Roth acknowledged that, eventually, he became aware that the account was

overdrawn. Id. at 438. He testified, however, that depression had frustrated his ability to take steps to cure the shortfall. Ibid.

In a third matter involving Prudential – Hillcrest Realty (Hillcrest), Roth issued a $7,500 trust account check to Hillcrest, a real estate agency owned by his father. Id. at 439. At the time, there were no corresponding trust funds standing to the credit of Hillcrest. Ibid. The issuance of the check caused the invasion of funds that Roth should have been holding on behalf of nineteen clients. Ibid.

Roth explained that the broker for Hillcrest needed the check to pay bills. Id. at 440. Roth admitted that he could have called his father and asked for a $7,500 check but claimed that his father was "in bad shape," because his mother had died a few weeks before. Ibid. Instead, he wrote the check from his trust account, intending to instruct the broker not to present it to the bank until he had an opportunity to get a check from his father that night and deposit it in his trust account. Ibid. Roth added that, for some reason, he did not follow through on that and forgot to tell the broker not to cash the check. Ibid. He claimed his father had the financial capacity to give him the $7,500. Ibid.

In a fourth matter, Roth deposited in his trust account a $10,000 loan from his father. Ibid. Roth then issued to "cash" two checks totaling $11,000, thereby

invading $1,000 in clients' funds. Id. at 441. He explained that, when he issued the second check, he had forgotten the amount of the first check. Ibid.

In respect of all of the matters, the special master found no clear and convincing evidence of knowing misappropriation, concluding that respondent had negligently invaded his clients' funds. Id. at 432. A five-member majority of our colleagues disagreed with the special master, finding respondent guilty of knowing misappropriation. Ibid. Three of our colleagues concurred with the special master's conclusion that the misappropriation had been negligent. Ibid.

The minority specifically found that respondent's sloppy recordkeeping practices had been responsible for his invasion of clients' funds, which the minority found negligent, as opposed to intentional. Ibid. As to the Hillcrest matter, the minority found that respondent's conduct was not consistent with the state of mind associated with a knowing misappropriation of clients' funds. Ibid. The minority would have suspended respondent for six months. Ibid.

The Court sided with the majority, finding that the totality of the circumstances demonstrated clearly and convincingly that respondent had knowingly misappropriated clients' funds. Id. at 445. Although the Court recognized that proving a guilty state of mind, in the absence of an outright admission, poses difficulties, it found that circumstantial evidence in this case – Roth's repeated invasion of funds that had to be kept inviolate – added up to the

conclusion that he either knew or had to know that he was invading clients' funds. Ibid.

In the first matter, the Court found circumstantial evidence that respondent knew that he was invading clients' funds. Ibid. The Court noted that, despite being notified by the bank that his trust account was overdrawn – whereupon he deposited sufficient funds to replenish the account – respondent again invaded the $1,300 clients' funds three days later. Id. at 447. Under the circumstances, the Court found, it could not be said that respondent's conduct was merely negligent. Ibid. The Court found that the "cumulative effect of respondent's multiple invasions of clients' trust-account funds diminishe[d] the persuasiveness of any of respondent's proffered explanations or justifications." Ibid. The Court ordered respondent's disbarment. Id. at 448.

In the Hillcrest matter, the Court found that, although Roth's explanation that he wanted to spare his father was plausible, his failure to replace the funds for three months was unjustified. Id. at 445-46. In the matter involving the $8,000 dishonored check, the Court found that, despite Roth's admitted knowledge of the check's return and, therefore, of the disarray in his trust account, he delayed in correcting the problem and implementing procedures to safeguard against future invasions. Id. at 446. Roth knew that his trust account procedures were deficient, yet, he failed to rectify them. Ibid.

One Justice dissented, agreeing with the minority that the evidence did not clearly and convincingly establish that there had been a knowing misappropriation within the meaning of Wilson. Id. at 449. As to the Hillcrest matter, the dissenting Justice noted that, when respondent issued the $7,500 check, he believed that it would be covered. Ibid. Later, for whatever reason, sympathy or his own grief, respondent did not attend to business. Ibid. He never found the "proper moment." Ibid.

