Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 22-133
District Docket No. XIV-2018-0652E

In the Matter of	:
Esther Maria Alvarez	:
An Attorney at Law	:

Decision

Argued: October 20, 2022

Decided: January 12, 2023

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

Raymond S. Londa 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 Glen J. Vida, 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) (two instances – knowing misappropriation of client funds),

and In re Hollendonner, 102 N.J. 21 (1985) (two instances – knowing misappropriation of escrow funds); RPC 1.15(a) (commingling); 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); RPC 8.1(a) (making a false statement of material fact in a disciplinary matter); RPC 8.4(b) (two instances – engaging in a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); and RPC 8.4(c) (two instances – engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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

Respondent earned admission to the New Jersey bar in 1992.

On September 20, 2019, respondent received an admonition for her violation of RPC 1.1(a) (committing gross neglect), RPC 1.3 (lacking diligence), and RPC 1.4(b) (failing to communicate with the client). In the Matter of Esther Maria Alvarez, DRB 19-190 (September 20, 2019). In one matter, respondent failed to take any action on her client's case for nine months and failed to reply to all but one of the client's requests for information about the status of the case.

In a second client matter, respondent represented a buyer in the purchase of residential property and filed a lawsuit against the seller. The lawsuit was

settled for $2,500 and the promise that the seller would perform certain repairs to the property within sixty days and, if the seller failed to do so, a $7,500 judgment would be entered against him upon the filing of a certification of default.

The seller paid respondent's client only $1,100, repaired just "a couple of things," and disappeared. The client notified respondent of these events, both verbally and in six e-mails over eighteen months, and informed respondent that she wanted to enforce the settlement agreement and asked whether she or respondent should do so. Respondent told her client that "it would be best" if respondent filed the certification seeking entry of default; however, respondent waited more than eighteen months to do so. The court entered judgment against the seller, but later vacated it after the seller filed a motion to vacate the default, finding that, due to the passage of time, it was not possible to determine when the damage to the property occurred.

For the totality of respondent's misconduct in those matters, we determined that an admonition was the appropriate quantum of discipline to impose, emphasizing her unblemished disciplinary record and "the emotional, physical, and financial burden placed on [respondent] by the serious health problems of [her] spouse and his parents, which required [respondent] to travel to Spain."

On August 5, 2019, the Office of Attorney Ethics (the OAE) petitioned the Court seeking respondent's immediate temporary suspension from the practice of law in connection with the misconduct underlying this matter. On September 10, 2020, the Court denied the OAE's motion. However, the Court ordered that respondent practice law under the supervision of a practicing attorney approved by the OAE. In re Alvarez, 250 N.J. 550 (2021).[1] The Court also ordered that all funds in respondent's attorney trust account (ATA) be transferred to and held in her counsel's ATA pending the conclusion of the instant disciplinary matter.

We now turn to the facts of this matter.

This disciplinary matter arose in connection with the OAE's May 23, 2019 random compliance audit of respondent's financial accounts and records. The matter was docketed for investigation because the random audit revealed a shortage of funds in her ATA.

[1] There is no Lexis citation for the Court's September 10, 2020 Order. However, on May 17, 2021, the Court entered a second Order continuing the condition that respondent practice under the supervision of a practicing attorney, pursuant to its earlier, September 10, 2020 Order.

The Rosalyn Arias Matter

Respondent represented Rosalyn Arias in a personal injury matter. Arias and her sister were injured in a motor vehicle accident and, initially, both sisters retained Robert Kuttner, Esq., for representation. Kuttner later referred the Arias matter to respondent after realizing that, as a part of the lawsuit, there was a limited policy of insurance, and he believed that, as a result, there could be a conflict between the sisters. During the ethics hearing, Kuttner testified that, at the time he referred the Arias matter to respondent, the majority of the work had been completed and all that remained was the preparation of the settlement paperwork; respondent, however, disputed Kuttner's assertion. Rather, respondent asserted that, when she took over the case, she appeared at depositions, engaged in extensive settlement negotiations, and prepared the closing paperwork. However, on August 17, 2015, Kuttner sent respondent a letter because respondent had not yet finalized the settlement. In the letter, Kuttner wrote that "at the time of the referral the case was essentially settled all due to the efforts of [his] office" and that the defendant in the personal injury matter had filed a motion to enforce the settlement due to respondent's delay.

Respondent asserted that, at the time Kuttner referred the matter to her, they did not discuss a division of the legal fee, but she had agreed to take on the Arias matter even though she was not sure how she would be paid for her

representation. Nevertheless, respondent assumed that she would receive one-third of the attorney fee because that was "standard." In Kuttner's August 17, 2015 letter, he also wrote that respondent told him that she "waived any clam [sic] to any portion of the attorney fee. Now we learn that you kept the entire fee for yourself. [. . .] Despite your waiving the fee entirely and our office doing the bulk of the work we would agree to your retaining 1/3 of the attorney fee."

