Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 20-285
District Docket No. XIV-2017-0397E

In the Matter of	:
Rosemarie Anderson	:
An Attorney at Law	:

Decision

Argued: March 18, 2021

Decided: July 26, 2021

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Arnold K. Mytelka appeared on behalf of respondent.

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

This matter was before us on a recommendation for disbarment filed by a special master. The 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) (knowing misappropriation of client and

escrow funds); RPC 1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6); RPC 8.1(b) (failure to correct a misapprehension known to have arisen in connection with a disciplinary matter); and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we determine that respondent knowingly misappropriated client funds and recommend to the Court that she be disbarred.

Respondent was admitted to the New Jersey bar in 2000; the New York bar in 2001; and the Jamaica, West Indies bar in 2016. At the relevant times, she maintained an office for the practice of law in Hackensack, New Jersey. She has no disciplinary history in New Jersey.

Respondent, a solo practitioner with a general practice, admitted most of the facts alleged in the formal ethics complaint, as well as the charged recordkeeping violations. She denied, however, that she had knowingly misappropriated client funds or acted dishonestly in any way.

Respondent maintained several accounts, including her attorney trust and business accounts, at Wells Fargo Bank, N.A. (Wells Fargo).[1] On November 15, 2016, Wells Fargo returned, for insufficient funds, respondent's attorney trust

[1] In addition to the ATA (ending in 9859), respondent maintained at Wells Fargo an attorney business account (ABA) (ending in 6359), a business savings account (ending in 6458), and a personal savings account (ending in 3399). Wells Fargo provided to respondent a combined monthly statement for her ATA, ABA, and business savings account. A separate monthly statement was provided for her personal savings account.

account (ATA) check number 1007, for $1,000, payable to Melinda Shriver. When the check was presented for payment, respondent's ATA balance was only $58.

On November 21, 2016, respondent learned of the overdraft from her client's spouse. Respondent claimed that, when she called Wells Fargo to inquire about the overdraft, a representative, whose name she did not write down and could not remember, informed her that there must have been a misunderstanding, and that the check had cleared the account.

By letter to respondent dated November 28, 2016, the Office of Attorney Ethics (the OAE) requested a written explanation of the overdraft. Two days later, Shriver's lawyer, Carmen R. Faia, Esq., called respondent, notifying her that the check had, in fact, been dishonored.

On December 2, 2016, respondent called Wells Fargo again and, this time, was told that the check had been returned for insufficient funds. That date, she issued an ATA replacement check, for $1,000, which cleared her ATA on December 7, 2016. By this point, respondent may not have received the OAE's overdraft letter.

On December 6, 2016, respondent replied, in writing, to the OAE's overdraft letter.[2] She maintained that ATA check number 1007 had been

[2] The letter erroneously was dated December 6, 2017.

returned for insufficient funds because, on November 15, 2016, she had mistakenly transferred $1,000 from her ATA – believing it to be her ABA – to her personal account. She claimed that her mistake occurred because her ATA had superseded her ABA as the first account listed on her consolidated Wells Fargo bank statement. Thus, respondent claimed, she simply transferred the funds from the account first listed, believing it to still be her ABA.

Respondent maintained that, the next day, she realized she had made a mistake and replenished the $1,000 that she mistakenly had removed from her ATA. Unfortunately, at around the same time, Shriver presented ATA check number 1007 for payment and it was dishonored. Respondent claimed that, to avoid a similar incident in the future, she planned to move her ATA to another bank.

On December 15, 2016, the OAE closed its file, concluding that the overdraft was a "simple mistake." More than four months later, respondent was selected for a random compliance audit, which took place on May 8, 2017. During the random audit, the OAE uncovered several violations of the recordkeeping Rules and, thus, count two of the complaint charged respondent with numerous violations of RPC 1.15(d). Respondent admitted the recordkeeping violations.

Prior to the disciplinary hearing, the special master granted the OAE's motion to preclude respondent's proffered expert, Joseph W. DeVito, a certified public accountant, from testifying. In short, respondent's counsel proffered DeVito for the purpose of establishing that (1) respondent "didn't know what was going on because of the state of her books," due to her inefficient and inaccurate "bookkeeping and bank procedures," and (2) thus, the November 15, 2016 overdraft was unintentional. In the special master's view, DeVito's report contained "no opinion" and, thus, he was not "a proper expert for this hearing." Rather, the special master found, the report was "all facts," and those facts could be "testified to by either [respondent] or her husband." As further discussed below, respondent's counsel reserved an objection to the special master's ruling.

In respect of the merits of the OAE's case in chief, former OAE Auditor and Certified Fraud Examiner William Colangelo testified that he conducted the May 8, 2017 random audit of respondent's financial records, which covered the period comprising April 1, 2015 through March 31, 2017. The 2017 random audit was not connected with respondent's November 2016 ATA overdraft. Moreover, the 2017 random audit was not respondent's first.

Specifically, in March 2006 and February 2011, the OAE had conducted random audits of respondent's financial records. The 2006 random audit disclosed the following recordkeeping violations: client ledger cards were not

fully descriptive (R. 1:21-6(c)(1)(B)); unresolved outstanding checks (R. 1:21-6(d)); improper designation of the ABA on bank statements, checks, and deposit slips (R. 1:21-6(a)(2)); and improperly-imaged ABA checks (R. 1:21-6(b)). On May 4, 2006, the OAE closed its file, and no further action was taken.

By the time of the 2011 random audit, respondent continued to be in violation of R. 1:21-6(a)(2) (improper designation of the ABA on bank statements, checks, and deposit slips) and R. 1:21-6(b) (improperly-imaged ABA checks). In addition, she failed to deposit legal fees in her ABA, in violation of R. 1:21-6(a)(2), and her ATA checks also were improperly imaged, in violation of R. 1:21-6(b). On April 28, 2011, the OAE closed its file, and no further action was taken.

Regarding the May 8, 2017 random audit, Colangelo described respondent's records as "not compliant" and described how "they had to be reconstructed [by the OAE] to get a better handle on the whole situation." The third audit revealed the following recordkeeping violations: individual client ledger cards failed to maintain running balances, but rather contained two sheets – one reflecting receipts and the other reflecting disbursements, a violation of R. 1:21-6(c)(1)(B); client trust funds were regularly deposited in the ABA, in violation of R. 1:21-6(a)(1); funds were electronically transferred funds from the ATA to respondent's personal bank account, without proper authorization,

in violation of R. 1:21-6(c)(1)(A); respondent did not receive imaged ATA checks or otherwise maintain canceled ATA checks, in violation of R. 1:21-6(c)(1); ABA bank statements were designated improperly as "The Law Office of Rosemarie A. Anderson LLC," a violation of R. 1:21-6(a)(2); and, once again, imaged ABA checks improperly comprised three fronts and three backs (or more) per page, and then five fronts and five backs per page, in violation of R. 1:21-6(b).[3]

Colangelo testified regarding a ledger card for respondent's client, Mustafa Chike-Obi, which was deficient because it did not contain a running balance; the transactions were not sequential; and the recorded deposits were inaccurate. For example, although respondent received $5,000 in client trust funds from Chike-Obi on October 14 and 17, 2016, she recorded the dates as October 20 and 26, 2016, which were the dates that she transferred the trust funds from her ABA to her ATA.[4] Further, her disbursements records for the Chike-Obi matter did not include the disbursements of those funds she made to other accounts.

[3] Respondent claimed that, despite many attempts, she had been unable to persuade the bank to rectify the problems with the processed images and the name on the ABA bank statements.

[4] To be precise, Chike-Obi gave $5,000 to respondent on October 14, 2016. She deposited $4,900 on October 14, and the remaining $100 on October 17.