Respondent next cited In re Shelly, 140 N.J. 501 (1995) for the proposition that he should not be disbarred for his misconduct. In that case, the formal ethics complaint charged attorney Lee W. Shelly with three counts of knowing misappropriation, involving $40,000 in proceeds from a real estate closing; a $6,000 deposit in the same real estate matter; and $1,250, from the closing proceeds in that matter, that Shelly supposedly was to hold in escrow. The special master found that Shelly had knowingly misappropriated the $6,000 deposit plus $34,000 of the $40,000 in sales proceeds and, thus, recommended his disbarment. Ibid. A majority of our colleagues found knowing misappropriation only in connection with the $6,000. Id. at 503-04.

Shelly represented Concetta Roden in several legal matters, most of which concerned the distribution of her family fortune between herself and several family members. Id. at 504. When Roden first sought respondent's assistance,

she was virtually penniless, and her mortgage loan was about to be foreclosed. Id. at 504. Shelly agreed to represent her, after receiving a $1,500 retainer from Roden's employer, and telling Roden that he would secure payment for his services by drawing on any monies recovered for her. Ibid. Roden agreed. Ibid. Indeed, she acknowledged that, from time to time, respondent would tell her that he wanted to take his fee from monies received in her behalf. Id. at 505. That arrangement was acceptable to her. Id. at 505.

For the first three years of the representation, Shelly received no compensation. Id. at 505. When he initially recovered $120,000 in Roden's behalf, she consented to his taking a $20,000 fee and instructed him to send the balance to several banks to which she owed money. Id. at 506. Subsequently, Shelly secured many more cash disbursements in Roden's behalf and took corresponding fees. Id. at 506. Each time, he obtained Roden's consent. Ibid. On several occasions, Shelly deducted nothing for himself. Id. at 506-07. On a few occasions, Roden sent the fees to him. Id. at 507.

Shelly maintained an extremely informal professional relationship with Roden, and did not maintain time records for his services, did not send her bills, and calculated his fee by the amount of time spent, her financial needs, and her ability to pay. Ibid.

Over the course of a nine-year representation, Shelly obtained in excess of $500,000 for Roden, obtained a $395,000 judgment in her favor (the Franceze litigation), and negotiated and handled the sale of her house. Ibid. He received a total of $100,000 in fees. Ibid. Despite the considerable sums she received, Roden was unable to reach financial stability. Ibid. On one occasion, Shelly even sent her $500 from his business account, to prevent either her eviction or the termination of her electrical service. Id. at 507-08.

As previously stated, Shelly represented Roden in the sale of her house. Id. at 508. The selling price was $192,000, with a $6,000 earnest money deposit to be held in escrow by Shelly, as escrow agent, until closing of title. Ibid. The day after Shelly deposited the $6,000 in his trust account, however, he began to disburse it for his personal use. Id. at 509. According to Shelly, the sale of the house was being threatened by damage that required repairs, and neither party had the monies to pay for the repairs. Ibid. To salvage the transaction, he and the buyers' attorney had agreed that the $6,000 deposit would be released to Roden, who would then perform the repairs. Ibid. According to respondent, Roden had then agreed to lend him the $6,000. Ibid.

The transaction ultimately closed and, thereafter, Shelly sent Roden a check for $41,250 less than the amount of sales proceeds to which she was entitled. Ibid. In a handwritten note to Roden, he explained that he had to borrow

$40,000 from her for two weeks, at 12% interest. Ibid. The $40,000 consisted of the $6,000 deposit plus an additional $34,000 in sales proceeds. Id. at 510. According to Shelly, Roden had agreed to that arrangement prior to the closing. Ibid.

A few weeks after the closing, Shelly and Roden had a conversation about the repayment of the loan, and he told her that he was "working on it." Ibid. Shelly testified that Roden's response had been "fine." Ibid. The following month, Roden sent a handwritten note to Shelly, offering to extend the time to repay the loan and asking respondent to give her a call. Ibid. Either later that month or early the following month, not having heard from Shelly, Roden contacted her former attorney, who demanded "prompt restitution" from respondent and warned him against contacting Roden directly. Id. at 510-11. In a subsequent telephone conversation with the attorney, Shelly agreed to repay the loan within a few weeks. Id. at 511. When he did not, the attorney contacted disciplinary authorities. Ibid.

The third incident giving rise to a charge of knowing misappropriation concerned the $1,250 balance from the $41,250 that respondent kept after the closing. Ibid. According to Shelly, that sum was necessary to satisfy a judgment against Roden; after the closing, he found out that he already had paid that judgment; he, therefore, kept the $1,250 toward his fees. Id. at 512. Despite his

claim of entitlement to the funds, respondent later sent a check to Roden in that amount. Ibid.

