Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 21-225
District Docket No. XIV-2017-0597E

In the Matter of	:
Joseph Cicala	:
An Attorney at Law	:

Decision

Argued: January 20, 2022

Decided: March 29, 2022

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

Lawrence S. Cutalo 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 Special Ethics Master Lisa D. Taylor, Esq. 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) (seven instances – knowing misappropriation of client

funds); RPC 1.15(b) (two instances – failing to promptly deliver funds to client); RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6); and RPC 8.4(c) (seven instances – engaging in 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 he be disbarred.

Respondent earned admission to the New Jersey bar in 1995 and to the Pennsylvania bar in 1994. He has no prior discipline in New Jersey. During the relevant timeframe, he maintained a practice of law in Nutley, New Jersey.

Prior to the commencement of the formal ethics hearing, respondent, through his counsel, moved to adjourn the hearing until a live (versus virtual) hearing could be safely accommodated. Although respondent acknowledged that R. 1:20-6(c)(2)(A) and the Court's Second Omnibus Order, effective April 24, 2020, contemplated virtual hearings for non-complex disciplinary matters, respondent argued that the facts of his matter were sufficiently complex and the potential consequences so severe as to warrant an adjournment until a live hearing could be held.

In particular, the Court's April 24, 2020 Omnibus Order stated that "[e]ffective May 11, 2020, disciplinary hearings and fee arbitrations will resume in a virtual (video or phone) format to the extent possible based on facilities,

technology, and other resources; and the nature and complexity of the matter." The Order also provided that the discretion to proceed in relatively straightforward matters rested with the Director of the Office of Attorney Ethics (the OAE). Respondent argued that disbarment is the most serious discipline to befall an attorney and, thus, the trier of fact should have the benefit of observing and assessing the demeanor and credibility of all witnesses, including that of respondent, in person. According to respondent:

> [t]his is particularly true, in the event of an appeal, when the DRB and the Supreme Court will place great weight on the Special Master's findings of fact and observations of [r]espondent's credibility and demeanor. In defending against disbarment, [r]espondent will have no further ability to present testimony, in any form, to the DRB or the Supreme Court.
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> [RMbp8.][1]

Respondent further alleged that the OAE exceeded the powers granted exclusively to the Court by permitting his hearing to proceed in a virtual format. Respondent again relied upon the Court's April 24, 2020 Order which, according to respondent, permitted virtual hearings only for non-complex disciplinary matters. The OAE Director, respondent argued, exceeded his authority by permitting this potential disbarment matter to proceed virtually, given its

[1] "RMb" refers to respondent's brief in support of his motion for an adjournment.

complexity which included: a three-year investigation by the OAE; violations that arose in connection with seven client matters; the parties, collectively, sought to introduce over eighty exhibits; and there were potentially sixty-eight witnesses.[2]

On January 15, 2021, the OAE opposed respondent's motion. First, the OAE argued that respondent's motion was nothing more than a delay tactic, noting respondent's failure to raise the objection during a July 27, 2020 prehearing conference; a September 10, 2020 discovery conference; or a November 17, 2020 final prehearing conference, during which the parties agreed on hearing dates. The OAE emphasized that, instead, respondent waited until two weeks before the commencement of the hearing to file his motion.

Next, the OAE pointed out that the Court previously had ruled, prior to the pandemic, that the use of telephonic and video conference testimony was permitted for grievants, witnesses, and respondents. See, e.g., In re Klamo, 225 N.J. 331 (2016), In the Matter of John A. Klamo, DRB 15-167 and DRB 15-168 (December 28, 2015) (panel chair properly overruled the attorney's objection and permitted the grievant to testify via telephone); In re Boyd, 221 N.J. 482 (2015), In the Matter of Carole King Boyd, DRB 12-329 (January 22, 2013) and DRB 14-141 (December 4, 2014) (panel chair should have permitted the

[2] Based on the record, six witnesses testified during the hearing.

attorney to testify via telephone; matter remanded to permit the attorney to appear by telephone if special circumstances existed; following remand, a hearing was conducted in which the attorney appeared via video conference; the attorney was reprimanded for her misconduct); and In re Tabor, 235 N.J. 162 (2018) (disbarment for attorney's knowing misappropriation of client funds; the attorney was allowed to testify via telephone). Further, the OAE argued that the use of Zoom technology, which includes video, would assist the fact finder in rendering credibility determinations and, thus, was an improvement over the previously approved use of telephonic testimony.

Finally, the OAE argued that the Court exercises its authority over New Jersey attorneys through, in part, the Board, the OAE, and the District Ethics Committees; as such, the Director is accorded, and properly exercised, the discretion bestowed upon him by the Court. R. 1:20-1(a); R.M. v. Supreme Court of New Jersey, 185 N.J. 208, 213 (2005).

On January 20, 2021, the special master denied respondent's adjournment motion. The special master relied upon the Court's eighth and ninth Omnibus Orders, dated September 17 and October 8, 2020, which confirmed its earlier directives that disciplinary hearings may continue in a virtual format. She further determined that the Court's Orders afforded her the discretion to determine

whether, given the nature and complexity of the matter, a fair hearing could be held.

The special master determined that, in this matter, a virtual hearing was appropriate and consistent with the Court's directive, finding:

> [t]he allegations in this matter and the potential ramifications of a finding that the allegations are supported are extremely serious, however the nature of the allegations are straightforward. Both parties will have received and reviewed all of the exhibits in advance of the hearing.
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> [January 20, 2021 Order, ¶1.]

The special master rejected respondent's credibility concerns, noting:

> the hearing is scheduled for a video proceeding so that the facial expressions and the body language of all the witnesses, including the [r]espondent, can be evaluated and taken into account by the Special Ethics Master in assessing credibility.
>
> [Ibid.]

Moreover, the special master emphasized that she was experienced with the technology being utilized, having used the same or similar technology for recently held hearings. Specifically, she stated:

> [t]he Special Ethics Master is confident that she can devote the same attention to the substance of the proceeding as she would be able to do in person. The concern expressed by counsel for [r]espondent that exhibits will not be able to be simultaneously viewed while a witness is testifying is unfounded for several reasons, including the fact that the Special Ethics

> Master has requested and will have hard copies in her possession. She can also use a split screen format or a second laptop, which she has available, for reviewing electronic exhibits simultaneously if that is necessary and she will request a second Zoom log in at counsel's request if that is counsel's preference. Respondent and his counsel can communicate by text or email during the hearing in almost the same manner as if they exchanged paper notes during an in-person hearing. Alternatively, Respondent and his counsel can be in the same room wearing masks and utilizing separate screens so as to be able participate at a safe distance.
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> [Ibid.]

Accordingly, the special master denied respondent's request for an adjournment. She offered, however, that "if issues arise during the course of the proceeding they should be brought to [her] attention" for consideration. Ibid. The special master correctly noted that the Court Rules did not grant her the authority to adjudicate respondent's constitutional challenges to the virtual proceeding.[3]

Thus, the ethics hearing took place over four days in January and February 2021. Each day, respondent repeated his general objection to the virtual proceedings. Respondent did not, however, cite any specific deficiencies during the course of the hearing.

[3] R. 1:20-4(e) states, in relevant part, that "[a]ll constitutional questions shall be held for consideration by the Supreme Court as part of its review of any final decision of the Board."

At the conclusion of the hearing, the special master stated that, with minor exception, there seemed "to be no problem whatsoever" with the virtual format.

We now turn to the facts of this matter, which are largely undisputed, although respondent denied that he had a knowing mental state when he misappropriated client funds.

Respondent has been a solo practitioner since 2007. Prior to 2007, he had no experience maintaining an attorney trust account. Between 1995 and 2007, respondent had practiced law with a small law firm located in West New York, which employed a full-time bookkeeper. Subsequently, upon opening his solo practice in 2007, respondent performed all bookkeeping and accounting on his own behalf, first using QuickBooks and then by maintaining paper files. Respondent's law practice was primarily limited to matrimonial, estate, and foreclosure matters, although he occasionally handled personal injury cases.