Regarding her improper habit of depositing client funds in her ABA, respondent testified that, after she had transferred her accounts to Wells Fargo, in 2015, she adopted a two-step procedure for depositing funds in her ATA; she first deposited trust funds in her ABA, via ATM, then transferred the monies to her ATA using her Wells Fargo's online account. Respondent claimed that a bank representative had suggested this method in response to respondent's complaints about having to leave her office early to physically go to the bank, which was not close to her office, to make deposits. Respondent considered the suggestion an "excellent idea" and, thus, implemented it.[5] In addition to time, the procedure also saved respondent money, because she no longer had to pay for deposit slips.

For her part, respondent claimed that she "[a]bsolutely" recognized the importance of safeguarding client funds in her ATA. Prior to the 2017 random audit, however, it never occurred to her that her two-step procedure for depositing trust funds was improper.

Respondent provided the OAE with a list of matters in which she had deposited trust funds in her ABA and then transferred the monies to her ATA. Between March 21, 2016 and April 6, 2017, she deposited client and escrow

[5] Respondent testified that she could not deposit funds in the ATA via ATM because she had no ATM card for her ATA. R. 1:21-6(c)(2) prohibits ATM or cash withdrawals from an ATA.

funds in her ABA, prior to transferring the funds to her ATA, on eleven occasions in four matters: Hugh Smith ($850 received from counsel for the opposing party, representing monthly installments of court-ordered child support reimbursements and attorney fees paid in Smith's behalf); Christoph Onyeyirim (client's $500 personal check in settlement of a claim against him);[6] the Chike-Obi matter ($5,000 in child support payments that were to be disbursed to Melinda Shriver); and Joel Gonzalez (client's $7,500 "down payment" for a residential real estate transaction).[7]

However, within days of the Smith, Onyeyirim, and Gonzalez deposits in her ABA, respondent transferred the funds to her ATA, and her ABA balance never fell below what she was holding for the clients. As described below, she did not transfer Chike-Obi's funds to her ATA within days of their deposit in her ABA and she failed to hold them inviolate.

[6] The formal ethics complaint incorrectly identified Onyeyirim's first name as Christopher. Although respondent deposited Onyeyirim's $500 check on July 8, 2016, she had issued a $500 ATA check in payment of the settlement on July 7, 2016. The ATA check did not post to the ATA until July 18, 2016, however. The complaint did not charge respondent with disbursing the $500 against uncollected funds, a violation of RPC 1.15(a).

[7] Colangelo made one correction to the chart in paragraph 76 of the complaint. Specifically, on the third substantive line of the chart, sixth column, the number 39 should have been the number 40. Throughout Colangelo's testimony, he corrected several errors in the allegations of the complaint and in the many charts that he had prepared to demonstrate respondent's receipts and disbursements. In our view, none of the errors or corrections affected the material facts of this case.

Respondent testified that she was solely responsible for her attorney accounts. She made all deposits; issued and signed checks; performed online transfers; and reconciled her ATA and ABA monthly, but only by ensuring that her handwritten notes corresponded to the ending balance on the bank statements.

Respondent understood that it was her responsibility to maintain proper records, in compliance with R. 1:21-6. Respondent and Colangelo agreed that the 2006 and 2011 random audits had provided her with notice of that responsibility. Nevertheless, she explained:

> I don't work very well with numbers, I don't like to work with numbers, I do the [bare minimum], as you can see, and that's one of the reasons I'm here, I've never liked numbers, never liked working with numbers. Money's not something that I like to deal with or talk about. And it seems – it may seem very strange, but that's the truth of the matter.
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> [3T151.][8]

It is undisputed that, by the time of the disciplinary hearing, respondent had corrected all the recordkeeping deficiencies revealed by the third audit. She

[8] "1T" refers to the January 15, 2020 hearing transcript; "2T" refers to the January 16, 2020 hearing transcript; "3T" refers to the March 11, 2020 hearing transcript; and "4T" refers to the March 12, 2020 hearing transcript.

now uses CosmoLex accounting and office management software and has DeVito "doing [her] books."

On August 31, 2017, the OAE notified respondent that, in connection with the random audit, a disciplinary case had been docketed against her. On April 16, 2019, the OAE issued the formal ethics complaint underlying this matter.

Count one of the complaint charged respondent with failure to safeguard funds; knowing misappropriation of client funds; failure to correct a misapprehension that had arisen with the OAE; and misrepresentation by silence to the OAE. This count focused on the Chike-Obi client matter.

On August 25, 2016, Chike-Obi had retained respondent to negotiate child support and parenting time with Melinda Shriver, the other parent of his child. Chike-Obi paid respondent a $2,000 retainer fee, via credit card. As mentioned above, Carmen R. Faia, Esq. represented Shriver.

Although the record is not entirely clear, it appears that respondent had reached an agreement with Faia for Chike-Obi's payment of $1,000 per month in child support. On Friday, October 14, 2016, Chike-Obi gave respondent $5,000, cash, representing client trust funds toward payment of the child support.

Respondent subsequently issued ATA checks to Shriver on October 17, 2016 ($2,000); November 15, 2016 ($1,000);[9] December 2, 2016 ($1,000); December 16, 2016 ($1,000); and January 11, 2017 ($1,000).

Respondent conceded that she had deposited Chike-Obi's client trust funds in her ABA rather than her ATA; that, with the exception of eight days in December 2016, between November 17, 2016 and January 4, 2017, none of her four bank accounts, individually or in the aggregate, held the amount of funds she should have been holding, inviolate, for Chike-Obi. Respondent further conceded that the insufficient client trust funds were due to her use of Chike-Obi's monies, without his authorization, to pay her mortgage and personal expenses, to refund money to a client, and to pay court filing fees. Despite those admissions, respondent denied that she had knowingly misappropriated Chike-Obi's funds, asserting, instead, that her misappropriations had been negligent, due to her poor recordkeeping practices. She further asserted that she had the ability, at all relevant times, to replenish the shortages.

Respondent testified that, prior to the Chike-Obi matter, she never had received $5,000 in cash from a client. Given the fear that she might lose the funds and, because she "didn't have $5,000 to pay back a client," respondent

[9] As stated previously, the November 15, 2016 ATA check was dishonored. The December 2, 2016 ATA check replaced the November 15 check and cleared the account.

tried to deposit the cash in her ABA via ATM the very evening she received it. She claimed, however, that the machine "wouldn't take it." Thus, she was required to make four smaller deposits in the individual amounts of $2,150; $2,250; $450; and $50. The machine, however, "just would not take" the last $100. Respondent found this "very strange" and suspected that "maybe the money [wasn't] good."

On Monday, October 17, 2016, respondent deposited the final $100 in her ABA, via ATM. Thus, as of October 17, 2016, respondent was holding $5,000 in her ABA on behalf of Chike-Obi for his payment of child support to Shriver. Respondent should have been holding the $5,000 for Chike-Obi in trust, in her ATA, the balance of which had been only $32 since September 30, 2016.[10]

Respondent agreed that Chike-Obi had entrusted her with the $5,000, which was to be used solely to pay child support to Shriver, and that she was neither entitled nor authorized to use the funds for any other purpose.[11] Respondent further admitted that neither Shriver nor her attorney, Faia, had authorized respondent's use of the monies for any purpose other than the payment of child support.

[10] Colangelo testified that, through the beginning of January 2017, respondent held no other client trust funds in her ABA.

[11] Colangelo was unable to communicate with Chike-Obi, who did not return his telephone calls or reply to his letters.

Respondent claimed that, based on her concern about "whether . . . the money was good or not" and "the idea that [Chike-Obi] might be deceptive," respondent "acted on those biases" and "changed what [she] did" in respect of his client funds. Thus, she claimed that she deviated from her practice of transferring client funds from her ABA to her ATA within days of receipt and, instead, chose to delay her transfer of any of Chike-Obi's $5,000 to her ATA.

Respondent claimed that, subsequently, Chike-Obi gave her $2,000 in cash, and that she had the "same problems with the money," although the deposit did go through. She discussed the matter with a bank representative, who said that, when the bills are "too old," an ATM will "sometimes reject[] them." Consequently, respondent told Chike-Obi that she could no longer accept cash from him.