We found knowing misappropriation only in connection with the $6,000 deposit. Id. at 504. We noted that, even if Shelly had the buyers' attorney's consent to the release of the $6,000 deposit to Roden to perform repair, he admittedly did not have that attorney's consent to use the monies for personal expenses. Ibid. As to the $34,000, we concluded that, based on the parties' informal and friendly relationship over the years, it was plausible that Roden had agreed to lend Shelly some monies, particularly for a short term, as in that instance. Id. at 503-04. We found no evidence of foul play in connection with the $1,250 sum.

The Court found no clear and convincing evidence of knowing misappropriation in any of the counts. Id. at 513. Specifically, the Court was unable to find that Shelly had borrowed Roden's monies knowing that he lacked authorization to do so. Ibid. The Court believed that, based on the "extraordinary and unique circumstances that characterized his nine years of financial dealings with Ms. Roden, [Shelly] was justified in assuming that he had Ms. Roden's consent to borrow from the closing proceeds." Ibid. The Court added:

> The borrowing of the $40,000, with only slight variation, was consistent with [Shelly's] common practice of securing the fees owed to him out of accounts receivable he collected for Ms. Roden. We

> note specifically that the borrowing of the $40,000 was directly connected to [Shelly's] anticipated $50,000 from the Franceze litigation, which he was on the verge of recovering as of the time that he borrowed from the closing proceeds. We find that in light of Ms. Roden's consistent practice of permitting [Shelly] to disburse sums of money to himself out of monies to be turned over to her, [Shelly] reasonably could have assumed that he had Ms. Roden's authorization to borrow the $40,000 against his anticipated fees in the Franceze litigation. We are therefore unable to conclude by clear-and-convincing evidence, with respect to either the $34,000 from the closing proceeds or the $6,000 deposit, that [Shelly] knew he lacked Ms. Roden's consent to borrow the money.
>
> [Id. at 514.]

The Court noted that Roden's letter to Shelly – offering to extend the time of repayment of the loan – proved that she had no objection to treating both the $34,000 transaction and respondent's use of the $6,000 as a loan. Ibid. The Court remarked that, "[a]lthough a client's subsequent ratification clearly cannot legitimize a prior knowing misappropriation by the attorney . . . Ms. Roden's May 8th letter provides evidential support for the conclusion that respondent reasonably could have believed that he had his client's implied consent to draw from the closing proceeds." Id. at 514-15.

The Court found no basis for our distinction between the treatment of the $34,000 transaction and of the $6,000 transaction:

> Contrary to the reasoning of the [Board], [Shelly's] failure to obtain the consent of the buyers' attorney to

> use the deposit money for his own purposes is irrelevant. Once it is accepted that the buyers agreed to release the deposit to Ms. Roden, the only relevant inquiry into the propriety of [Shelly's] conduct is whether Ms. Roden personally gave authorization to use the deposit money for respondent's own purposes. [Shelly] was not charged with violating an escrow agreement.
>
> . . . .
>
> We emphasize that the decision announced today is predicated solely on the unique factual circumstances surrounding this case. The decision indicates only that based on the peculiar facts before us, we are unable to conclude by the demanding standard of clear-and-convincing that [Shelly] "knowingly" misappropriated his client's funds.
>
> [Ibid.]

Respondent next cited In re Rabbat, 228 N.J. 274 (2017), In the Matter of Victor K. Rabbat, DRB 16-018 (December 8, 2016), in which we unanimously recommended the attorney's disbarment for the knowing misappropriation of client funds. Specifically, prior to the June 27, 2007 commencement of a protracted random audit, Rabbat's firm had disbursed approximately $80,000 to clients, representing old, outstanding balances reflected on client ledger cards that the firm had reviewed in anticipation of the audit. Id. at 2-3. Despite the above disbursements, the firm's two-way reconciliations, dated April 30, 2007, reflected an additional $82,618.49 in outstanding checks, which the OAE

described as unaccounted funds. Id. at 2. A subsequent, three-way reconciliation prepared by the OAE accounted for all of the funds, but for $1,822.16. Id. at 4.

The OAE directed the firm to resolve the old outstanding checks. Ibid. By letter dated January 30, 2008, Rabbat explained that the firm had disbursed a majority of the outstanding ledger card balances; that it had begun conducting monthly reconciliations; and that, although the firm had attempted to communicate with clients holding outstanding checks, few had replied. Ibid.