This disciplinary matter arose in connection with the OAE's June 19, 2017 random compliance audit of respondent's financial accounts and records. The audit covered a two-year time period, from May 1, 2015 to April 30, 2017. Respondent maintained both his attorney trust account (ATA) and his attorney business account (ABA) with Wells Fargo Bank. During the random audit, the OAE discovered that respondent repeatedly had disbursed legal fees to himself

prior to depositing the client's corresponding settlement check, which conduct invaded other clients' trust funds, without their consent or authorization.

On July 5, 2017, the OAE sent respondent a letter enumerating the following recordkeeping deficiencies:

a) Client ledger cards with debit balances (R. 1:21-6(d));

b) No separate ledger sheet identifying any attorney funds held in ATA for bank charges (R. 1:21-6(d));

c) Inactive ledger balances remained in ATA for extended period of time (R. 1:21-6(d));

d) Attorney fees not deposited in ABA (R. 1:21-6(a)(2));

e) ATA checks disbursed against undeposited funds in eight client matters (R.1:21-6(D));

f) Improper designation of the attorney business account on bank statements, checks, and deposit slips (R. 1:21-6(a)(2));

g) Business receipts and disbursements journal not maintained (R. 1:21-6(c)(1)(A));

h) No monthly trust account reconciliation with client ledgers, journals, and checkbook (R. 1:21-6(c)(1)(H));

i) Processed business checks improperly imaged (R. 1:21-6(b));

j) Improper electronic transfers from the ATA without the appropriate documentation (R. 1:21-6(c)(1)(A)).

[PEx1.][4]

The OAE directed respondent, within forty-five days, to address each deficiency, in writing, and to produce to the OAE a detailed corrective action plan. In its letter, the OAE also notified respondent that, as the result of his practice of disbursing legal fees prior to depositing corresponding settlement checks in his ATA, the matter would be forwarded to the OAE Director for review and possible disciplinary action.

On September 21, 2017, respondent informed the OAE of the measures he had taken to remedy his recordkeeping deficiencies. Regarding his practice of disbursing legal fees from his ATA prior to his receipt and deposit of the client's settlement check, respondent asserted that he had ceased that practice and stated:

> [o]n the eight (8) noted occasions, I settled a matter, cut checks and deposited my earned fee into my business account prior to depositing the settlement check. This practice has ceased. All funds for which I will earn a fee will not be drawn upon until the checks are deposited and have cleared.
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> [PEx2.]

Respondent acknowledged to the OAE that this practice was unacceptable but maintained that the only instances in which he paid himself against undeposited settlements funds were in matters where he had earned the fee and

[4] "PEx" refers to the presenter's exhibits entered into evidence at the hearing.

was entitled to the fee pursuant to the terms of the agreements he had with the clients.

The OAE subsequently docketed the matter for investigation and, on December 20, 2017, respondent appeared for a demand audit. During his interview, respondent explained to the ethics investigator the process he generally followed when he settled the personal injury matters identified in the audit. Specifically, respondent required that the client sign a release or stipulation of dismissal, along with a disbursement sheet that itemized expenses and payments from the settlement funds. The settlement date, according to respondent, was the date these documents were executed by the client. Once the documents were executed, respondent would issue an ATA check to himself toward payment of his earned legal fees, regardless of whether he had received a corresponding settlement check or deposited the settlement check in his ATA. Respondent acknowledged that, by proceeding in this manner, he had invaded other clients' trust funds that he was required to safeguard. When asked where he thought the money was coming from, respondent admitted:

> whatever the balance was in my trust account at the time. It was poor business practice, poor judgment that I used in doing that . . . . It would come from whatever was in the trust account.
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> [PEx48p17.]

During the demand audit, when asked whether he held any legal fees in his ATA, respondent answered that it might have been a mixture but "it was mostly, if I'm being honest, it was probably mostly client funds."

During the ethics hearing, however, respondent modified his position, testifying that, at the time he disbursed legal fees to himself from his ATA, he believed his ATA held his own personal funds sufficient to cover the cost of the fees.

> Q: So besides the Cardentey (sic) matter, what other legal fees did you leave in your trust account?
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> A: As I said, I don't know. As I sit here today, I believe that there weren't any, but when I wrote the checks, I did believe that there was.
>
> Q: I'm sorry, as you sit here today, you do not think you had any legal fees remaining in your attorney trust account that you could use?
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> A: As a result of my reconciling for the random audit, and sitting through the random audit with Ms. Hagerman, I was made to realize that there was not funds in my account that belonged to me even though I thought that there was, and that what I did was improper . . . .
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> [3T151.][5]

[5] "3T" refers to the February 23, 2021 hearing transcript.

The OAE auditor, on the other hand, testified that, in order to verify that respondent's ATA contained no commingled funds, she had obtained financial records outside the audit period, dating back to 2014. She testified that, based upon her review of all the records, she could confirm that, with the exception of $10,000 in the Cardenty matter discussed below, respondent's ATA held no other commingled or personal funds.

Respondent also testified that, with respect to other personal injury matters that he handled during the same period, he did not take his fees prior to his collection of the underlying settlement funds. Respondent attributed his aberrational handling of the matters underlying this ethics proceeding to the fact that there were extraneous circumstances that prevented him from depositing the settlement checks sooner or properly reconciling his ATA.

Respondent stated that, prior to paying himself legal fees from this ATA, he simply verified that his ATA held sufficient funds to cover the disbursement. Respondent acknowledged that he did not know which client funds were impacted by his payments.

> Q: So would it be a fair statement to say that what you were doing is you would check to see if you had enough money to cover the check that you were going to write that was in your trust account?
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> A: I guess the answer to that question would be yes, but it's more that . . . I know what my balance is.

[PEx48p19.]

At the ethics hearing, respondent reiterated this practice but stated that he did not ordinarily disburse any funds, including his legal fees, until the corresponding settlement check was negotiated. He, thus, claimed that the client matters that gave rise to the ethics complaint were out of the ordinary.

> Q: Generally, when would you disburse the settlement proceeds?
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> A: After the check was received generally.
>
> Q: Okay. And generally, when would you take your own attorney's fees?
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> A: Other than the five or six matters that we have before us, the reason why I'm here today, I would take [indiscernible], the settlement check came in, and the funds were in my trust account.
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> Q: So the five or six matters at issue in the OAE's complaint are aberrational?
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> A: Yes, they are. And I say five or six. It's five personal injury matters and one nonpersonal injury matter. So its five PI matters, yes, they were aberrational.
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> [3T18.]

Regarding the client matters at issue, respondent paid himself legal fees but did not disburse any other funds from the anticipated settlement proceeds, including to the client, until the corresponding settlement check was deposited in his ATA and the funds cleared. Respondent told the OAE that he engaged in

this practice because he was "improperly handling it" and not because of any financial hardship. Specifically, when asked whether he was experiencing any financial difficulties, respondent explained:

> Nothing more than the ordinary, you know, solo practice paying bills, you know three kids, you know, wife. Nothing – no big financial hole. Just, you know, running the day-to-day in the practice. Solo practice, you know. Again, I'm not trying to make excuses, you know, you got guaranteed subpoena, $500 bill for service, there's, you know, Federal Express, there's, you know, the rent, the mortgage . . . . but no, I wasn't in any big financial crisis.
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> [PEx48pp23-24.]

During the audit period, respondent's ATA contained trust funds for over fifty clients. From February 3 to February 19, 2020, the OAE contacted those fifty clients, using contact information provided by respondent, to inquire whether respondent had obtained their permission to use their funds for himself. Of the thirty-four clients who responded to the OAE's inquiries, thirty-three stated that respondent had not asked for their permission to use their finds and that they had not authorized respondent to do so. The thirty-fourth client, Ivette Vigo, stated she may have authorized respondent to use her funds. Following its investigation, however, the OAE determined that respondent did not hold any funds on Vigo's behalf during the relevant time period.

None of respondent's clients complained that their funds were invaded and none of them were permanently deprived of their funds as the result of respondent's conduct.

Respondent was charged with knowingly invading seven clients' funds as discussed below.