On October 13, 2016, the day before respondent deposited Chike-Obi's trust funds in her ABA, the opening balance was $703.88. On that date, respondent deposited a $2,700 fee and, after a few debits to the account, the ending balance was $2,880.87. On October 14, 2016, following respondent's deposit of Chike-Obi's $4,900 and a $23.26 purchase, her ending ABA balance was $7,757.61.

On October 17, 2016, respondent transferred $2,200 from her ABA to her personal account. She maintained that she did not "usually leave a lot of money

in [her] business account." Prior to the transfer from her ABA, her personal account balance was $0.71.

In addition to the $2,200 transfer and the deposit of Chike-Obi's remaining $100, on October 17, 2016, the following ABA transactions took place: (1) a $30.21 purchase at Acme; (2) a $50 transfer to Anderson Angelia; (3) a $500 cash withdrawal via ATM; (4) a $200 payment to Chase; and (5) the payment of ABA check number 1318, to the New Jersey Superior Court, in the amount of $92. Thus, on October 17, 2016, her closing ABA balance was $4,785.40, which was $214.60 less than what respondent should have been holding in trust for Chike-Obi alone.

Respondent acknowledged that, on October 17, 2016 – the same day she had transferred $2,200 from her ABA to her personal bank account – she paid her $2,084.91 mortgage from the personal account. In addition to the $2,200 transfer, she deposited a $3,021.26 check in her personal account on that date. Given the more than $3,000 deposit, Colangelo could not "say for certain" that "100 percent" of the $2,000 deposit was used to pay the mortgage.

During respondent's December 12, 2017 OAE interview, Colangelo had proposed the theory that respondent had used Chike-Obi's funds to "survive." Respondent countered that she had no need to use Chike-Obi's funds, because a

client had just paid her $2,700, which she had deposited in her ABA on October 13, 2016.

On October 17, 2016, notwithstanding her ATA's $32 balance, respondent issued ATA check number 1006, payable to Shriver, in the amount of $2,000. She sent the check to Faia two days later, on October 19, 2016. On October 20, 2016, respondent transferred $2,000 from her ABA to her ATA. Respondent testified that she "transferred those monies over, because . . . [she] needed to write [Shriver] a check. That was [her] obligation." Respondent asserted that she "never thought about the money . . . again until [she] needed to write another check."

As detailed above, six days later, on October 26, 2016, respondent transferred $2,000 from her personal bank account to her ATA. Respondent testified that she transferred the funds because they "had been sitting in [her] personal account doing nothing." She had not spent the money, which "was just there."

On October 31, 2016, after the deduction of a $14 service fee, respondent's ending ATA balance was $4,018. Thus, on November 3, 2016, when ATA check number 1006 was presented for payment, it cleared the account, reducing the ATA balance to $2,018. However, as she conceded, on

that date respondent should have been holding $3,000 in her ATA, inviolate, on behalf of Chike-Obi.

In fact, respondent had deposited Chike-Obi's $5,000 in her ABA and had never transferred the funds, as a whole, to her ATA. Thus, Chike-Obi's remaining $3,000 should have remained, inviolate, in her ABA. However, on November 3, 2016, the balance was only $40.43.

On November 8, 2016, respondent issued to Shriver ATA check number 1007, in the amount of $1,000. She sent the check to Faia on that same day. On November 15, 2016, that check was dishonored for insufficient funds. Respondent acknowledged that she was responsible for knowing "what was going on in [her] attorney trust account." Yet, she testified that, when she issued the November 8, 2016 check, she did not verify her ATA balance.

When respondent issued check number 1007, her ATA balance was $2,018. On November 10, 2016, however, respondent electronically transferred $810 to her ABA to pay for office rent, which she paid to the landlord, C.G.C.K. Associates, four days later. On November 15, 2016, respondent electronically transferred $1,000 and $150 from her ATA to her personal account, thereby reducing her ATA balance to $58. Thus, on November 15, 2016, when check number 1007 was presented for payment, the check was not honored.

After the bank deducted a $14 service fee, on November 30, 2016, respondent's ATA balance was $1,159.

Respondent admitted that, between November 17 and December 4, 2016, the combined total balance of all four of her bank accounts under scrutiny was less than the $3,000 of Chike-Obi's funds that she was required, during that period, to hold in trust, because she had used Chike-Obi's funds to pay her mortgage and personal expenses, to issue a refund to a client, and to pay court filing fees. Colangelo testified that he had examined and included all of respondent's bank accounts as part of his analysis because, during the relevant period, she was depositing and withdrawing funds in and from those accounts, and he "wanted to get a better feel and understanding for what was occurring if there was any sort of a need for the funds."

On December 2, 2016, respondent transferred $1,000 to her ATA from her ABA and issued to Shriver another ATA check, in the amount of $1,000, which replaced the dishonored check. When that check cleared the account, on December 7, 2016, respondent's ATA balance was reduced to $1,159. Respondent and Colangelo agreed that, at this point, respondent should have been holding $2,000, inviolate, for Chike-Obi. That same date, respondent's ABA balance was less than $2,000.

Between December 9 and 15, 2016 and between December 20 and 27, 2016, the combined total balance of all four of respondent's bank accounts under scrutiny was less than $2,000 and, moreover, had shortages ranging from $154.72 to $306.26 regarding Chike-Obi's trust funds alone. Respondent agreed that this was because she had made cash withdrawals and had used Chike-Obi's funds to pay personal expenses.

On December 16, 2016, respondent issued to Shriver ATA check number 1010 in the amount of $1,000. At this point, respondent's ATA balance was $1,159 when it should have been at least $2,000. Her ABA balance was $1,279.91.

Respondent's ATA check number 1010 was not cashed until December 28, 2016, however. From December 20 through 27, 2016, the shortages for her combined accounts ranged from $28.35 to $168.02, and the combined total balance of all four of respondent's bank accounts was less than the $2,000 she was required to hold, inviolate, for Chike-Obi. On December 28, 2016, ATA check number 1010 was negotiated, leaving a balance of $159 in respondent's ATA.

Between December 28, 2016 and January 4, 2017, although respondent should have been holding $1,000 for Chike-Obi, the shortages for her combined accounts ranged from $295.66 to $376.95. Based on Colangelo's review of

respondent's bank statements, he concluded that she had depleted the funds via cash withdrawals and the payment of personal expenses from her ABA and her personal account. Respondent agreed.

As of November 28, 2016, respondent's ATA balance should have been $3,000. Instead, the balance was only $1,173. Respondent did not have enough funds in her ATA to meet her obligations to Chike-Obi until January 9, 2017. Thus, with the exception of four days between November 28, 2016 and January 4, 2017, respondent did not hold in her ATA sufficient funds on behalf of Chike-Obi.

On January 9, 2017, respondent's ATA balance was only $145. On that date, respondent transferred $1,000 from her ABA to her ATA, increasing the balance to $1,145. On January 11, 2017, respondent issued to Shriver ATA check number 1011, in the amount of $1,000.

On January 19, 2017, respondent deposited $18,000 in her ATA. Because ATA check number 1011 had not yet been negotiated, that deposit increased respondent's ATA balance to $19,145. On February 10, 2017, ATA check 1011 cleared the account.

In addition to knowing misappropriation, the complaint charged respondent with having violated RPC 8.1(b) and RPC 8.4(c), based on alleged omissions in her reply to the OAE's November 28, 2016 letter seeking an

explanation for the November 15, 2016 overdraft. According to the complaint, respondent's lack of candor led the OAE initially to conclude that the November 15, 2016 overdraft was the result of a simple mistake.

The OAE's claim that respondent violated RPC 8.1(b) and RPC 8.4(c) by silence was based on her failure to mention, in her December 6, 2016 letter to the OAE, all financial transactions involving the Chike-Obi matter and all financial transactions that took place in her accounts during the month of November 2016. According to Colangelo, respondent left out multiple, relevant pieces of information.