Because the firm did not begin conducting three-way reconciliations until January 2008, the OAE requested additional information. Id. at 5. In reply, the firm certified that, as of January 31, 2008, the trust account had a $73,307.37 surplus, which had accumulated since before 1998. Ibid. Rabbat could not explain the accumulated surplus, but claimed that his father, who was his law partner, had informed him of it.

In March 2008, Rabbat claimed to the OAE that the unidentified funds totaled $18,806.01. Ibid. Given the continuing change in the amount of unidentified funds, the OAE requested reconciliations from May through December 2007, as well as additional documents. Ibid. The records were incomplete, but the OAE was able to prepare a reconciliation, which reflected $19,830.81 in unidentified funds, as of January 31, 2008. Id. at 6. Based on the

firm's representation that it would resolve the issues, the OAE did not continue the random audit. Ibid.

On July 28, 2009, Rabbat's father and law partner, William Rabbat, died. Ibid. Prior to and until his death, William oversaw the handling of the firm's attorney trust account and reconciliations. Ibid. Thereafter, Rabbat became solely responsible for handling "the managerial and financial aspects" of the firm. Ibid.

In October 2010, a $20,055 trust account check was returned for insufficient funds. Id. at 7. Rabbat failed to comply with the OAE's request for a written explanation, prompting a demand audit. Ibid. Meanwhile, on January 5, 2011, Rabbat wrote a letter to the OAE, claiming that the overdraft was caused by the simultaneous payment of $20,055 to client Lorraine Hayek and the return of funds after a failed real estate transaction. Ibid. Rabbat also stated that, in respect of the random audit, although there appeared to be old deposits in the trust account, "in reality that money had been forwarded to clients." Id. at 7-8. Rabbat, thus, issued trust checks totaling the amount of what appeared to be the old deposits and deposited those funds in the firm's business account. Id. at 8.

During its investigation, the OAE learned that, on September 21, 2010, the firm deposited in the trust account $30,000 in settlement proceeds for the benefit of Hayek. Ibid. The next day, the firm disbursed $9,945 in fees, and, on

September 28, 2010, issued a $20,055 check to Hayek, representing her share of the proceeds. Ibid. When Hayek presented the check for payment, the trust account balance was only $15,335.86. Ibid. Thus, the $20,055 check was dishonored and returned. Ibid.

After Hayek's husband notified the firm of the overdraft, which was reported to Rabbat, a firm associate, Natalie Esposito Capano, conducted an independent investigation of the trust account. Id. at 9. At the time, the firm was experiencing "financial difficulties." Ibid. Capano found "several unexplained payments to the Firm" and contacted ethics authorities. Ibid.

During its investigation, the OAE determined that, despite Rabbat's claim, the real estate deposit was not the cause of the overdraft; rather, seven trust account "replacement" checks, totaling $32,332.86, that Rabbat had issued to either himself or the firm, caused the shortfall. Ibid. Rabbat claimed that, at his father's direction, he had issued and deposited the checks in the business account, as the funds represented earned legal fees and costs. Id. at 9. The seven checks ranged from $567.84 to $12,011.94. Id. at 10.

On the day before the January 11, 2011 demand audit, Rabbat transferred $32,332.86 from the business account to the trust account. Id. at 10. He did so on the claim that he had recently learned at a Continuing Legal Education class that the funds should have been turned over to the Superior Court Trust Fund

Unit (SCTFU), not deposited in the firm's business account. Ibid. The business account funds had been used to pay "routine business expenses." Ibid. According to the OAE, when the funds were deposited in the business account, it was facing a shortage, which would have led to an overdraw if "certain checks" had been presented for payment. Id. at 11. Rabbat admitted that the firm was experiencing financial difficulties. Ibid.

During the demand audit, Rabbat stated that he would open a new trust account and turn the $32,332.86 over to the SCTFU. Ibid. Rabbat again claimed that the replacement checks were legal fees and unreimbursed expenses owed to the firm. Ibid. Two OAE auditors asserted that Rabbat had not made such a claim during the demand audit. Ibid. Instead, he "consistently indicated that the funds belonged to clients or third-party payees." Ibid. Indeed, during the demand audit, Rabbat did not provide client ledger cards in respect of the replacement checks. Id. at 12. During discovery, however, he produced eight ledger cards reflecting $32,422.71 in payments. Ibid. The ledger cards challenged the accuracy of the 2007 outstanding check list because they reflected that the firm had already been paid its fees in those matters. Id. at 12-13. According to the OAE, by adding back the amounts to its reconciliation and correcting a mathematical error, the unidentified funds would have exceeded $32,000. Id. at 14.