The Nermin Ghabous Matter

Nermin Ghabous retained respondent to represent him in a personal injury action arising from injuries Ghabous sustained in an October 21, 2010 motor vehicle accident. The record does not include a written fee agreement regarding the representation. Respondent settled the case on Ghabous's behalf for $12,500. On September 22, 2014, Ghabous signed a stipulation of dismissal, in which he dismissed the claims against the defendant in exchange for the settlement proceeds. On the same date,[6] Ghabous signed a settlement memorandum that itemized certain settlement disbursements, including attorney fees in the amount of $3,881.24 and expenses in the amount of $856.28, a total of $4,737.52. The memorandum included a limited power of attorney (POA) that authorized

[6] Although the settlement memorandum is undated, respondent admitted the document was signed the same date, as was his practice.

respondent to sign Ghabous's name to the settlement check for deposit in respondent's ATA.

On September 22, 2014, the same date that the matter settled, respondent disbursed to himself $4,737.52 for legal fees and expenses, via ATA check number 1319.[7] At the time respondent paid himself legal fees in the Ghabous matter, his ATA held no funds on behalf of Ghabous, but held $39,561.63 in funds belonging to other clients.[8]

On September 29, 2014, seven days after paying himself legal fees from his ATA, respondent endorsed and deposited in his ATA the settlement check, dated September 25, 2014, in the amount of $12,500, and payable to "Nermin Ghabous and Attorney(s) Joseph Cicala ESQ." On October 10, 2014, respondent disbursed settlement proceeds in the amount of $7,762.48 to Ghabous, via ATA check number 1323.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a), and RPC 8.4(c) with respect to the Ghabous matter.

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[7] Respondent's client ledger card states that the check was dated September 16, 2014; the check, however, was dated September 22, 2014 and presented for deposit on the same day.

[8] Respondent testified that he did not know which clients' funds made up the $39,561.63 balance on September 16, 2014. He further testified that he "might have" had some of his own money in the trust account. Although respondent previously told the OAE that his ATA held "probably mostly client funds," respondent testified at the hearing that he was not certain and seemingly tried to distance himself from his prior admission by stating he did not understand the gravity of the situation at the time of his initial statement.

Although respondent admitted that he had paid himself legal fees prior to depositing the Ghabous settlement check in his ATA, he maintained that he had done so because he was accustomed to receiving settlement checks the same day, or within a day or two, of a settlement. He further explained that he had recently moved his law practice to his home to care for his daughter, who recently had surgery. Respondent testified that, during this period of time, he experienced difficulty handling his personal and professional obligations, and "just deposited the check knowing that the insurance company check was close behind, and it was more for convenience sake than anything else." Respondent further explained that Ghabous had been paid his settlement proceeds, that respondent only paid to himself his earned fee, and that there was no overdraft of his ATA or harm to other clients.[9]

The Eftihia Montano Matter

On June 8, 2012, Eftihia Montano retained respondent to represent her in a personal injury action arising from injuries she sustained in a slip and fall accident. The parties' written fee agreement provided that respondent would be paid a percentage of the net recovery "if the law firm recovers money" on her

[9] Respondent also pointed out that the Ghabous matter was outside of the random audit period, but that he had voluntarily brought this matter to the OAE's attention at the time of the audit.

behalf. On November 3, 2014, respondent settled the case on Montano's behalf for $36,000. On November 24, 2014, Montano signed a release of claims in exchange for the settlement payment. On the same date,[10] Montano also signed a settlement memorandum that itemized expenses totaling $1,376.71, and settlement disbursements, including attorney fees, in the amount of $11,539.29. The memorandum also included a limited POA that authorized respondent to sign the client's name to the settlement check for deposit in his ATA.

On November 6, November 12, and December 4, 2014, respondent issued to himself payments from his ATA, in the amounts of $3,000, $2,000, and $1,089.72, respectively, and totaling $6,089.72, toward legal fees and expenses.[11] At the time respondent paid himself legal fees in the Montano matter, his ATA held no funds on behalf of Montano but held funds belonging to other clients. Respondent did not know which clients' funds made up his ATA balance. Respondent testified that he was generally aware of the balance in his ATA and noted that it exceeded the amounts that he had disbursed to himself.

On December 18, 2014, approximately six weeks after paying himself the first installment towards his legal fees, respondent endorsed and deposited in his

[10] Although the settlement memorandum is undated, respondent admitted the document was signed the same date, as was his practice.

[11] The total legal fee was $11,539.29. Respondent shared the fee with another attorney who received a disbursement of $5,878.69.

ATA the settlement check, dated November 6, 2014, in the amount of $36,000 and payable to "Joseph Cicala LLC Law Office and Eftihia Montano."[12] The settlement funds cleared on December 19, 2014. On January 2, 2015, respondent disbursed the settlement proceeds in the amount of $23,083.35 to Montano, via ATA check number 1344.

According to respondent's client ledger card, $143 of the Montano settlement proceeds were not disbursed. Thus, on August 24, 2017, following the random audit, respondent zeroed out the ledger and credited the $143 balance to shortages on other client ledgers.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a) and RPC 8.4(c) with respect to the Montano matter.

Respondent admitted that he paid himself legal fees prior to depositing the Montano settlement check in his ATA. Respondent testified, by way of explanation, that he had a general idea of his ATA balance on the three dates he paid himself for legal fees, which balances were $21,795.92, $75,795.92, and $89,570.92, respectively. Respondent further explained that he paid himself his legal fee prior to the deposit of the settlement check because he was still caring for his daughter following her surgery, bringing her to follow-up medical

[12] Respondent's client ledger card stated that the deposit was made on November 19, 2014; the deposit slip, however, clearly indicated that the deposit was made on December 18, 2014 and credited to respondent's ATA on December 19, 2014.

appointments, and that he was constantly out of the office, with seventeen court appearances in fifteen business days. Further, Montano received the settlement proceeds and respondent only paid himself his earned legal fee. Moreover, respondent contended that the settlement check was dated the same date that he took his first draw of the earned legal fees, that there was no overdraft of his ATA, and that no client was harmed by his conduct.[13]

The Concetta Forst Matter

On August 15, 2012, Concetta Forst retained respondent to represent her in a contractual dispute with her employer. According to the terms of the written fee agreement, Forst agreed to pay respondent a $2,500 retainer plus twenty-five percent of any net recovery. On April 13, 2015, respondent settled the case on Forst's behalf for $30,350.92.

On April 16, 2015, Forst signed a release of claims in exchange for the settlement payment. On the same date,[14] Forst also signed a settlement memorandum that itemized expenses totaling $299.90, and settlement disbursements, including additional attorney fees, in the amount of $5,012.75,

[13] This matter was outside of the initial random audit period but was brought to the OAE's attention by respondent.

[14] Although the settlement memorandum is undated, respondent admitted the document was signed the same date, as was his practice.

for a total attorney fee of $7,512.76. The memorandum included a limited POA that authorized respondent to sign the client's name to the settlement check for deposit in his ATA.

On April 14, 2015, two days before the release and settlement memorandum were signed, respondent issued ATA check number 1354, payable to himself, in the amount of $5,312.65, toward legal fees and expenses.[15] At the time respondent paid himself legal fees in the Forst matter, his ATA held no funds on behalf of Forst but, rather, only on behalf of other clients. Respondent testified that he did not know which clients' funds were held in his ATA and that, at the time he disbursed fees to himself, he believed the balance may have also included his own personal funds.

On May 5, 2015, twenty-one days after paying himself legal fees, respondent deposited in his ATA the settlement check, dated April 16, 2015, in the amount of $30,350.92 and payable to "Concetta Forst and Joseph Cicala, Esq, Attorney Trust." On May 13, 2015, nearly a month after he paid himself, respondent disbursed the settlement proceeds in the amount of $25,038.27 to Concetta Forst, via ATA check number 1356.

[15] Respondent's client ledger card indicates that respondent paid himself on April 1, 2015. The check from his ATA, however, is dated April 14, 2015.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a) and RPC 8.4(c) with respect to the Forst matter.

Respondent testified that, at the time he paid himself legal fees from his ATA, his ATA balance was $24,606.79 and, thus, exceeded what he paid to himself in fees. Respondent explained that he did not immediately deposit the Forst settlement check due to his busy workload. Further, Forst received her settlement proceeds and respondent paid himself only his earned legal fee. Moreover, respondent contended that there was no overdraft of his ATA and that no client was harmed by his conduct.