Particularly, respondent acknowledged that her December 6, 2016 letter did not mention the $5,000 in client trust finds that she had received, in October 2016, from Chike-Obi. However, respondent testified that she had provided the OAE with her "best record as to this file," including Chike-Obi's ledger card, which reflected the deposit of a total of $5,000 on various dates, but not October 14 and 17, 2016. She emphasized that the specific dates were reflected on the bank statement for her ABA. Respondent acknowledged that "it doesn't make sense today, but at the time, that's what I was thinking." She stated that, if the OAE had asked her to provide additional information, she would have done so.

As for the $2,200 transfer from her ABA to her personal account, on October 17, 2016, respondent maintained that, since the transfer was to her

personal account and was not from her ATA, she did not include it on the Chike-Obi ledger card. Although the $2,000 transfer took place after she had deposited Chike-Obi's $5,000 in her ABA, respondent claimed she "didn't have any reason to believe it was Chike-Obi's funds at the time of the transfer." She maintained, "[i]t might not appear to be truthful, but it is the truth. This is what happened at the time I made those transfers." Respondent acknowledged that the client ledger also did not reflect the $2,000 transfer from her personal bank account to her ATA, on October 26, 2016.

In addition, neither the letter nor the trust receipts and disbursements journals reflected the $810 transfer from her ATA to her ABA, on November 10, 2016; the $150 transfer from her ATA to her personal account, on November 15, 2016; or the transfer of $150 from her ABA to her ATA, on November 16, 2016.

Regarding respondent's claim, in her overdraft reply letter, that, on November 15, 2016, she had transferred $1,000 from her ATA to her personal account under the mistaken impression that she was transferring the money from her ABA, Colangelo testified that, on November 15, 2016, respondent's ABA balance was only $135.31. Yet, on that same date, she transferred $60 from her ABA to her personal account – a fact which Colangelo asserted supported the

OAE's theory that respondent was acutely aware that her ABA balance was only $135.31 on that date.

Respondent did not dispute Colangelo's testimony regarding her November 2016 financial transactions. Rather, she asserted that the OAE had requested an explanation for the dishonored check, and that she attempted to provide such an explanation in her December letter. She maintained that she did not provide information about the other November transactions because she believed that the check had been dishonored due to the mistaken $1,000 transfer from her ATA to her personal account.

According to respondent, when she transferred the $1,000 from her ATA to her personal account, her personal account balance was already $2,000, as that amount "goes into [her] account every month" to pay her mortgage. She maintained that she, thus, did not need to transfer $1,000 into the account to pay the mortgage. Her December 6 letter did not mention that she used the $1,000 to pay her mortgage because, she claimed, she did not. Indeed, once the mortgage was paid, she had more than $1,000 remaining in her personal account. At that point, respondent maintained that she realized that she had made a mistake and, thus, on November 16, 2016, she transferred the $1,000 back to her ATA to correct the error.

Respondent testified that she did not recall making the $810 transfer from her ATA to her ABA. She stated that, if she had, she would have returned the funds to her ATA just as she had done with the $1,000. She claimed that she simply did not know "what happened" or "how it happened."

Respondent acknowledged that, four days after making the $810 transfer from her ATA to her ABA, she paid her office rent in that amount. She also acknowledged that, on November 14, 2016, her personal account had a $663.71 balance. Finally, she acknowledged that, prior to the $810 transfer, her ABA had a balance of only $595.02. The balance in her business savings account was only $0.11.

Respondent claimed that this was "not the entire picture," asserting that she "tend[s]" not to leave money in her ABA. Thus, if her ABA had "too much money," her practice was to transfer the excess to her personal account. If her ABA required an infusion of funds, she transferred the funds back to that account.

When the OAE presenter pressed respondent about having highlighted only the $1,000 transfer from her ATA to her personal account, in the December 6, 2016 letter, respondent replied:

> I responded to the question that was asked about a specific check. I knew the check bounced on -- what's the date of the letter? Whatever the date of the letter is, when I responded to the OAE, I knew the check had

> bounced, and I believed the check bounced because I had transferred the $1,000 from my – from the trust account to my personal account. At that time, I did not even realize that I transferred the $150 to my personal account from the trust account. I did not think that one had anything to do with the other. I wasn't even thinking of the $150. I was simply responding to why did this check for $1,000 bounce. And in my mind, it bounced because I had erroneously transferred $1,000 into my personal account. And that's why the money was returned to the trust account as soon as I realized that. I did not need $1,000 to pay my mortgage because I had sufficient funds in the account at the time the $1,000 was deposited to pay my mortgage. I was simply responding to the OAE's query about why that check bounced.
>
> [1T133 to 1T134.]

Respondent insisted that she had provided the OAE with all the information requested in its November 28, 2016 letter. She continued to maintain that the OAE had asked for an explanation of the $1,000 overdraft, which she provided.

When the presenter stated, on cross-examination, "[y]ou seem to have a good knowledge of what's in your accounts," respondent replied that, at the time of the conduct under scrutiny, she did not. She countered that she had prepared for the hearing. The bottom line, she said, was that, at the time of the conduct, she "wasn't looking at balances per day." She did not check the daily balances to ensure that "every day [the] balance was a particular number." She was paying her bills "because [she] thought there was money to pay."

Respondent conceded that, as of December 7, 2016, she should have been holding $2,000 in trust for Chike-Obi. She agreed that, between November 17 and December 4, 2016, she had used Chike-Obi's funds to pay her mortgage, purchase personal items, refund money to a client, and pay court filing fees. The shortage in her combined accounts ranged from $111.26 to $1,129.83 on behalf of Chike-Obi alone.[12] The ATA shortages ranged from $800 to $2,800.[13]

Respondent did not know that, from December 28, 2016 through January 4, 2017, her ATA remained short by more than $800, although she acknowledged she had since learned that to be the case. She also did not know that her ATA was short by $2,000 on December 7, 2016. Thus, she did not replenish the account with $2,000.

Once again, respondent asserted that, in respect of the overdraft, she had inadvertently transferred funds from her ATA to her personal account rather than from her ABA to the personal account, which was a typical practice of hers over the years. She maintained that, previously, she had never made a transfer from her ATA to her personal account. Once respondent realized that she had done "something wrong," she "immediately returned the thousand dollars" from

[12] Due to either a mistake in the transcription or on Colangelo's part, the smaller shortage was inaccurately identified in the transcript as $111.28.

[13] In our view, these numbers are incorrect. The low ATA balance was $1,173. The high balance was $2,159. Thus, the range of the shortages was $841 to $1,827.

her personal account to her ATA. She returned $150 from her ABA to her ATA because she "must have mistakenly believed" that she had deposited the funds from her ATA into her ABA. She testified

> I'm not sure why I made three transfers that day or why I made those errors, but the fact is I did make the errors and as soon as I became aware of them, I remedied the errors.
>
> [3T156.]

In other words, respondent did not have "any other reason or rational explanation, that's just what happened." She continued

> And it might not -- it might not make sense to you, but that's the truth of the matter. I do things that doesn't [sic] make sense all the time. I have made -- I have made mistakes in my personal life, putting aside this, I could tell you some of those mistakes that I've made that you would say, but why would you do that?
>
> I went into my mother's account that I have had for over 20 years, never used it, my name is on the account, have no business using it. I made an error and withdrew money from her account thinking it was my account. Didn't realize the error until the teller told me that it was the error. What did I do? I took her account, her -- her bank [ATM] card, and I left it at her house to prevent this from happening again.
>
> I make errors that normal people don't make. And I say normal, because I don't know how else to -- to explain it. I paid my utility bill, $37 from a Jamaican account, from my Jamaican account. I would never do that, because the exchange rate is ridiculous. That was an error. I didn't see the error until I was reconciling my

> books that month. And I thought, does Jamaica have a Suez account? Then I realized that I had made the error.
>
> It doesn't happen all the time, but it happens, I make errors. I'm not perfect, I make errors. When I realize that I make errors, I take corrective action.
>
> So the card that I used to pay the Suez bill, now I have two -- two wallets, one for Jamaica when I'm going to Jamaica, the cards that I need in Jamaica are in that wallet. I have a United States wallet, I keep the cards that I use here in that wallet. I make errors. I make mistakes. This was one of them.
>
> [3T191 to 3T193.]