The OAE auditor testified that other client funds were used to cover the overdraft caused by the $20,055 check issued to Hayek, namely an $18,000 deposit in behalf of Nieves Ret and a $11,500 deposit in behalf of Gonzalez-Hernandez. Id. at 14-15. When Rabbat learned that Hayek's check had been returned, he failed to cover the shortage and, instead, allowed Hayek to re-present the check on the same day that the Nieves Ret and Gonzalez-Hernandez funds were deposited in his trust account. Id. at 15.

A firm secretary described William as a "'control freak'" and stated that, while he was alive, Rabbat had nothing to do with the financial aspects of the firm. Id. at 15-16. She also testified that the firm's practice was to promptly remove legal fees from the trust account. Id. at 16. After William died, "'[a]ll hell broke loose'" in the firm, and Rabbat became depressed. Ibid. He delayed in reviewing and returning the two-way reconciliations to her. Id. at 16-17. After William's death, the secretary noticed that several trust account checks were written to Rabbat and to the firm with various clients identified on the memo line. Id. at 17. She had not seen this before. Ibid.

Rabbat testified that he had an "extremely dysfunctional" relationship with his father, who had handled all financial aspects of the firm and never taught him how to handle any such matters. Ibid. Among other things, Rabbat stated that the January 2008 letter regarding the deficiencies contained a

mistake. Id. at 18. The firm had not written to clients holding outstanding trust account checks, but rather clients with outstanding balances on their ledger cards. Ibid. The representations in the letter were based on information provided by William, unconfirmed by an investigation on Rabbat's part. Ibid.

According to Rabbat, when his father was transitioning the firm to him, he had a "sticky note," which contained the names of clients and outstanding balances, seven of which represented fees and/or expenses belonging to the firm. Id. at 18-19. Rabbat, however, admittedly did not verify the information or retain the note before disbursing the seven replacement checks. Id. at 19. He did say, however, that the information was consistent with his general information about the matters, which included the fact that there were fees owed to the firm. Ibid.

In respect of the remaining fifteen checks on the outstanding check list, Rabbat claimed that William had told him that he would have to research to whom the funds belonged. Id. at 20. Rabbat denied that the Nieves Ret and Gonzalez-Hernandez deposits were used to "'cover'" the Hayek check. Ibid. He said she, not he, had determined when she would re-present the check for payment. Ibid.

Certified Public Accountant Samuel Fischer testified as Rabbat's forensic accounting expert. Id. at 21. He maintained that the unidentified funds exceeded $1,822.15 because checks that were identified as outstanding were not, in fact,

outstanding. Ibid. He concluded that the seven "replacement checks" and the invasion of the Nieves Ret and Gonzalez-Hernandez funds were merely negligent misappropriations, because Rabbat believed that the funds belonged to either him or the firm. Ibid. Indeed, Rabbat had no way of determining who owned the $32,000 unless he had done "'a lot more accounting investigation work and analysis.'" Ibid. Fischer also asserted that Rabbat's behavior was not consistent with an attorney who had knowingly misappropriated client funds. Ibid. For example, if he had done so, he would not have hired an accountant to review his records. Ibid.

The special master found that, by issuing the seven checks to himself or the firm, Rabbat knowingly misappropriated client funds. Id. at 22. He also knowingly misappropriated client funds when he authorized Hayek to re-present her settlement check, knowing that payment of the check would impact the Nieves Ret and Gonzalez-Hernandez funds on deposit. Ibid. The special master accepted the OAE's testimony regarding the deposit of the replacement checks and the fact that the firm already had been paid before those checks were issued and, thus, no funds were due to the firm. Id. at 21-22. He did not believe that the business account shortages were material to the finding. Id. at 23.

The special master also found that Rabbat deposited the Nieves Ret and Gonzalez-Hernandez funds to cover the Hayek check on re-presentment for

payment. Id. at 24. In this regard, he stated that Rabbat's return of $32,332.86 to the trust account on the day before the demand audit proved that he knew he had invaded Hayek's funds and waited until the last minute to replenish the account. Ibid. He also found that the seven replacement checks were issued as "money was needed or wanted." Ibid.