The Domingo Cardenty Matter

Domingo Cardenty retained respondent, on a twenty-five percent contingent fee basis, to represent him in an action against P&A Auto Parts in which Cardenty sought the repayment of a loan.[16] P&A Auto Parts had defaulted and respondent obtained a final judgment on Cardenty's behalf.

On May 22, 2015, P&A Auto Parts paid the judgment, in the amount of $22,500, via a check payable to "Joseph Cicala Attorney Trust Account." On

[16] The record does not include a written fee agreement.

May 27, 2015, respondent deposited this check in his ATA and it was credited to his account on May 28, 2015.

Cardenty signed an undated, handwritten settlement sheet that reflected the gross settlement amount of $22,500 and twenty-five percent legal fees totaling $5,625, for which respondent already had received $750. Thus, according to the settlement sheet, Cardenty was entitled to $17,625 in settlement proceeds[17] and respondent was owed $4,875 in legal fees.

On May 28, June 16, and July 29, 2015, respondent issued to himself three payments from his ATA, in the amounts of $4,500, $4,000, and $4,000, respectively, and totaling $12,500, for legal fees. Thus, by June 16, 2015, respondent had overpaid himself $3,625 in legal fees and, by July 29, 2015, had overpaid himself $7,625 in legal fees. As of July 29, 2015, respondent held only $10,000 in his ATA on behalf of Cardenty, $6,875 less than Cardenty was due.

On September 11, 2015, respondent disbursed the settlement funds to Cardenty, in the amount of $17,625. Because respondent only held $10,000 of

[17] The settlement sheet is incorrect in this regard. Cardenty was due $16,875, not $17,625, in settlement proceeds. The $750 overpayment appears to be the result of respondent's failure to deduct his total legal fee ($5,625) from the settlement amount; instead, respondent deducted $4,875 which was the fee respondent was still owed after accounting for the $750 that he received upfront ($5,625 - $750 = $4,875). Stated differently, although respondent was only owed $4,875 from the settlement proceeds, his total legal fees should have been deducted in determining the amount owed to Cardenty. Although respondent overpaid Cardenty by $750, the overpayment did not invade other client funds because respondent paid Cardenty from his ABA and not his ATA.

Cardenty's settlement funds in his ATA, and not the full settlement amount, respondent paid Cardenty from his ABA, via check number 2262.

Thereafter, respondent left the remaining $10,000 in his ATA until March 21 and April 8, 2016, when he issued two checks payable to himself against his ATA, each in the amount of $5,000.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a), RPC 1.15(b), and RPC 8.4(c) with respect to the Cardenty matter.

Respondent testified that he had informed Cardenty that he had received the settlement proceeds. He explained that Cardenty, who was traveling, had told him he could use the funds for any purpose and that he would collect the funds when he returned from his travels. Respondent testified that he paid Cardenty the settlement proceeds as soon as Cardenty requested the funds.

The OAE unsuccessfully attempted to contact Cardenty during its investigation to determine whether he had authorized respondent to use his funds. During the ethics hearing, Cardenty testified that he had contacted the OAE in response but was told he would be contacted if his assistance was required. Cardenty submitted a certification, dated May 14, 2020, which stated that respondent was authorized to use Cardenty's trust funds. Cardenty also testified at the hearing, reiterating that he told respondent that he could "use the money as he wish[ed] because [Cardenty] would be away for a while." Cardenty

added that, when he subsequently asked respondent for the funds, respondent promptly disbursed the settlement funds to him.

The Patricia Reiris Matter

On February 6, 2014, Patricia Reiris retained respondent to represent her in a slip and fall action. According to the terms of the written fee agreement, Reiris agreed to pay a contingent fee. Respondent settled the matter on Reiris's behalf for $80,000. On January 17, 2016, Reiris signed a release of claims in exchange for the settlement payment. On the same date,[18] Reiris also signed a settlement memorandum that itemized expenses totaling $1,147.46, and settlement disbursements, including attorney fees, in the amount of $26,284.18.[19] The memorandum included a limited POA that authorized respondent to sign the client's name to the settlement check for deposit in his ATA.

On February 10, 2016, respondent deposited in his ATA the $80,000 settlement check, which was dated January 27, 2016.

[18] Although the settlement memorandum is undated, respondent admitted the document was signed the same date, as was his practice.

[19] Respondent shared the legal fee with another attorney, who received a disbursement of $11,904.59 on February 19, 2016.

On January 19, 2016, respondent issued ATA check number 1405, payable to himself, in the amount of $14,000, as partial payment for legal fees and expenses.[20] At the time respondent paid himself legal fees in this matter, he still held $10,000 in his ATA from the Cardenty settlement (discussed above). Respondent also held funds in his ATA belonging to other clients but no funds belonging to Reiris. Respondent also testified that he did not know which clients' funds were held in his ATA and that, at the time he paid himself, he believed his ATA held his own personal funds sufficient to cover the fees. Thus, $4,000 in other client funds were invaded when respondent paid himself legal fees in the amount of $14,000, on January 19, 2016, because no funds were on deposit for the Reiris matter until February 10, 2016.

Respondent also disbursed $18,872.31, via a check payable to Medicare, in satisfaction of its outstanding lien. Medicare subsequently refunded a portion of this lien, via check in the sum of $6,025.45 and payable to "Law Offices of Joseph Cicala, LLC," with a memo indicating that the refund related to the Reiris matter. Respondent deposited this check in his ABA, rather than his ATA, and failed to record the deposit on Reiris's client ledger card.

[20] Respondent's client ledger card indicated that respondent paid himself on January 15, 2016. The check from his ATA, however, is dated January 19, 2016.

Respondent testified that, on January 19, 2016, when he disbursed the legal fee to himself, his ATA held a balance of $123,120.55, thereby exceeding the amount of his disbursement. Respondent further testified that his ATA held $10,000 of his own money, as a result of the $10,000 that remained from the Cardenty matter.

Further, respondent told the OAE, and reiterated at the hearing, that Reiris had approved his use of the Medicare refund proceeds in connection with other matters that respondent was handling on her behalf. Respondent failed to provide the OAE, however, with a signed document from Reiris acknowledging her approval of respondent's use of these funds, despite the OAE's request. The OAE attempted, unsuccessfully, to contact Reiris via telephone and letter. Reiris did not testify at the hearing.

Subsequently, on February 11, 2020, respondent issued a check to Reiris in the amount of $6,025.45. In his letter to Reiris, respondent stated that the funds represented "a refund of funds being held for additional legal services." Reiris received and cashed the check.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a) and RPC 8.4(c) with respect to the Reiris matter.

The Joan Herrington Matter

On February 27, 2014, Joan Herrington retained respondent to represent her in a personal injury action for injuries she had sustained in a September 4, 2012 motor vehicle accident. According to the parties' fee agreement, respondent agreed to be paid a percentage of the net recovery. Respondent settled the case on Herrington's behalf for $44,500. On May 16, 2016, Herrington signed a release of claims in exchange for the settlement payment. On the same date,[21] Herrington also signed a settlement memorandum that itemized the settlement disbursements, including a workers' compensation lien in the amount of $7,183.46, two-thirds of which ($4,788.97) was required to be paid back; expenses totaling $810.72; and attorney fees in the amount of $12,966.77. The memorandum also included a limited POA that authorized respondent to sign the client's name to the settlement check for deposit in his ATA.

On May 16, 2016, respondent disbursed to himself from his ATA two checks, in the amounts of $6,483.39 and $810.72, totaling $7,294.11, toward legal fees and expenses.[22] At the time respondent paid himself legal fees in the

[21] Although the settlement memorandum is undated, respondent admitted the document was signed the same date, as was his practice.

[22] On May 26, 2016, respondent paid another attorney a portion of the legal fee in the amount of $6,483.38.

Herrington matter, his ATA did not contain any funds on behalf of Herrington but, rather, held funds belonging to other clients. Respondent testified that he was not aware of which clients' funds were held in his ATA, and further testified that it may have also held funds that belonged to himself.

On May 23, 2016, seven days after paying himself legal fees, respondent endorsed and deposited in his ATA the settlement check, dated May 19, 2016, in the amount of $44,500, and payable to the "Law Offices of Joseph Cicala LLC and Joan Herrington." On June 3, 2016, respondent disbursed the settlement proceeds, in the amount of $25,933.50, to Herrington via ATA check number 1430.