Regarding the OAE's theory that she needed Chike-Obi's funds to "survive," respondent testified that she is married to Courtney Nelson, a mechanical engineer. Nelson, who also testified, estimated that, in 2016 and 2017, he earned approximately $120,000 to $125,000 as a staff engineer with Sikorsky Aircraft Corporation, a division of Lockheed Martin. He had been employed by Sikorsky for thirty-three years.

Respondent and Nelson agreed that he has provided her with funds "whenever she tells [him] that she needs it." For his part, Nelson testified that he has never had financial problems.

Respondent identified several checks that Nelson had issued to her between March 2016 and March 2018, in amounts ranging from $500 to $5,000,

totaling $19,000.[14] According to Nelson, these were the only funds that he had provided to respondent during that period. She did not tell him how she had used the funds.

Respondent testified that she deposited most of the checks issued by Nelson in her ABA. She claimed that none of the funds were provided to cover shortages in her ATA. Nelson has never required that respondent repay the funds. However, if she has "extra money," she shares it with him.

Respondent testified that, during the period at issue, she was unaware that she was spending client trust funds and causing ATA shortages. If she had, she would have explained the situation to Nelson and asked him to replenish the account. Indeed, that "would be – actually be a reason to ask him, if I knew that there was a shortage." She clarified, however, that she has always understood that she could not use client funds even if she could have obtained replacement monies from Nelson. Yet, she never asked Nelson to replenish her ATA because she "didn't realize that there was a shortage."

On cross-examination, Nelson asserted that the bank statements he had provided to the OAE did not represent all his assets. He claimed he had additional investment accounts. He did not, however, produce any information addressing either those accounts or his debts and liabilities.

[14] On December 5, 2016, Nelson also gave respondent $1,000 cash.

Respondent testified that, with one exception, each time she issued a check to Shriver, there was money in "the account, and the check cleared." In the end, she asserted, no economic harm had been sustained by any client, including Chike-Obi, although there may have been a two-week delay in Shriver's receipt of child support.

Colangelo acknowledged that, during respondent's demand interview, he injected the theory that she had used Chike-Obi's funds to survive. He maintained that he did not know, at that time, whether she had access to funds from another source. Colangelo recounted that, during the OAE's investigation, respondent never asserted that she had access to funds from her husband or any other person. She did not provide the OAE with any documentation regarding her family's assets or expenses. In turn, respondent testified that she simply had answered the questions that were asked of her.

Regarding mitigation, respondent testified that she had fully cooperated and was truthful in replying to all the OAE's inquiries during its probe into the overdraft, all three random audits, and the disciplinary investigation. She also noted the passage of time between the December 2017 demand interview and April 2019, when she was served with the formal ethics complaint. Further, despite the OAE's claim that she had knowingly misappropriated client funds,

the OAE allowed respondent to continue practicing law, which she was still doing as of the hearing.

In addition, respondent testified that she had served, since 2002, on district fee arbitration committees in various counties. Specifically, for approximately two years, she had served as the Vice-Chair of one of the committees, until her term concluded, in 2018. Respondent noted that, despite the OAE's insistence that she had knowingly misappropriated Chike-Obi's funds, on conclusion of her term as Vice-Chair, the OAE presented her with a certificate of appreciation, on August 31, 2018, signed by OAE Director Charles Centinaro. Thereafter, on October 12, 2018, the OAE sent another letter to respondent, thanking her for her service on the committee and encouraging her to "serve again in the future."

Finally, respondent has provided pro bono services on behalf of New Jersey Legal Services, Legal Services of New Jersey, and the Women's Rights Information Center.

In respect of respondent's character, Nelson testified:

> Besides my mom and her mother, my grandmother, Rosemarie is the most honest person that I know of. Okay? It's one of the reasons I married her. I trust her totally. I never question when she asks, that's why I never question, because I have complete trust in her.
>
> [4T92 to 4T93.]

THE PARTIES' POST-HEARING SUBMISSIONS

In support of its request for disbarment, the OAE relied on the special master's findings and conclusions, as well as its summation brief, dated June 1, 2020, and reply brief, dated June 16, 2020. The OAE argued that, from October 14, 2016 through January 9, 2017, respondent's ATA was "continuously short" of the funds required to be maintained for Chike-Obi, in amounts ranging from $841 to $4,968. Moreover, from November 17, 2016 to January 4, 2017, with the exception of nine days in December 2016, the sum total of all four of respondent's bank accounts was short of the funds required to be maintained for Chike-Obi, in amounts ranging from $28.35 to $1,129.86. As respondent admitted, these shortages were due to her use of Chike-Obi's funds to make purchases and to pay her mortgage and office rent, among other personal expenses.

The OAE also argued that respondent's pattern of moving funds between accounts when certain payments, such as her mortgage, office rent, and child support to Shriver were due, demonstrates that, despite her claims to the contrary, she was not merely negligent in the handling of her accounts. Moreover, in the OAE's view, respondent's attempt to show she had no need for Chike-Obi's funds, by producing her husband's testimony at the hearing, carried no weight, as it was untimely; the family's total financial picture, including

liabilities, was incomplete; the evidence was only marginally relevant; and respondent's need of $20,000 in financial assistance from her husband, between March 2016 and March 2018, supported the OAE's theory that she was in financial distress.

According to the OAE, the clear and convincing evidence also established that respondent violated RPC 8.1(b) and RPC 8.4(c) by failing to provide the OAE with complete information about the November 15, 2016 overdraft. Specifically, the OAE asserted that she had failed to disclose the two initial deposits of Chike-Obi's $5,000 in her ABA and failed to disclose transfers from her ATA before and after ATA check number 1007 was dishonored, thus, failing to report crucial information pertaining to her handling of Chike-Obi's funds.

In turn, counsel for respondent argued that the record lacked clear and convincing evidence that respondent knowingly misappropriated Chike-Obi's funds. Rather, respondent was a "messy bookkeeper," who had no need to misappropriate money, had "difficulty with accounting processes," and was a "good person," and "not a thief."

Regarding the random audits in 2006 and 2011, counsel argued that respondent received no discipline for the recordkeeping violations, no help in correcting her accounting practices, and no follow up from the OAE.

Regarding the OAE's November 28, 2016 letter seeking an explanation for the $1,000 overdraft, counsel argued that respondent "gave a specific answer to a specific question and provided the documents that were specifically requested."

Respondent further argued that, despite her deposit of Chike-Obi's $5,000 in her ABA, "every dollar" was paid to Shriver. She challenged the OAE's theory that she used Chike-Obi's money to "survive" in light of the evidence that "the family was not impoverished and that Mr. Nelson supplied [respondent] with money whenever she needed it."

Counsel also argued that the OAE's case was based on "speculative testimony and speculative decision-making," citing instances when, in answering questions, Colangelo used words such as "possibility" and phrases such as "it would appear." Further, counsel argued that Colangelo had assumed that respondent needed money to "survive," without having investigated her family's financial status.

Counsel also criticized the special master's speculation as to respondent's ability to see account balances on her bank statements, based on the special master's ability to do so and the special master's conclusions about respondent's family finances, which respondent argued were irrelevant. Significantly, counsel challenged the special master's finding that clear and convincing evidence

supported the knowing misappropriation charge, given the special master's comment that respondent's conduct, "if not grossly negligent, could amount to recklessness."

Finally, counsel pointed out that, in addition to an unblemished disciplinary history, respondent's "contribution to our society and to our justice system has been exemplary." Indeed, counsel emphasized that the OAE had commended respondent for her service to the bar and invited her to seek another appointment as a fee arbitration committee member, at the same time she was being accused of knowingly misappropriating Chike-Obi's funds.