The Arias matter settled for $12,492.79. Therefore, Kuttner was entitled to $2,627.45 in legal fees (plus costs of $659.28) and respondent was entitled to $1,313.72 in legal fees (plus costs of $10). Neither respondent nor Arias were able to produce a copy of the retainer agreement respondent and Arias had signed.

On April 24, 2015, respondent received the settlement proceeds and deposited the funds in her ATA. On May 16, 2015, without requesting the permission of either Arias or Kuttner, respondent issued a $2,000 ATA check, payable to herself, with the notation "Arias, R. Case (PI)." More than three months later, on August 31, 2015, Arias signed the Authorization to Settle and Closing Statement (the Closing Statement).

Respondent omitted the $2,000 ATA check from the Arias client ledger card that she provided to the OAE during the random audit.[2] Respondent claimed that the $2,000 check was a "starter check" that she had received from her bank because she had just opened her ATA. Thus, according to respondent, she forgot about the $2,000 check and, "through oversight," due to her "inadequate record keeping which she acknowledges," had failed to enter the check on the Arias client ledger. Respondent asserted that, when the OAE notified her of the omission, she "immediately reimbursed her trust account for the amount which should have been held in escrow by her for Rosalyn Arias."

Respondent, however, conceded that she knowingly misappropriated $2,000 in the Arias matter because under no circumstances should she have received a legal fee of $2,000. Respondent confirmed that Arias had neither authorized her use of the $2,000 nor loaned her the $2,000. Further, the OAE's audit of respondent's financial records demonstrated a financial need for the money, and respondent admitted that she used the $2,000 for personal and business expenses.

Additionally, on August 31, 2015, when Arias finally signed the Closing Statement, respondent issued herself another check, for $1,313.72, which

[2] Respondent did not dispute that she issued the $2,000 check to herself out of the Arias settlement proceeds.

represented the legal fees to which she was entitled. Additionally, in accordance with the Closing Statement, respondent issued a $6,682.34 check to Arias; a $2,627.45 check to Kuttner for legal fees; a $659.28 check to Kuttner for costs; and a $10 check to herself for costs. The remaining $1,200 in settlement funds was to remain in respondent's ATA to satisfy any outstanding medical liens.[3]

Because respondent issued herself the first, $2,000 check from the Arias settlement funds, she failed to hold the settlement funds intact and carried a negative balance for Arias until August 27, 2018.

On August 27, 2018, respondent replenished her ATA with $1,200 from her personal funds, which brought the Arias balance to $400. Later, on February 28, 2019, respondent replenished her ATA with another $1,200 of personal funds, which brought the Arias balance to $1,600, representing the first time, since May 16, 2015, that respondent was safeguarding sufficient funds in her ATA on behalf of Arias.

Furthermore, respondent's unauthorized disbursement of $2,000 to herself resulted in respondent's invasion of other client funds she was required to safeguard from May 16, 2015 through August 27, 2018.

[3] As of the date of the ethics hearing, the $1,200 for Arias remained in Raymond S. Londa's ATA, pursuant to the Court's September 10, 2020 Order requiring respondent to transfer all funds to Londa.

Respondent was unable to explain why she disbursed $2,000 to herself without Arias' permission, and before Arias had even signed the Closing Statement. However, on May 16, 2015, respondent's ABA balance was only $250.36. On May 17, 2015, when respondent deposited the $2,000 ATA check in her ABA, as a part of a batch of deposits totaling $4,500, her ABA balance increased to $4,750.36. The same date, respondent made three electronic payments from her ABA – a $4,368.06 mortgage payment; a $301.01 payment to Stu*Stumps; and a $53.49 payment to Norton.com. Those three disbursements decreased respondent's ABA balance to $27.80. Therefore, without taking $2,000 of Arias' funds, respondent testified that she would not have been able to pay her mortgage. Indeed, throughout the OAE's three interviews and the ethics proceeding, respondent consistently admitted that she knowingly misappropriated $2,000 from Arias.

The Carolyn Roentgen Matter

Respondent represented Carolyn Roentgen in a matrimonial action against Carolyn's ex-husband, Daniel Roentgen.[4] As part of the divorce action,

[4] Because Carolyn and Daniel share a last name, this memorandum will refer to the parties by their first names to avoid any confusion. No disrespect is intended by the informality.

respondent assisted Carolyn with the sale of the marital home she owned with Daniel.

Although respondent was not charged with violating RPC 1.7(a)(2) (engaging in a concurrent conflict of interest) respondent admitted that, in the midst of the matrimonial action between Carolyn and Daniel, she nevertheless represented both parties in the sale of the marital home.[5]

On December 5, 2014, respondent deposited $133,825.36, representing the proceeds from the sale of Roentgen's marital home, in her ATA as escrow funds, until further order from the court.