Furthermore, respondent disbursed two payments in the amounts of $119.93 and $4,038.97, totaling $4,158.90, on Herrington's behalf as payments for the workers' compensation lien. After making all disbursements, respondent still held $630.07 in his ATA on Herrington's behalf. This balance represented the difference between the amount of funds escrowed for the workers' compensation lien as represented on the settlement memorandum ($4,788.97) and the amount paid ($4,158.90). Herrington was entitled to this balance, less any legal fees due respondent. Respondent learned of this credit balance during the random audit. Subsequently, on August 24, 2017, respondent issued a check

to Herrington in the amount of $630.07.[23] Herrington never cashed the check, although respondent testified that Herrington remained a current client.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a), RPC 1.15(b), and RPC 8.4(c) with respect to the Herrington matter.

Respondent testified that, at the time he disbursed to himself legal fees in the Herrington matter, his ATA had a balance of $95,648.40, thereby exceeding the amount that he disbursed to himself in fees. Respondent further maintained that he did not immediately deposit the settlement check in his ATA due to his busy work schedule.

The Ezzedin Bautista Matter

On April 1, 2013, Ezzedin Bautista retained respondent to represent him in an underinsured claim stemming from a June 26, 2009 motor vehicle accident. According to the terms of the parties' fee agreement, Bautista agreed to pay respondent a contingent fee of thirty-three and one-third percent of any net recovery. Respondent settled the matter on Bautista's behalf for $40,000.

[23] Based upon the OAE's review of bank statements produced in connection with the random audit and subsequent investigation through January 9, 2018, there was no record that Herrington cashed the refund check.

The matter settled on May 27, 2016. On June 21, 2016, Bautista signed a release of claims in exchange for the settlement payment. On the same date,[24] Bautista also signed a settlement memorandum that indicated respondent reduced his contingent fee to twenty-five percent, or $10,000. The memorandum included a limited POA that authorized respondent to sign the client's name to the settlement check for deposit in his ATA.

On June 17, 2016, the insurance carrier issued a settlement check in the amount of $40,000 payable to "Joseph Cicala Law Offices and Ezzedin M. Bautista." The check was mailed to respondent's former law office address and received by respondent, but the insurance carrier placed a stop payment on the settlement check. Respondent did not attempt to deposit this check because, at the time he received the check, he had already been made aware that the insurance carrier had stopped payment. Respondent testified, however, that he had already disbursed to himself his legal fees because he "knew that the settlement check was on its way."

On June 27, 2016, the insurance carrier issued a replacement check in the amount of $40,000, payable to "Joseph Cicala Law Offices and Ezzedin M.

[24] Although the settlement memorandum is undated, respondent admitted the document was signed the same date, as was his practice.

Bautista." Respondent endorsed and deposited this check in his ATA on June 28, 2016, the funds for which cleared on July 1, 2016.

On June 21, 2016, respondent had issued ATA check number 1434, payable to himself, in the amount of $10,000 for legal fees. Respondent, thus, paid himself legal fees prior to his receipt and deposit of the re-issued settlement check dated June 27, 2016. Further, respondent had paid himself legal fees prior to his deposit of the initial settlement check; he acknowledged that he never deposited the initial check having been informed that a stop payment was issued; and subsequently failed to refund the $10,000 legal fee to this ATA when he learned that the insurance carrier had stopped payment on the June 17, 2016 settlement check. At the time respondent paid himself legal fees in the Bautista matter, his ATA held no funds belonging to Bautista but, rather, funds belonging to other clients. Respondent did not know which clients' funds made up the balance. Respondent also testified that the ATA may have held some of his own money at the time but was not certain and presented no corroborating evidence.

On July 14, 2016, respondent disbursed the settlement proceeds in the amount of $20,000 to Bautista, via ATA check number 1437. On November 11, 2016, after paying expenses, respondent disbursed the remaining settlement proceeds, in the amount of $5,150, to Bautista via ATA check number 1457.

The OAE charged respondent with violating the principles of Wilson, RPC 1.15(a), and RPC 8.4(c) with respect to the Bautista matter.

Respondent testified that he knew his ATA balance exceeded the amount of the legal fees he paid himself. Specifically, his ATA held $59,008.39 on June 21, 2016, the same date that respondent paid himself $10,000 in legal fees.

Respondent did not dispute that he paid himself legal fees from his ATA prior to his receipt and/or deposit of the corresponding settlement checks in the Ghabous; Montano; Forst; Reiris; Herrington; and Bautista matters.

Respondent asserted, however, the following in defense of the charges against him: that he was never trained to maintain records as required by the Court Rules; he did not routinely handle personal injury matters; he never disbursed funds to himself that were not earned legal fees; he always had a general idea of his ATA balance prior to disbursing fees to himself and never caused an overdraft of the account; he never intended to invade clients' funds entrusted to him; that he believed his ATA held his own personal funds at the time he disbursed fees to himself; and that no clients were harmed by his actions. Respondent also pointed to the limited number of days that passed between the dates he disbursed legal fees to himself, the dates of the corresponding settlement checks, and the dates the settlement checks were deposited in his ATA.

During the ethics hearing, respondent testified regarding proffered mitigation. Respondent explained he entered public service in 2010, first by serving as a member of the Cedar Grove Board of Education, and, subsequently, as its president. In 2016, respondent served on Cedar Grove's town council and subsequently served as its deputy mayor and mayor. Respondent also testified regarding the time he devoted to other community service efforts, including the Boy Scouts of America, coaching youth sports, and organizing "clean sweeps" to clean up public areas.

Respondent expressed deep remorse for his conduct, stating:

> I feel a great amount of remorse and regret. Even though it was an inadvertence and mistake, I do feel terrible. I pride myself on my clients and my clientele . . . . [I]f I affected any of my clients through my inadvertence and my mistake and my mishandling of my records and my trust account, I am, you know, terribly sorry for that. And I regret not keeping better records, and I regret not knowing what was going on in my account, but I do have very, very deep feelings of remorse.
>
> [3T72.]

Respondent added that he attributed his mistakes to himself but did "not believe that anything that [he] did was done intentionally, knowingly, or with any intent to deprive any clients." Respondent testified that he wanted to continue practicing law and remained willing to accept responsibility for his actions.

Respondent also presented testimony and certifications from four character witnesses, Christine Dye; Domingo Cardenty; Jeff Boucher; and Martin J. Kiely, who testified regarding respondent's upstanding character, integrity, and competency as a lawyer.

Specifically, Christine Dye, who served with respondent on the board of education and is a former client, testified that she has known respondent for ten years. Dye testified that respondent was a valued and dedicated member of the board and the community; that he was "an honest person," "trustworthy," and a man with integrity; and that she would have no concern with respondent holding money in trust for a client.

Next, Domingo Cardenty testified that respondent has provided his family with legal representation for over twenty years. Cardenty described respondent as an "easy going person" with whom he had no concerns about his legal representation or respondent's holding money on his behalf.[25]

Jeff Boucher, a pastor and former client, testified that he has known respondent for approximately six years. Boucher testified that respondent went above and beyond his expectations to shepherd him through a difficult divorce proceeding; that he found respondent to be "incredibly helpful;" and that he was so impressed with respondent's legal representation that he referred other clients

[25] Cardenty also testified with respect to respondent's authorized use of his client trust funds.

to respondent. Further, Boucher testified that respondent frequently did not bill him for telephone calls; that his bills were always fair; and that the bills always were sent after the work was completed. Boucher described respondent as "extremely competent," "extremely compassionate," and "understanding."

Lastly, Martin J. Kiely, a retired detective commander with the Hoboken police department who has known respondent personally and professionally for approximately twenty years, testified that he considered respondent to be a very capable and effective lawyer, whom he entrusted to hold his own funds exceeding $100,000 over the course of multiple representations. Kiely further testified that respondent was a civic-minded individual who has served his community through local government and volunteerism, and who he trusted "implicitly without fail." Moreover, Kiely testified that, in his opinion, respondent would be a better attorney as a result of the lessons he has learned as a result of these proceedings. Kiely explained that he trusted respondent's advice and guidance.