The special master considered the testimony of William's secretary to be significant. Ibid. Yet, he believed that Rabbat's correspondence with the OAE during the 2007 audit demonstrated that he had knowledge and involvement with the trust account deficiencies and that he was not simply "parroting" William's instruction. Id. at 25. Thus, Rabbat's claim that he had no knowledge of the trust account was not credible. Ibid. Moreover, the special master found that, given the testimony about William's methods, it would have been uncharacteristic of him to give instructions to Rabbat on a sticky note. Ibid. Thus, he rejected Rabbat's testimony in this regard as not credible. Id. at 25-26. He also rejected Fischer's conclusion that Rabbat's misappropriation was merely negligent. Id. at 26.

The special master, thus, concluded that Rabbat had knowingly misappropriated the $32,332.86, which represented client funds. Ibid. He also knowingly invaded the Nieves Ret and Gonzalez-Hernandez funds, by allowing Hayek to re-present her check without their consent. Ibid.

We agreed that Rabbat had knowingly misappropriated client funds. Id. at 27. We found that, despite Rabbat's claim that he had no familiarity with the trust account, between September 2009 and February 2010, he issued the seven checks, totaling $32,332.86 and deposited four of them in the business account. Id. at 32. Unlike the special master, we determined that, when Rabbat deposited the checks, the business account was facing shortages, which would have resulted in overdrafts were it not for the deposits. Ibid. Further, none of the funds were disbursed to clients. Id. at 32-33.

In respect of the seven replacement checks, we found that Rabbat had knowingly misappropriated client funds. Id. at 37. We rejected Rabbat's claim that the funds already had been paid to clients or third parties. Id. at 34. Further, he failed to disclose that the replacement checks had been issued to the firm, leaving the OAE to discover that fact when it received the discovery. Id. at 34.

We rejected Rabbat's claim that he issued the replacement checks based on the sticky note and that, based on his knowledge of the clients' matters, he believed they owed fees to the firm, noting that he undertook no independent investigation or inquiry. Id. at 35. After summarizing the special master's credibility findings regarding Rabbat's testimony, we concluded that the evidence clearly and convincingly established that respondent knowingly misappropriated the $32,332.86. Id. at 37. Rabbat's admission that he took the

funds based on the sticky note and without any independent verification, including confirmation that the trust account contained sufficient funds to cover the checks, demonstrated that he knew there was a high probability that the funds did not exist. Id. at 38. In other words, his willful blindness was sufficient to satisfy the knowing element in knowing misappropriation. Id. at 37-38.

In respect of the Hayek check, we found that Rabbat knew that it had been returned for insufficient funds, but failed to replenish the trust account, choosing instead to deposit the Nieves Ret and Gonzalez-Hernandez checks and direct Hayek to re-present the check. Id. at 38. He, thus, knowingly misappropriated those clients' funds. Ibid.

We rejected Fisher's assertion that, because Rabbat believed that either he or the firm were entitled to the funds underlying the replacement checks, he did not engage in knowing misappropriation. Ibid. If Rabbat could not demonstrate that the funds represented legal fees, he was not entitled to them. Id. at 39. Further, the funds previously had been identified as client funds via outstanding checks. Ibid. At no time during the 2007 audit did Rabbat or the firm claim that the funds represented fees or expenses. Ibid. He only said so in the face of the overdraft. Ibid. Thus, we recommended his disbarment. Ibid.

The Court disagreed and imposed a three-year suspension for what it concluded was Rabbat's negligent misappropriation of client funds. In re Rabbat, 228 N.J. 274.

Finally, as noted above, the special master requested that the parties apply In re Silverman, 240 N.J. 51 (2019); In the Matter of A. Jared Silverman, DRB 18-362 (May 29, 2019) (slip op. at 2, 20) to the facts of this case. In that case, we unanimously recommended the attorney's disbarment for the knowing misappropriation of trust account funds. The Court disagreed and imposed a censure for his improper business transaction with a client and recordkeeping violations. In re Silverman, 240 N.J. 51.

Silverman's client, Kent Lessman, brokered sales of petroleum and petroleum products and arranged the financing of petroleum related projects. Id. at 2. For approximately eight years, Silverman functioned as Lessman's "paymaster." Ibid. In that capacity, Silverman deposited in his trust account funds from Lessman's business associates and, pursuant to Lessman's instructions, disbursed the funds to third party service providers in payment of fees, commissions, and expenses incurred in respect of particular projects. Ibid. Silverman accounted for Lessman's funds on a project-by-project basis. Ibid.

On April 15, 2015, Silverman wired $7,500 to one of the third parties but, due to what he argued was a "computer glitch," the disbursement did not reduce

the running balance on his client ledger. Id. at 3. Due to the initial error, which the OAE characterized as "an innocent recordkeeping violation," Silverman subsequently over-disbursed $7,414 in Lessman funds and invaded other clients' funds. Ibid.