Two months later, on February 6, 2015, respondent disbursed to herself $7,500 of those escrow funds. Six days later, on February 12, 2015, respondent disbursed to herself $6,500 of the escrow funds. Respondent admitted that she neither sought nor received Daniel's authorization to disburse the first two checks to herself.

At an unknown time after the sale of the marital home, Daniel retained Richard N. Zuvich, Esq., to represent him in the matrimonial action.[6]

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[5] Although uncharged, we may consider respondent's violation of RPC 1.7(a)(2) in aggravation. See In re Steiert, 201 N.J. 119 (2010) (evidence of unethical conduct contained in the record can be considered in aggravation, even though such unethical conduct was not charged in the formal ethics complaint).

[6] On March 13, 2019, the Court disbarred Zuvich for knowing misappropriation of client and escrow funds. In re Zuvich, 237 N.J. 253 (2019). Prior to his disbarment, Zuvich had been

(footnote cont'd on next page)

Also, after the sale of the marital home, but before the finalization of Carolyn's divorce, the Honorable Lisa F. Chrystal, P.J.F.P., appointed Jennifer Brandt, Esq., to serve as guardian ad litem to represent Carolyn's interests. Respondent testified that Judge Chrystal appointed Brandt because Carolyn had been hospitalized multiple times during a short period of time. Brandt remained Carolyn's guardian ad litem until the conclusion of the matrimonial action.

In March 2016, Carolyn, Daniel, their respective counsel, and Brandt participated in an economic mediation as a part of the divorce action. At the time the parties participated in the economic mediation, respondent already had disbursed $46,900, depicted in the below chart, of the Roentgen's marital assets to herself as "counsel fees."

Check Date	Check #	Description	Amount
2/6/2015	997	Ledger card "Roentgen" Blacked Out	$7,500
2/12/2015	998	Ledger card "Roentgen" Blacked Out	$6,500
5/27/2015	Transfer	Ledger card "Counsel Fees"	$3,000
8/12/2015	Transfer	Ledger card "Counsel Fees"	$3,000
8/17/2015	Transfer	Ledger card "Counsel Fees"	$4,500
10/14/2015	Transfer	Ledger card "Counsel Fees"	$10,000
1/19/2016	Transfer	Ledger card "Counsel Fees"	$5,000

ineligible to practice law since November 17, 2014, for failure to comply with mandatory continuing legal education requirements, and since August 24, 2015, for failure to pay his annual assessment to the New Jersey Lawyers' Fund for Client Protection.

2/19/2016	Transfer	Ledger card "Counsel Fees"	$3,400
2/29/2016	Transfer	Ledger card "Counsel Fees"	$4,000

On May 26, 2015, respondent's ABA was overdrawn by $564.15. Thus, on May 27, 2015, when respondent transferred $3,000 from her ATA to her ABA as "Counsel Fees" in Carolyn's matter, her ABA balance increased to $2,435.85. On October 14, 2015, respondent transferred $10,000 from her ATA to her ABA, again as "Counsel Fees," in Carolyn's matter. The next day, respondent wrote a $10,000 ABA check to pay her rent.

During the mediation, the parties reached an agreement wherein respondent would make two disbursements from the escrow funds she held in her ATA – a $13,000 disbursement to Daniel and a $5,000 disbursement to Zuvich. On March 11, 2016, respondent made those disbursements, one to Daniel and one to Zuvich, which reduced the escrow funds she was required to hold in her ATA to $115,825.36.

On May 13, 2016, respondent prepared a negotiated property settlement agreement (the PSA), which respondent, Zuvich, and the Roentgens executed. In the PSA, respondent represented that she held $115,825.36 in escrow funds in her ATA. However, on that date, respondent held only $68,925.36 in her ATA on behalf of the Roentgens, because she already had disbursed to herself $46,900 of the marital funds. Indeed, on May 13, 2016, respondent's total ATA balance

was $87,222.96, which represented the $68,925.36 she held for the Roentgens and $18,297.60 she held for other clients. Therefore, in the PSA, respondent failed to account for the disbursements she had made to herself. Moreover, in the PSA, respondent capped her legal fees at $11,505, and did not include modifying language, such as that the cap was prospective. Judge Chrystal incorporated the PSA as a part of the Roentgen's June 7, 2016 final judgment of divorce.