Respondent also submitted certifications from George Zazzali, Esq. (friend of forty years); John Imperatore (current and former client of two years); Manuel Pimentel (current and former client of ten years); and James C. Maloney, Esq. (client for fifteen years), who similarly attested to respondent's character, reputation, and fitness to practice law.

In respondent's April 28, 2021 post-hearing submission to the special master, he denied having committed knowing misappropriation and suggested that, at most, his conduct was negligent, arguing that "any misappropriation of funds for the short periods of time involved" were in amounts equivalent to his earned fees. Respondent compared his misconduct to that of the attorney in In re Wigenton, 210 N.J. 95 (2012), a case in which the Court agreed with our recommendation that the attorney be censured for negligent misappropriation, thus, rejecting the OAE's argument that the attorney had knowingly misappropriated funds necessitating disbarment. Respondent contended that, like Wigenton, he had a "reasonable, but mistaken, belief that he was entitled" to the funds at issue. Specifically,

> [respondent] had a general idea of the trust account balance when he withdrew the funds at issue, but was not sure of whose money specifically was in the account, including whether there were any of his own funds in the account
>
> [Rb26.]

Respondent also argued that the OAE failed to present evidence regarding which clients' funds were in his ATA at the time he withdrew his fees, and that the OAE presented nothing more than "a sole practitioner becoming overwhelmed with this practice and the bookkeeping involved therein," who subsequently "took full responsibility for his actions and implemented

immediate corrective measures." For what he characterized as his negligent misappropriation of client funds, respondent argued that a censure or short term of suspension would be appropriate.

In the alternative, respondent argued that, even if his conduct amounted to knowing misappropriation of funds entrusted to him, he should not be disbarred, in view of compelling mitigation, which included the amount of time since the events transpired; his remorse; his lack of disciplinary history; his commitment to service to his community; and the extensive character evidence admitted at trial. Further, respondent asserted that no aggravating factors were present.

In its May 28, 2021 post-hearing submission to the special master, the OAE asserted that it had proven every charge against respondent by clear and convincing evidence. Specifically, the OAE argued that the evidence established that respondent "committed knowing misappropriations of client trust funds when he advanced legal fees to himself out of the client funds in his attorney trust account prior to his depositing the corresponding settlement checks into his attorney trust account." Further, the OAE rejected respondent's assertion that he had commingled personal funds in his trust account, stating that it had confirmed that "[n]o commingled funds were found." Respondent was able to pay himself fees in the Ghabous; Montano; Forst; Reiris; Herrington; and Bautista matters

only because he held funds belonging to other clients in his ATA; yet, respondent never informed those clients he had invaded their funds or obtained authorization to use their funds. According to the OAE, respondent's conduct met the "classic definition of knowing misappropriation" under Wilson, necessitating disbarment.

Further, the OAE argued that the Court has disbarred lawyers in substantially similar situations, citing In re Skevin, 104 N.J. 476 (1986), cert. denied, 481 U.S. 1028 (1987); In re Warhaftig, 106 N.J. 529 (1987); In re Ford, 140 N.J. 618 (1995); In re Tighe, 143 N.J. 298 (1996); In re Schofield, 146 N.J. 476 (1996); In re Goldstein, 167 N.J. 279 (2001); In re Untracht, 174 N.J. 344 (2002); and In re Blaher, 239 N.J. 524 (2019).

Following the ethics hearing, the special master concluded that the OAE had proven, by clear and convincing evidence, that respondent had knowingly misappropriated client funds in the Ghabous; Montano; Forst; Bautista; Reiris; and Herrington matters, in violation of RPC 1.15(a) and the principles of Wilson. The special master reasoned that "[r]espondent repeatedly wrote checks from his trust account to himself not only before receiving settlement proceeds but even before clients signed settlement documents." The special master also found that "[r]espondent's handling of his trust account was similar to a pyramid or ponzi scheme in that the availability of monies to pay clients was dependent

upon monies later being deposited from other clients."

The special master rejected respondent's defense that he was simply paying himself earned fees and, at best, committed negligent misappropriation of client funds. Referencing his handling of the Montano matter, the special master determined that "if [r]espondent truly believed he was paying an earned legal fee, his fee would have been paid in one payment, but [r]espondent paid himself in three installments." The special master was further persuaded that "[r]espondent's pattern and practice of delaying release of settlement checks to clients until settlement checks were deposited and cleared, is clear and convincing evidence that [r]espondent acted knowingly." Thus, the special master determined that, in six instances, respondent committed knowing misappropriation, in violation of RPC 1.15(a) and the principles of Wilson.

The special master determined that the OAE did not sustain its burden of proof of establishing a knowing misappropriation of client funds in connection with the Cardenty matter. In particular, the special master reasoned that, although there was no contemporaneous documentation, Cardenty testified that he told respondent to hold onto his money and that respondent could use it for any purpose. The special master also determined that respondent did not violate RPC 1.15(b) or RPC 8.4(c) in his handling of the Cardenty matter.

The special master further determined that respondent's failure to promptly disburse to Reiris the Medicare lien refund constituted negligent misappropriation.[26] She also found that the OAE had proven that respondent violated RPC 1.15(b) in the Herrington matter as a result of his failure to repay $630.07 following the reduction in liens.

The special master also determined that the clear and convincing evidence established that respondent violated the recordkeeping rules, in violation of RPC 1.15(d).

Finally, the special master determined that respondent violated RPC 8.4(c) in the Montano; Forst; Bautista; Reiris; and Herrington matters, in which he had entered into written contingent fee agreements. The special master reasoned that respondent expressly agreed, via those written fee agreements, that his fee was contingent upon recovery of funds on behalf of the client. By paying himself legal fees in advance of his receipt of the corresponding settlement proceeds, respondent mispresented to the clients that his fee was contingent upon his recovery on behalf of the client. Since respondent did not have a contingent fee agreement with Ghabous, the special master determined that the OAE had not established a violation of RPC 8.4(c) in that client matter.

[26] The OAE did not charge respondent with negligent misappropriation in the Reiris matter.

The special master recommended that respondent be disbarred for his misconduct.

In his brief to us, and during oral argument, respondent, through his counsel, reiterated the arguments he raised before the special master, and urged that we determine that his misconduct amounted to, at most, negligent misappropriation. Respondent contended that the OAE failed to establish that respondent's conduct was knowing, "when he withdrew his fees in other amounts given his bookkeeping issues, and the fact that he had intermingled funds in the account." Rather, according to respondent, "any misappropriation of funds for the short periods of time involved, for his exact amount of earned fees for matters that had already settled, was negligent at most." Respondent claimed, in response to our questioning at oral argument, that, at the time he took his fees, he believed his ATA held sufficient funds of his own to cover the fees that he had paid himself, and that it was only after the fact that he learned there were no commingled funds, other than the Cardenty funds, in his ATA.

Respondent also argued that the Court's recently decided Lucid and Caruso decisions supported his position. Similar to the Court's reasoning in Lucid, respondent argued that he, like Lucid, had a reasonable belief that he would be able to validly withdraw his fees from his ATA "given his possible

intermingled funds, and the fact that the matters were settled and Respondent expected to be able to deposit the settlement check shortly."

In response to the audit and to ensure this conduct did not occur in the future, respondent has concentrated on bookkeeping as an essential part of his practice. Further, respondent took immediate corrective action and again started using QuickBooks for his trust account, rather than his paper file method.

Respondent also stated that he rarely handled personal injury matters and, thus, the misconduct at issue should not be viewed as a pattern or practice. Rather, respondent urged that, in the six client matters, he made a "reasonable but mistaken belief" that he could take his fees before depositing the corresponding settlement check.

For what he characterized as his negligent misappropriation, respondent urged us to impose a reprimand or censure. Alternatively, even if we were to conclude that his conduct was knowing, respondent urged that we impose discipline short of disbarment, in view of the substantial mitigation which included the passage of time since the events transpired; the lack of harm to his clients; his commitment to the community; his contrition and remorse; and the extensive character testimony that he presented at the hearing.

In its brief, and during oral argument, the OAE reiterated its position that respondent knowingly misappropriated client funds when he paid himself legal

fees in six client matters prior to depositing the corresponding settlement checks, for which he should be disbarred.