Counsel also took issue with the special master's decision not to permit DeVito, who had issued an expert report, to testify as a fact witness. According to counsel, DeVito also would have provided factual testimony regarding the "inefficiencies and inaccuracies of her bookkeeping and bank procedures," which resulted in the invasion of Chike-Obi's funds, and the absence of need of the funds due to her financial stability and her husband's cash flow, thus establishing that respondent did not knowingly misappropriate Chike-Obi's funds. Respondent asserted that the special master's reliance on Colangelo's testimony, without the benefit of DeVito's, "slanted the record."

Counsel for respondent argued that respondent negligently misappropriated Chike-Obi's funds due to "poor banking practices and insufficient recordkeeping." Thus, he requested the imposition of a reprimand.

* * *

On August 27, 2020, the special master issued his report. First, the special master noted that respondent had admitted the recordkeeping violations and, thus, he concluded that the evidence sustained the RPC 1.15(d) charge.

Second, the special master found that respondent did not violate RPC 8.1(b) and RPC 8.4(c) based on the alleged omissions in her December 6, 2016 reply to the OAE's November 28, 2016 letter seeking information regarding the ATA overdraft. In the special master's view, the OAE's letter sought specific information about the overdraft, which respondent provided. He added that, if the OAE believed that respondent's reply was "insufficient," the OAE "had the right to request a clarification or additional information and/or supplemental documentation."

Third, the special master concluded that respondent failed to safeguard client funds, by depositing Chike-Obi's funds in her ABA rather than her ATA. The special master observed that, despite respondent's claimed concern about the legitimacy of the funds, she believed them "legitimate enough for $2,200.00" to be transferred to her personal account that same day.

The special master also found that respondent knowingly misappropriated portions of Chike-Obi's $5,000 in client trust funds, both by failing to deposit the funds into her ATA and by using the monies to pay personal expenses. The special master noted that, by October 26, "eighty percent (80%) of Mr. Chike-Obi's money was in respondent's trust account, but half of that money came from her personal checking account." The special master went on to evaluate respondent's finances, in line with the OAE's proofs, highlighting the ATA balances before and after payments to Shriver, as well as during the general period from early November 2016 through January 2017. Importantly, he noted the repeated movement of funds into her ATA just before a disbursement to Shriver. The special master emphasized that, during the month of November 2016, the highest ABA balance was $1,405.02, which was well short of the $3,000 that respondent should have been holding, inviolate, for Chike-Obi.

In respect of Nelson's testimony, the special master stated that his credit union statements did not demonstrate "a lack of financial stress," and that he was left unaware of whether the family's monthly income was "sufficient to meet its expenses." Thus, the evidence did not establish that respondent had no need to misappropriate Chike-Obi's funds. Furthermore, the special master noted that the "'need to misappropriate' is not a prerequisite for doing so."

The special master completed his analysis by observing the following:

> I must add, that if I were to accept Ms. Anderson's explanation of the events, I could not conclude that her actions were merely negligent. Many young attorneys begin practice upon entry to the bar with no mentor and are not versed in the mandated accounting techniques required by the Rules of Professional Conduct. Such a circumstance is not present here.
>
> Ms. Anderson had the benefit of not once, but on two prior occasions having been informed by the OAE of the proper methods for administering a trust account. An experienced, intelligent, well-educated person like Ms. Anderson if not having learned from the first audit, should have corrected all issues after the second. Her conduct, if not grossly negligent, could amount to recklessness. Her explanation that the money from the client may not have been legitimate does not coincide with the actions she took with that same money.
>
> [SMR,p.10.][15]

Given the rule in Wilson, the special master recommended respondent's disbarment for the knowing misappropriation of Chike-Obi's client trust funds.

* * *

At oral argument before us, respondent's counsel argued that the OAE had failed to meet its burden of proof that respondent committed knowing misappropriation, emphasized that the special master had excluded DeVito's testimony, which he claimed was improper and prejudicial to the defense, and compared respondent's conduct to that of the attorney in In re Jeney, 243 N.J.

[15] "SMR" refers to the August 27, 2020 report issued by the special master.

195 (2020), who was reprimanded for recordkeeping violations despite having been charged with knowing misappropriation. These arguments are addressed below.

* * *

Following our de novo review of the record, we determine that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. As detailed below, the special master's findings and conclusions were correct regarding respondent's recordkeeping violations and knowing misappropriation of Chike-Obi's client trust funds, albeit, as to the latter, for the wrong reasons. In our view, however, the special master erred in determining that respondent did not violate RPC 8.1(b) and RPC 8.4(c).

We adopt and uphold the special master's findings and determination to preclude the proffered expert testimony from DeVito. The special master's denial was based upon the fact that the proffered testimony was founded exclusively in DeVito's interview of respondent and her husband and would not aid his understanding of the facts as presented through the fact witnesses. Respondent's view that DeVito could have described the problems with respondent's accounting and banking procedures better than Colangelo and respondent does not change this result. Further, as the special master noted, respondent's mental state is the ultimate issue in this case and was not the

subject of the proffered expert testimony. See State v. Odom, 116 N.J. 65, 82 (1989); N.J.R.E. 703.

Respondent admitted the charged violations of R. 1:21-6, which also were the subject of testimony by respondent and Colangelo, who detailed the deficiencies. Therefore, the clear and convincing evidence establishes respondent's numerous violations of RPC 1.15(d).

The crux of respondent's misconduct was her knowing misappropriation of Chike-Obi's client trust funds. 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).]

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). Specifically, 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.

In this case, the OAE charged respondent with the knowing misappropriation of entrusted funds, citing both Wilson and Hollendonner. To be sure, the $5,000 under scrutiny constituted Chike-Obi's client trust funds. Based on the record before us, however, the Hollendonner charge cannot be sustained.

Specifically, although the parties agreed that Chike-Obi gave the $5,000 to respondent toward child support payments to Shriver, for respondent to disburse in $1,000, monthly installments, nothing in the record demonstrates that Chike-Obi had any contractual obligation to pay $1,000 monthly child support to Shriver, or that respondent had an obligation to Shriver to safeguard Chike-Obi's money for her benefit. Stated differently, there is no evidence of a court order imposing that obligation on Chike-Obi or respondent, vis-à-vis Shriver, or of a written, enforceable child support agreement between Chike-Obi and Shriver. In short, nothing in the record established, by clear and convincing evidence, that any agreement akin to an escrow arrangement had been established, or that Shriver had a demonstrable, enforceable right to the $5,000. Hollendonner, thus, is inapplicable to this case.

Regarding the principles of Wilson, however, we determine that respondent knowingly misappropriated Chike-Obi's client funds. Although respondent's failure to deposit Chike-Obi's $5,000 in client trust funds in her ATA constituted merely a failure to safeguard her client's funds, pursuant to R. 1:21-6(a)(1) and RPC 1.15(a) and (d), respondent's subsequent, repeated and unauthorized use of Chike-Obi's $5,000 constituted knowing misappropriation.

An examination of respondent's financial records clearly and convincingly demonstrates that, as soon as she deposited the last $100 of Chike-

Obi's $5,000 in client funds, she began to invade them. Further, within a few weeks, the entire corpus of his client trust funds had been depleted. Pursuant to disciplinary precedent, respondent's behavior constituted "lapping," that is, using one party's funds to pay trust obligations owed to another party. See In re Brown, 102 N.J. 512, 515 (1986). Respondent made either just-in-time deposits or transfers of funds back to her attorney trust or business accounts to cover trust account shortages, negative client balances, and obligations as they became due. Her financial records demonstrate this unethical practice.