About a month later, in May 2015, Silverman discovered the error by performing the three-way reconciliation of his trust account for April. Ibid. He informed Lessman of the shortage and requested that he replace the funds immediately. Ibid. Lessman agreed to do so, with the proceeds from "a completed transaction." Ibid. At the time, Lessman had two projects in progress and, thus, Silverman relied on his representation. Ibid. The projects did not proceed, however, and Lessman did not replenish the funds. Ibid.

Subsequent to Silverman's discovery of the shortage, in May 2015, he continued to disburse funds on behalf of Lessman. Id. at 4. During an early 2016 random audit, the OAE discovered the shortage, and directed Silverman to replenish his trust account within two weeks. Ibid. He failed to comply with the directive. Ibid. He also failed to comply with subsequent requests, as well as his own promises, to replenish the account. Id. at 4-5.

During the course of a demand audit, the OAE learned that, between May 26, 2015, when the shortage was discovered, and December 31, 2015, respondent claimed that neither he nor Lessman had personal funds sufficient to

replenish the trust account. Id. at 5. Yet, following the discovery of the shortage, Silverman received $9,090 in fees through the end of the year in non-Lessman matters, which he used to pay bills and make purchases. Id. at 5-6. In July 2015, he received an improper $10,000 loan from his client Richard Yahya, which he did not use to replenish the shortage. Id. at 6, 12.[5]

The $7,414 Lessman ledger deficit carried forward to 2016, a fact which Silverman's reconciliations continued to reflect. Ibid. In July 2016, Silverman deposited in his trust account a $50,000 deposit on behalf of ACR Equities, Inc. (ACR), which "cured" the Lessman ledger balance from -$7,414 to $42,388 by creating in a shortage of ACR funds. Ibid. According to Silverman, he had agreed to disburse the $50,000 for that project, as directed, even though, "[u]nfortunately," he had to use the funds of other clients. Id. at 7-8.

Between July 25 and November 7, 2016, Silverman continued to invade client funds, including via a $7,500 disbursement to Lessman. Id. at 8-9. Silverman claimed that he could not have used those funds to replenish the trust account because they did not belong to Lessman, but rather had been made "pursuant to pay orders, which were related to specific projects." Id. at 9-10. If Silverman had withheld the funds from Lessman, he would have exposed him to

[5] The loan transaction failed to comply with the requirements of RPC 1.8(a). Id. at 15.

breach of contract claims. Id. at 10. Thus, "he had placed himself in 'an unfortunate position' because he invaded other client trust account funds." Ibid.

The shortage continued through December 2016. Ibid. Given the length of time since the shortage first occurred, in April 2015, the OAE asserted that it could not continue to be deemed an "innocent recordkeeping violation," given the failure to replenish the shortage coupled with the continued disbursement of funds. Id. at 10-11. By the date of the March 26, 2018 ethics hearing, Silverman still had not replenished the shortage. Id. at 11. Although he stated that he would do so within forty-five days, he failed to meet that deadline. Ibid. He finally fully replenished the account one week before his brief to us was due. Ibid.

Silverman argued to us that his failure to replenish the trust account was not "willful;" that he had relied on Lessman's unfulfilled representations; and that he did not have the financial ability to replenish the account with personal funds. Ibid.

The special master found that Silverman had knowingly misappropriated $7,414 in client trust accounts funds and had also engaged in an improper business transaction with Yahya. Id. at 13. Despite Silverman's claim that, if he had not made the disbursements on behalf of Lessman, he would have exposed Lessman to liability to his investors, the special master noted that, in so doing, Silverman had jeopardized both the funds of other clients and his practice. Ibid.

He, thus, knowingly misappropriated "escrowed trust account funds." Ibid. The special master dismissed the recordkeeping charge (RPC 1.15(d)), as Silverman's attorney books and records were in proper form. Id. at 14. He also dismissed the RPC 8.4(c) charge, as the shortage had been reflected on those records. Ibid.

Although we found Silverman did violate RPC 1.15(d) and RPC 8.4(c), we otherwise agreed with the special master's findings regarding the improper business transaction and the knowing misappropriation. Id. at 15-16, 19. In respect of the knowing misappropriation claim, which we considered "straightforward," we noted that Silverman's failure to replenish the $7,414 while continuing to disburse funds to Lessman and to himself, knowing that the trust account continued to have a shortage, constituted the knowing misappropriation of funds. Id. at 18-19.