* * *

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence. We determine that respondent knowingly misappropriated client funds, in violation of RPC 1.15(a) and the principles of Wilson and, thus, recommend to the Court that he be disbarred. Respondent's constitutional objections to the virtual disciplinary hearing are reserved for the Court. See R. 1:20-15(h).

There is no dispute that, in the Ghabous; Montano; Forst; Reiris; Herrington; and Bautista matters, respondent disbursed to himself legal fees, from his ATA, prior to depositing the corresponding settlement check in his ATA. By doing so, respondent repeatedly and knowingly invaded other clients' funds he was required to hold, inviolate, in his ATA. Wilson and its progeny expressly mandate respondent's disbarment for such misconduct.

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 clear and convincing evidence must demonstrate that the attorney used trust funds, knowing they belonged to a client and knowing that the client had not authorized him or her to do so.

Here, respondent admitted that, in connection with six distinct client matters, he disbursed legal fees to himself from his ATA prior to his deposit of the corresponding settlement check. In so doing, respondent invaded trust funds belonging to other clients, without their knowledge or authorization. Respondent, thus, violated RPC 1.15(a) and the principles of Wilson.

Despite the evidence of his misconduct, respondent argued that he should be spared the harsh fate of Wilson because he reasonably believed, albeit erroneously, that he had intermingled personal funds in his trust account at the time he paid himself the legal fees in question. Thus, respondent urged us to determine his conduct was negligent – not knowing or intentional. Respondent further contended that disbarment is unduly harsh for his misconduct, even if we were to determine that his conduct constituted knowing misappropriation, because he paid himself only those earned fees to which he was entitled; that he did not have adequate recordkeeping or accounting experience; that he rarely handled personal injury matters; and the presence of substantial mitigation. As discussed below, none of these defenses or the significant mitigation shield respondent from Wilson and its corresponding discipline.

We further find that respondent violated RPC 1.15(b) in connection with the Herrington matter, by failing to disburse to her the remaining $630.07 until it was brought to his attention during the audit. We also find, in accord with the

special master, that respondent violated RPC 1.15(d) by wholly failing to perform his recordkeeping duties; and RPC 8.4(c), also for his systematic invasion of entrusted funds in the Ghabous; Montano; Forst; Reiris; Herrington; and Bautista matters. Further, we agree with the special master and dismiss all RPC violations regarding the Cardenty matter, considering Cardenty's undisputed testimony that he authorized respondent to use his client trust funds.

In sum, we find that respondent violated RPC 1.15(a) and the principles of Wilson (six instances); RPC 1.15(b); RPC 1.15(d); and RPC 8.4(c) (six instances) by clear and convincing evidence. We dismiss the allegations that respondent violated the principles of Wilson; RPC 1.15(a); RPC 1.15(b); and RPC 8.4(c) in connection with the Cardenty matter. There remains for determination the appropriate quantum of discipline to impose on respondent for his misconduct.

Respondent's most egregious misconduct was his knowing misappropriation of client funds in six matters, in violation of RPC 1.15(a) and the principles of Wilson. That misconduct requires respondent's disbarment.

Although repeatedly acknowledging the harshness of per se disbarment, the Court has "repeatedly rejected opportunities to create exceptions to the Wilson rule." In re Greenberg, 155 N.J. 138, 149 (1998). Thus, the Wilson rule allows for no exceptions. Attorneys who knowingly misappropriate clients'

funds invariably suffer the disbarment penalty. Not even the need for life-saving medical treatment spared from disbarment an attorney who misappropriated client trust funds for that purpose. In re Manning, 134 N.J. 523 (1993).

The Court has repeatedly disbarred attorneys who engaged in misconduct similar to that of respondent. For instance, in In re Untracht, 174 N.J. 344 (2002), the Court disbarred the attorney for knowing misappropriation of trust and escrow funds, where, in fourteen client matters, he took fees and costs from his trust account before depositing the corresponding settlement funds, thereby invading other clients' funds. In one instance, he took funds only three days after settling a case, before sending the release to the insurance company. In the Matter of Gary H. Untracht, DRB 01-367 (April 12, 2002) (slip op. at 6).

Likewise, in In re Goldstein, 167 N.J. 279 (2001), the attorney was disbarred for knowingly misappropriating funds. In three personal injury cases, he advanced fees to himself before receiving the settlement proceeds, thereby invading other clients' funds. He also used real estate deposits without the consent of the parties, and took excessive fees in two matters, which invaded other clients' funds.

In In re Warhaftig, 106 N.J. 529 (1987), the attorney was disbarred for routinely advancing fees to himself in real estate matters, before the closings

took place. The sums he took corresponded exactly to the amount of the anticipated fees. The Court stated:

> [i]t is clear that respondent's conduct constituted knowing misappropriation as contemplated by *Wilson*. Through the use of the advance-fee mechanism, he took funds from his trust account before he had any legal right to those monies. These "fees" were taken by respondent before he received any deposits in connection with the relevant real-estate closings. Thus, he was effectively borrowing monies from one group of clients in order to compensate himself, in advance, for matters being handled for other clients. Respondent made these withdrawals with full recognition that his actions had not been authorized by his clients, and that he was therefore violating the rules governing attorney conduct. Respondent's unauthorized misappropriation of clients' trust funds for his personal needs cannot be distinguished from the conduct condemned in *Wilson, supra.*
>
> [Id. at 533-34.]

Also, in In re Lennan, 102 N.J. 518, 525 (1986), the attorney was disbarred following an OAE random audit that disclosed that he had engaged in a pattern of taking trust funds held as deposits on real estate transactions. He replaced the funds prior to the closing of title. Over a two-year period, the attorney knowingly misappropriated $13,000 in trust funds from four clients.

In Lennan, the Court was not swayed by the attorney's proffered mitigation: (1) he was suffering from the extreme financial pressure of providing for his family, specifically, the college education of his two daughters; (2) no

clients had complained or suffered any loss or a delay in receipt of funds due; (3) three of the clients submitted affidavits indicating that they would have authorized his actions had they known of his economic difficulties, and they were satisfied with his services; (4) he made no attempt to disguise or mischaracterize his actions, which he fully disclosed to the OAE; and (5) he expressed "severe regret" for his actions. Id. at 523.[27]

Thus, for respondent's misconduct, disbarment is the appropriate quantum of discipline necessary to preserve confidence in the bar and protect the public.

Respondent's defenses and significant mitigation do not alter this result. Respondent contended that, at the time he paid himself legal fees, he believed that his trust account also contained his personal funds but, due to his poor recordkeeping, could not be certain. Respondent, however, bears the burden of proving such a defense. R. 1:20-6(c)(2)(C) ("The burden of going forward regarding defenses . . . relevant to the charges of unethical conduct shall be on the respondent"). Respondent did not satisfy that burden. As the Court explained in a similar case:

[27] Cases cited by the OAE are in accord. In re Blaher, 239 N.J. 524 (2019) (in reciprocal discipline matter, the Court disbarred attorney who, in part, took trust funds as "advanced attorney fees" for personal use before the clients had actually paid those fees; in so doing, he invaded other client funds); In re Tighe, 143 N.J. 298 (1996) (the Court disbarred attorney who, in thirty-four client matters, withdrew his legal fees prior to receiving the corresponding personal injury settlement); and In re Ford, 140 N.J. 618 (1995) (the Court disbarred attorney who withdrew attorney fees in advance of receipt or deposit of corresponding settlement funds).

> Respondent also testified that whenever he withdrew escrow fees in advance of a closing, the withdrawal was based on his assumption that he had an equivalent "cushion" in his trust account. However, respondent did not attempt to offer any specific factual basis for that assumption, and respondent's own expert testified that when he performed a reconciliation of the trust account he determined that "there weren't always sufficient funds on hand, and he was always indeed out of trust." Respondent's erroneous belief that he had an equity cushion was unfounded, and respondent failed to offer evidence to sustain the contention that his belief in the existence of an adequate cushion was reasonable or justifiable.
>
> [In re Mininsohn, 162 N.J. 62, 73-74 (1999).]