One of the most commonly asserted defenses to knowing misappropriation is shoddy recordkeeping. Attorneys charged with the intentional invasion of entrusted funds frequently allege that their failure to properly maintain their trust account records prevented them from knowing that they were using entrusted funds for the benefit of themselves or another. They also often allege that their failure to promptly remove earned legal fees from their trust account (commingling), coupled with their failure to reconcile their trust account records, led them to believe that they had sufficient personal funds of their own in the account to cover personal withdrawals. Because the line between knowing misappropriation and negligent misappropriation is a thin one and because of the grave consequences that befall attorneys found guilty of the former, the standard of proof -- clear and convincing evidence -- must be fully satisfied.

For instance, in In re Fleischer, In re Shultz, and In re Schwimer, 102 N.J. 440 (1986), the attorneys commingled personal and trust funds and, ultimately, invaded clients' funds by exceeding the disbursements against their funds. The Court rejected the attorneys' defense that poor accounting procedures prevented them from knowing the amount of their own funds in the trust account:

> It is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using clients' trust funds. Lawyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds.
>
> [Id. at 447.]

Finding overwhelming evidence that the attorneys had knowingly misappropriated clients' funds, the Court ordered their disbarment.

Six months later, the Court decided In re Skevin, 104 N.J. 476 (1986). In Skevin, the attorney was out of trust in amounts ranging from $12,000 to $133,000. The attorney admitted the shortages but pointed out that he had deposited $1 million of his own funds in the trust account to cover personal withdrawals. The Court found that, because the attorney did not maintain an accounting or running balance of his personal funds in the account, each time he made withdrawals for himself and for clients before the receipt of corresponding settlement funds, there was a "realistic likelihood of invading the accounts of

another client since respondent had no way of knowing what the balances were." Id. at 485. The Court, thus, equated "willful blindness" to knowledge:

> The concept arises in a situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist. Such cases should be viewed as acting knowingly and not merely as recklessly. The proposition that willful blindness satisfies for a requirement of knowledge is established in our cases [citations omitted].
>
> [Id. at 486.]

The attorney was disbarred. Skevin is considered the seminal willful blindness case.

Another willful blindness decision is applicable to the facts of the instant case. In In re Pomerantz, 155 N.J. 122 (1998), the Court found that the attorney "had used her client's funds for her own purposes without authorization." Id. at 133. The Court explained:

> Her juggling of funds between her personal, business, and trust accounts belies her claimed lack of knowledge that she was out-of-trust. Respondent's behavior demonstrates that she was aware of shortfalls in her accounts. For example, respondent paid D'Esposito from the trust account rather than the business account when the business account did not contain enough money to cover the amount due D'Esposito. We have previously observed that when an attorney makes a loan to a deficient trust account, it indicates that the attorney may be "personally aware on that date that his handling of the trust account had produced the deficit result." [Ibid.]

Further, the Court noted that, even though Pomerantz "may not have intended to permanently deprive [the client] of her money," and that she "intended to replace the funds," her intentions were irrelevant, citing In re Irizarry, 141 N.J. 189, 192 (1995), and In re Noonan, 102 N.J. at 160. Id. at 134. As a corollary, the Court rejected the importance of the claimed ability to make restitution, noting that the restitution funds may fail to materialize. Id. at 134-35.

The attorney's defenses constituted willful blindness, in the Court's eyes, because knowledge that the invasion of client funds is likely as a result of an attorney's conduct constitutes "a state of mind consistent with the definition of knowledge in our statute law." Ibid. In other words, even if the Court had accepted Pomerantz's contentions that "she was unaware that she was out-of-trust, her 'willful blindness' satisfie[d the Court] that she knowingly misappropriated client funds." Ibid.

"The burden of proof in proceedings seeking discipline . . . is on the presenter. The burden of going forward regarding defenses . . . relevant to the charges of unethical conduct shall be on the respondent." R. 1:20-6(c)(2)(C).

To be clear, there must be clear and convincing proof of an attorney's knowing misappropriation to apply the ultimate sanction of disbarment. As the Court stated in In re Konopka, 126 N.J. 225 (1991),

> [w]e insist, in every Wilson case, on clear and convincing proof that the attorney knew he or she was misappropriating. . . . 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.]

The clear and convincing standard was described in In re James, 112 N.J. 580 (1988), as

> [t]hat which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established," evidence "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."
>
> [Id. at 585.]

To be sure, proving a state of mind, in the absence of an outright admission, may pose difficulties. However, "an inculpatory statement is not an indispensable ingredient of proof of knowledge . . . . Circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded." In re Johnson, 105 N.J. 249, 258 (1987).

Following our review of the record, we determine that the OAE proved, by clear and convincing evidence, that respondent repeatedly engaged in the knowing misappropriation of entrusted funds, in violation of Wilson. Respondent would have us believe that her use of Chike-Obi's funds was

negligent, as she had no ability to manage money, she does not work well with numbers, and that she did not properly keep track of her ATA and ABA transactions. In support of her position, during oral argument before us, respondent, through counsel, compared her conduct to that of the attorney in the recent matter of Jeney, who was not disbarred.

In that case, we determined that the record lacked clear and convincing evidence that the attorney knowingly misappropriated attorney trust funds relating to a real estate transaction. In the Matter of Robert Joseph Jeney, Jr., DRB 19-204 (January 14, 2020) (slip op. at 16). As in the instant matter, following an OAE audit, recordkeeping violations were found, and the attorney admitted to that aspect of misconduct. Ibid. The attorney denied, however, that he had misappropriated more than $6,000 in entrusted funds, arguing that he believed that the funds belonged to him in connection with unrelated legal services he had provided to the same clients, subsequent to the real estate transaction under scrutiny. Id. at 16-18.

The OAE's knowing misappropriation charges rested on a Skevin theory of willful blindness. Id. at 18. We concluded, however, that the facts of Jeney were distinguishable from the willful blindness precedent, noting that the attorney did not design a recordkeeping system that would insulate him from knowing what was going on with his trust account; did not intentionally and

purposely avoid knowing what was going on in his trust account; and did not engage in horrendous recordkeeping practices. Id. at 20.

We found that, rather, the attorney had botched a real estate closing, which, unbeknownst to him, left $6,000 on the ledger and in his attorney trust account. Thus, the attorney's primary act of misconduct was failing to fulfill his duties as an escrow and settlement agent, which included preparing an accurate HUD-1 and disbursing the proper funds to the proper parties. Ibid.

We further emphasized that no attorney has ever been disbarred for taking client funds on the reasonable belief of entitlement to the monies – a defense not present or applicable in the instant matter. Id. at 21 (citing In re Frost, 156 N.J. 416 (1998) and In re Kim, 222 N.J. 3 (2015)).

Finally, in Jeney, we emphasized that the attorney had not exhibited any behavior – such as the lapping and dishonesty present in this case – that suggested a nefarious purpose in his disbursement of the entrusted funds to himself. Id. at 23. Simply put, the facts and outcome in Jeney are fully distinguishable from the matter at hand.

Specifically, as detailed herein, the evidence clearly and convincingly establishes that, despite respondent's claims, her juggling of funds among and between her ATA, ABA, and personal accounts demonstrated an acumen belied by her claimed lack of knowledge of her account balances. On October 14, 2016,

respondent deposited $4,900 in the ABA, followed by the remaining $100 on October 17, 2016. Thus, on October 17, 2016, respondent's ABA should have held $5,000, inviolate, on behalf of Chike-Obi. Although respondent made no disbursement in Chike-Obi's behalf on that date, her ending ABA balance was $4,785.40. Thus, she had immediately invaded $214.60 of Chike-Obi's funds.

On October 17, 2016, respondent issued ATA check number 1006, payable to Shriver, in the amount of $2,000, which she mailed to Faia two days later. By this point, she was aware that the entrusted funds were in her ABA because, on October 20, 2016, she transferred $2,000 from her ABA to her ATA for the purpose of covering the check. This was an appropriate use of Chike-Obi's funds. Thus, as of October 20, 2016, respondent's ABA should have held $3,000 in Chike-Obi's behalf. Instead, the ending balance on that date was $2,480.29 and, thus, her ABA was out of trust by $519.71.