The Court found that the record lacked clear and convincing evidence that Silverman had "knowingly misappropriated client funds or engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation" and, thus, dismissed those charges of the complaint. In re Silverman, 240 N.J. 51 (2019). Instead, the Court imposed a censure on Silverman for the improper loan from Yahya and his recordkeeping violations. Ibid.

Here, contrary to respondent's position, the line between negligent and intentional use of escrow and client funds, both of which respondent was duty-bound to hold, inviolate, is quite clear. The record clearly and convincingly demonstrates that respondent committed the repeated knowing misappropriation of the Escrow Funds, in violation of Hollendonner, and subsequently committed the knowing misappropriation of client funds, in violation of Wilson. Respondent's knowing creation of a shortfall in the escrow funds, to pay himself a $15,000 fee, was a textbook Hollendonner violation, especially considering the fact that the escrow arrangement required the authorization of three interested parties, and was not a more customary fiduciary arrangement between two parties. Moreover, the record proves that respondent was well aware of the genesis of the $11,000 shortage and its continued existence, despite his claims to the contrary. Indeed, he intentionally created the shortage.

We are unpersuaded by respondent's reliance on cases with less compelling proof of knowledge. First, Gold does not help respondent escape disbarment. The record contains no evidence that respondent's recordkeeping, or another party's malfeasance, created an environment in which he could not be aware of his knowing misappropriations. To the contrary, his conduct in this case was straightforward, especially his initial, knowing misappropriation of $15,000, which he admittedly believed, at the time, created an $11,000 shortage

of the Escrow Funds. As the Court held in Skevin, which is cited in Gold, an attorney may be viewed as acting knowingly when he or she is aware of the highly probable existence of a material fact but chooses to ignore it. By respondent's own admission, he was acutely aware of the Escrow Funds shortage he intentionally created, but chose to ignore it, committed additional Hollendonner violations, and, ultimately, a Wilson violation.

Likewise, Konopka does not support respondent's defense that his misappropriations were negligent. The Court could not decipher Konopka's mens rea to a clear and convincing standard. Here, unlike the facts of that case, respondent openly admitted that he knew he was creating a shortage in the Escrow Funds by disbursing a $15,000 fee to himself.

The facts and holding of Roth only serve to support the finding that respondent committed multiple knowing misappropriations of escrow and client funds. In that case, the Court found knowing misappropriation and disbarred Roth, based solely on circumstantial evidence, despite recognizing that proving a guilty state of mind, in the absence of an outright admission, poses difficulties. Here, we need not rely on circumstantial evidence to sustain any of the charges – rather, we rely on respondent's outright admission that he intentionally created a shortage in the Escrow Funds to pay himself a fee, and then did nothing to ensure that the shortage was rectified, for a prolonged period of time. Notably,

the Court in Roth held that the "cumulative effect of respondent's multiple invasions of clients' trust-account funds diminishe[d] the persuasiveness of any of respondent's proffered explanations or justifications." The same principle readily applies here.

Of all the cases cited by respondent, Shelly is most easily distinguished. In that matter, the Court did not find knowing misappropriation, emphasizing that, despite a real estate escrow agreement being a critical part of the operative facts, Shelly was not charged with a Hollendonner violation. Here, respondent is so charged. Moreover, the Court explicitly limited its holding in Shelly, stating "[w]e emphasize that the decision announced today is predicated solely on the unique factual circumstances surrounding this case."

Likewise, Rabbat offers no guidance or safe harbor for respondent's misconduct. The Court issued no decision and excluded from its consideration that attorney's misconduct in respect of the Hayek matter, the only factual scenario present in that case that is remotely similar to the facts of this matter.

Finally, at best, the holding in Silverman would apply only to respondent's final act of knowing misappropriation of client funds, in violation of Wilson – the issuance of the $56,000 check to the Division. Silverman, the facts of which are limited to a pure Wilson/client trust funds shortage, in no way applies to or vitiates respondent's repeated knowing misappropriation of the Escrow Funds

from his ABA, in violation of Hollendonner, whereby he admittedly knew he was creating the shortage, yet did so anyway.

Accordingly, in this case, disbarment is the only appropriate sanction.

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: _____
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dominic V. Caruso
Docket No. DRB 20-191

Argued: January 21, 2021

Decided: April 30, 2021

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0

Johanna Barba Jones
Chief Counsel