Like the attorney in Mininsohn, respondent "failed to offer evidence to sustain the contention that his belief in the existence of an adequate cushion was reasonable or justifiable." Id. at 74. Mininsohn did not offer any specific factual basis for his belief and his own expert testified that his reconciliation of the trust account revealed that there were not "always sufficient funds on hand, and he was always indeed out of trust." Id. at 73-74. Like Mininsohn, respondent did not offer any reasonable factual basis for his belief that he had an adequate cushion of his own personal funds to cover his advanced fees. Instead, respondent repeatedly invaded the funds of other clients without their authorization or knowledge.

Further, respondent's claim that he never intended to deprive his clients of their funds does not spare him from the fate of Wilson. The Court already has made clear that intent to permanently deprive is not required, nor is an intent to "steal funds" from a client. Id. at 62, 72.

Here, respondent's belated and bald assertion that, at the time he disbursed checks to himself against his trust account, he believed that the account may have also held personal funds, is belied by the evidence. With the exception of the $10,000 that respondent purportedly maintained in his trust account stemming from the Cardenty matter, respondent presented no evidence which would support a reasonable belief that his trust account held any of his own funds. Instead, all the evidence demonstrated that his ATA held only client funds, which respondent repeatedly invaded. In fact, the OAE auditor testified that she reviewed and reconciled respondent's financial records for the audit period and beyond, and that there were no earned legal fees or personal funds in his ATA. Specifically, with the exception of the $10,000 from the Cardenty matter, respondent's trust account held no other commingled funds.

Moreover, time and again, the Court has stated that restitution or availability of other funds is irrelevant to a finding of knowing misappropriation. In re Livingston, 217 N.J. 591 (2014) (attorney disbarred for using trust account funds to pay household expenses and to avoid overdrafts in

his business account; we rejected the attorney's defense that, because he could "cover" the improper withdrawals from the trust account with funds in his various personal accounts, he did not knowingly misappropriate the monies). See also In re Blumenstyk, 152 N.J. 158, 161 (1997) (the Court held that attorney's restitution of the funds prior to notification of the random audit indicated that he intended only to borrow funds temporarily before restoring them, but did not alter the character of the knowing misappropriation such that disbarment was required), and In re Barlow, 140 N.J. 191, 198-99 (1995) (intent to repay or otherwise make restitution is not a defense to knowing misappropriation).

Respondent's shoddy recordkeeping defense also fails. Indeed, shoddy recordkeeping is a commonly asserted defense to knowing misappropriation. Attorneys charged with the intentional invasion of entrusted funds frequently argue, as respondent did here, 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.

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.
>
> [Schwimer, 102 N.J. at 447.]

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

Likewise, in In re Skevin, 104 N.J. 476 (1986), the attorney was disbarred for taking fees and costs from the settlement of clients' cases before he received the settlement proceeds. Similar to respondent, Skevin asserted the belief that he had sufficient funds of his own in his trust account to cover the disbursement, although he did not keep a running balance or any other accounting of those funds. 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.]

Skevin was disbarred.

Moreover, respondent's lack of knowledge concerning his bookkeeping obligations is no defense for his knowing invasion of client funds. The Court has held that ignorance of the law is no excuse for an attorney's failure to abide by the RPCs. See In re Berkowitz, 136 N.J. 134, 147 (1994) ("Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct"), and In re Goldstein, 116 N.J. 1, 5 (1989) (holding that "[i]gnorance of ethics rules and case law does not diminish responsibility for an ethics violation") (citations omitted).

We find that respondent repeatedly engaged in the knowing misappropriation of entrusted client funds, in violation of Wilson. Specifically, in six separate client matters, respondent paid himself legal fees before depositing the corresponding settlement proceeds in his ATA. Consequently, he invaded funds belonging to other clients who never authorized the use of these funds. Respondent ceased this unethical practice only because of the OAE's

random audit. None of respondent's proffered defenses rescue him from the ultimate sanction of disbarment.

Finally, none of the evidence or arguments that respondent presented in his case in chief or his submission to us move us to recommend that the Court consider carving out an exception to his disbarment, notwithstanding the Court's recent departure from our recommendations in the Lucid and Caruso matters.

Specifically, in In the Matter of Karina Pia Lucid, DRB 20-216 (July 9, 2021), we addressed the application of the principles of Wilson and Hollendonner based upon the reasonableness of the attorney's conduct and her reliance on a client. Lucid instructed her client, Petrelli, to "immediately" send funds to cover a settlement and she believed that Petrelli would follow her instruction (slip op. at 2-3). Thereafter, despite knowing that her trust account did not hold any funds for the benefit of Petrelli, the attorney intentionally issued a $5,500 trust account check to MS Services on Petrelli's behalf, without the authorization of other clients whose funds were held in the account and ultimately invaded, in an effort to preserve Petrelli's settlement with MS Service (slip op. at 4, and 28). Lucid reasoned that Petrelli had been a good client who always paid his bills in a timely fashion and, therefore, she had "full anticipation" that she would receive his check and that it would clear the account

before the check issued to MS Services was negotiated (slip op. at 4). Ultimately, Petrelli's check came late, resulting in the invasion of other clients' funds.

Our majority decision found that Lucid had knowingly misappropriated $5,500 in entrusted funds (slip op. at 20). The Court, however, disagreed by way of Order, and determined that Lucid had committed only negligent misappropriation. Accordingly, the Court imposed a censure. In re Lucid, 248 N.J. 514 (2021).

In In the Matter of Dominic V. Caruso, DRB 20-191 (April 30, 2021) (slip op. at 28-29), we rejected the attorney's argument that, after having requested that the client wire funds to cure an escrow shortfall, he reasonably relied on the client and expected that the funds were wired, thus, curing the shortfall. Instead, we determined that Caruso had knowingly misappropriated entrusted funds by his knowing creation of the escrow shortfall, both when he used entrusted funds to pay his personal tax debt and when he paid himself a legal fee, especially in consideration of the fact that the escrow arrangement required the authorization of three interested parties, and we recommended his disbarment (slip op. at 67,70). We found that Caruso failed to confirm that the client's transfer of funds occurred, and that this misconduct fell "short of his obligations as a New Jersey attorney and as a fiduciary and escrow agent." Caruso (slip op. at 17, 29). The Court, however, disagreed by way of Order, finding that Caruso had committed

only negligent misappropriation, and imposed a six-month suspension. In re Caruso, 248 N.J. 426 (2021).

Unlike the misconduct committed by the attorneys in Lucid and Caruso, respondent's misconduct was not isolated but, rather, occurred in six separate client matters over a period of years. Further, unlike Lucid, respondent's misconduct was committed solely to benefit himself. Importantly, too, the Court has consistently disbarred attorneys for taking their legal fees in advance of the receipt and deposit of the corresponding settlement proceeds in their trust account. See, e.g., Blaher, Untracht, and Ford. Thus, stare decisis mandates respondent's disbarment.

Despite the record being replete with evidence of respondent's demonstrably good personal reputation, the record is equally replete with overwhelming evidence that he knowingly misappropriated client funds, on six occasions, via his practice of disbursing legal fees to himself prior to depositing the corresponding settlement proceeds. Accordingly, disbarment is the only appropriate sanction, pursuant to the principles of Wilson. Therefore, we need not address the appropriate quantum of discipline for his additional ethics violations.

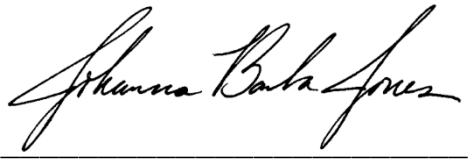
Members Campelo and Joseph dissent from the majority, finding that respondent's misappropriation of client funds was negligent, not knowing, and

that it occurred directly as the result of respondent's inept recordkeeping. Considering respondent's unblemished legal career, his lack of intent to harm his clients, and the lack of any actual harm or prejudice to his clients, Members Campelo and Joseph voted to impose a censure for respondent's misconduct.

Chair Gallipoli was recused.

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
Anne C. Singer, Vice-Chair

By: 
Johanna Barba Jones
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph Cicala
Docket No. DRB 21-225

Argued: January 20, 2022

Decided: March 29, 2022

Disposition: Disbar

Members	Disbar	Censure	Recused
Gallipoli			X
Singer	X		
Boyer	X		
Campelo		X	
Hoberman	X		
Joseph		X	
Menaker	X		
Petrou	X		
Rivera	X		
Total:	6	2	1

Johanna Barba Jones
Chief Counsel