On October 31, 2016, respondent's ABA balance was reduced to $184.79. By that date, the account still should have been holding Chike-Obi's $3,000, inviolate. Thus, her ABA was out of trust by $2,815.21.

By close of business on November 1, 2016, respondent's ABA balance was $59.79. On November 2, 2016, it was $40.43. Thus, the Chike-Obi shortage was now $2,959.57. The shortage was caused by respondent's $2,200 transfer from her ABA to her personal bank account on October 17, 2016, in addition to

her cash withdrawals and payment of expenses. Chike-Obi's funds were essentially gone.

The next check, number 1007, issued on November 8, 2016, in the amount of $1,000, was dishonored. To be sure, at the time respondent issued that ATA check, there were sufficient funds to cover the check, due to the October 26, 2016 transfer of $2,000 from her personal account to her ATA. Yet, in the meantime, other ATA transactions took place. Even assuming respondent lost track of those events, she recovered quickly, by transferring – just in time – funds from her personal account and her ABA to fund the December 2, 2016 ATA replacement check and, later, the December 16, 2016 ATA check. The ABA funds were only available due to deposits from other sources.

Finally, respondent issued the final $1,000 check, on January 11, 2017, after she had transferred $1,000 from her ABA to her ATA on January 9, 2017. This transfer, however, was not Chike-Obi's original funds, which had been entirely spent by that point.

Respondent would have us believe that she had no idea what was happening with her attorney accounts. With one exception, despite respondent's protestations that she did not look at bank account balances, did not keep track of the funds in her various accounts, and did not "work very well with numbers," the transfers from other accounts into her ATA, either just before or just after

she issued a check to Shriver, demonstrate that she was quite adept at tracking and moving funds. Most telling was the claim that, despite her lack of awareness of what was going on with her attorney accounts, as well as her claimed lack of knowledge that ATA check number 1007 had bounced until late November 2016, she also testified that, the day after the check was returned, she realized her mistake and transferred the funds back to her ATA.

Further, after two random audits, respondent's claim that she still did not understand how to maintain and manage her attorney accounts cannot exonerate her. She had a heightened awareness of her responsibilities. Yet, she continued to ignore them. Further, her refusal to take her recordkeeping responsibilities seriously and to put her financial records in order serves only to condemn her. In In the Matter of Thomas Andrew Clark, DRB 16-111 (January 11, 2017) (slip op. at 59), we observed

> Although abominable recordkeeping practices may remove a case from the realm of knowing misappropriation, the Court has rejected the notion that an attorney "who just walks away from his fiduciary obligation as safekeeper of client funds can expect an indulgent view of any misappropriation." In re Johnson, 105 N.J. 249, 260 (1987). Rather, the Court "will view 'defensive ignorance' with a jaundiced eye." Ibid. Consequently, "[t]he intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation'." Ibid. In so ruling, the Court was confident that, "within our ethics system, there is

> sufficient sophistication to detect the difference between intentional ignorance and legitimate lack of knowledge."

In defending against the mens rea required for knowing misappropriation, respondent described her difficulty with numbers. Yet, instead of stopping there, she went on to say that she chose to do "the bear [sic] minimal [sic]" because money was not "something that [she] liked to deal with" – a clear abdication of her acknowledged responsibility for her attorney accounts.

Further, respondent's repeated claims that she did not check her account balances and, thus, she often did not know how much money was in her accounts, were simply not true. First, respondent demonstrated a clear ability to repeatedly fund the monthly payments to Shriver. She also managed to know and understand her account balances enough to transfer funds, from whichever account(s) necessary, to make timely payments of other monthly obligations, such as her mortgage and office rent. Simply put, whatever her deficiencies in recordkeeping and banking procedures, respondent was able to keep her financial ship afloat.

Respondent cannot have it both ways. On the one hand, she claimed ignorance when it came to Chike-Obi's funds. Yet, on the other hand, she moved funds around to pay the mortgage and office rent or to avoid having too much money in any given account. More importantly, she claimed that, after the

mortgage was paid, in November 2016, she realized that she had made a mistake in transferring funds and then fixed it.

Respondent presented evidence of Nelson's generosity in an attempt to overcome the OAE's suggestion that she expended Chike-Obi's funds to "survive." Nelson's testimony was to demonstrate that, if respondent needed money, she did not have to resort to stealing funds from clients. Rather, she simply could have asked Nelson.

Here, too, respondent's evidence falls short. Although Nelson presented credit union statements showing some savings, the special master was not presented with the complete picture regarding his and respondent's assets and liabilities. More importantly, we need not consider respondent's financial status and whether she "needed" Chike-Obi's funds in order to "survive." As Noonan proclaimed, "the pressures on the lawyer to take the money," however "great," are irrelevant to a determination of knowing misappropriation. Noonan, 102 N.J. at 160. As the special master recognized, although financial need may provide a motive for a lawyer's misappropriation of the client's funds, it is not a prerequisite.

The clear and convincing evidence establishes that respondent knowingly misappropriated $3,000 of Chike-Obi's funds, which were to be used solely for the payment of child support to Shriver.

Finally, the clear and convincing evidence also supports the RPC 8.1(b) and RPC 8.4(c) charges. The November 15, 2016 ATA overdraft did not – as respondent claimed to the OAE and testified before the special master – occur because she had mistakenly transferred $1,000 from her ATA, instead of her ABA, on that date. The ATA beginning balance on November 15, 2016 was $2,018. Thus, the "accidental" transfer alone would have left $1,018 in her ATA, which would have covered ATA check number 1007, when it was presented on November 15, 2016. Instead, the check was dishonored because respondent transferred an additional $960 from her ATA to other accounts.

Respondent's claim that she mistook her ATA for her ABA when she made the $1,000 transfer from her ATA to her ABA, on November 15, 2016, lacks credibility. Five days earlier, she had transferred $810 from her ATA to her ABA. At the time, she must have known, or would have learned, that her ATA was no longer listed first on the bank statement, because her attempt to transfer $810 from the first listed account (on the belief that it was her ATA) would have been impossible, as the balance in the first listed account (which was her ABA) was only $595.02. Second, even if there were sufficient funds in the first listed account (her ABA), it would have been impossible to transfer those funds from the first listed account to the first listed account.

Moreover, in addition to the $1,000 transfer, respondent transferred $150 from her ATA to her personal account on November 15, 2016. Again, if she believed that the first listed account was her ATA, she would have been unable to make the transfer because the actual first listed account, her ABA, had a balance of only $135.31. Had the OAE known about the $810 and $150 transfers, respondent's initial excuse about mistaking her ATA for her ABA on the bank statement would have evaporated, and the truth of the bounced check would have been exposed in connection with the overdraft letter. Respondent withheld this information from the OAE, however, which caused the OAE to initially accept her false claim that a mistake had caused the overdraft. She, thus, violated RPC 8.1(b) and RPC 8.4(c).

To be sure, the $960 in additional transactions in November 2016 were reflected on the bank statement that respondent provided to the OAE with her December 6, 2016 letter. However, that statement was not a final statement for the month of November and did not contain a running balance.

To conclude, respondent knowingly misappropriated Chike-Obi's client trust funds, which she was duty-bound to hold, inviolate, despite their deposit in her ABA. In light of respondent's knowing misappropriation of client funds, disbarment is the only appropriate sanction, pursuant to Wilson. We dismiss the

charge that respondent further violated Hollendonner. We need not address the appropriate quantum of discipline for respondent's additional ethics violations.

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: **/s/ Timothy M. Ellis**
Timothy M. Ellis
Acting Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Rosemarie Anderson
Docket No. DRB 20-285

Argued: March 18, 2021

Decided: July 26, 2021

Disposition: Disbarment

Members	Disbarment
Clark	X
Gallipoli	X
Boyer	X
Hoberman	X
Joseph	X
Petrou	X
Rivera	X
Singer	X
Zmirich	X
Total:	9

/s/ Timothy M. Ellis
Timothy M. Ellis
Acting Chief Counsel