When respondent presented Carolyn's client ledger to the OAE during the random audit, she blacked out the first two disbursements ($7,500 and $6,500) to herself. Notwithstanding respondent's attempt to black out the two entries, the OAE was able to ascertain that, under the redactions, respondent had entered the correct entries for checks #997 and #998. With the two entries blacked out, Carolyn's ledger balance remained positive; however, when respondent's two unauthorized disbursements to herself were considered, the balance on Carolyn's ledger card was negative, which resulted in respondent's invasion of other client funds, for nearly one year. Indeed, as of June 10, 2019, Carolyn's client ledger was negative $581.75. Thus, respondent invaded other client funds that she was required to safeguard.

On July 6, 2016, notwithstanding respondent's self-imposed cap of $11,505 for legal fees, respondent deposited a $15,200 ATA check in her ABA.

The next day, respondent wrote a $15,224.20 ABA check to pay past-due rent. Without the $15,200 infusion of funds to her ABA, respondent did not have sufficient funds to pay her past-due rent.

Ultimately, respondent contended that she disbursed only $15,900 to herself as legal fees in Carolyn's case and that, of the $84,300 she ultimately transferred to her ABA, she subsequently provided Carolyn with $68,400 in cash. Respondent claimed that sometimes she would drop the cash off at Carolyn's home, sometimes Carolyn would come to the office to pick up the cash, or sometimes respondent would give the cash to Carolyn's boyfriend, to bring to Carolyn.

Respondent maintained that Carolyn asked her to disburse the funds, in cash, when Carolyn requested, so that Carolyn's Social Security Supplemental Income[7] (SSI) benefits were not jeopardized. Respondent denied that there was anything wrong with her conduct because she was doing what her client requested.

[7] According to the Social Security Administration, the SSI program "makes cash assistance payments to aged, blind, and disabled persons (including children) who have limited income and resources," whereas the Social Security Disability Insurance Program (SSD) provides benefits to disabled or blind individuals who are "'insured' by workers' contributions to the Social Security trust fund. These contributions are based on [the workers'] earnings." Social Security Administration, Overview of our disability programs, (October 20, 2022), https://www.ssa.gov/redbook/eng/overview-disability.htm?tl=0%2C1.

However, respondent failed to produce any documentation to the OAE corroborating her assertion that Carolyn received any funds from the proceeds of the sale of the marital home. When the OAE attempted to interview Carolyn to confirm whether she received any cash payments from respondent, Carolyn first directed the OAE to speak with her boyfriend. Thus, the OAE spoke with the boyfriend,[8] who first told the OAE that respondent's legal fee was approximately $40,000. When the OAE informed the boyfriend that respondent had taken $84,300, the boyfriend corrected his response and stated that the figure "sounded accurate" for respondent's legal fees. The second time the OAE attempted to speak with Carolyn, "she kept going off on tangents and telling us that she couldn't speak with us, that she was too overwhelmed, and that she wouldn't speak with us." The third time the OAE attempted to speak with Carolyn, she refused to speak with them and refused to participate in a formal interview. Therefore, Carolyn did not provide any information about cash payments respondent made.

When the OAE initially asked respondent about the cash payments, she asserted that she had transferred $46,900 of Carolyn's funds from her ATA to her ABA and the had provided corresponding cash to Carolyn. However, the

[8] Carolyn's boyfriend passed away prior to the commencement of the ethics proceeding and thus, did not testify.

OAE subpoenaed respondent's ABA records and the ATM and bank teller withdrawals did not coincide with the transfers of her counsel fees from her ATA to her ABA. For example, from May 2015 through April 2018, respondent withdrew $31,749.72 in cash from her ABA, which is $15,150.28 less than the $46,900 she transferred in "counsel fees" during that time.

After the OAE confronted respondent with the discrepancy in cash withdrawals from her ABA, respondent claimed that she transferred the funds to her ABA, but paid Carolyn cash payments from respondent's personal accounts, not her ABA, as she previously told the OAE. Consequently, the OAE subpoenaed respondent's personal accounts. Those records, however, did not support respondent's claim that she paid Carolyn with her personal funds because respondent's personal accounts did not contain enough funds to support her explanation.[9] When the OAE again confronted respondent with the discrepancy in her explanation and the financial records, respondent told the OAE "there's no personal account that would house that amount of money for me to be able [sic] because what goes in goes out for household expenses and office expenses." Respondent, thereafter, again claimed that she paid Carolyn cash out of her ABA. When the OAE reminded respondent that her ABA records did not support that explanation, respondent asserted that she transferred the

[9] Respondent's personal financial records were not contained in the record.

funds from her ATA to her ABA, used the money for personal and office expenses, and then paid Carolyn with cash that respondent had "lying around."

Respondent further claimed that Carolyn would frequently request more cash than she ultimately wanted to receive. Thus, after respondent transferred the funds to her ABA, instead of returning the excess funds to her ATA, respondent claimed she kept the extra cash in a lockbox in her office. However, respondent admitted that she used the extra cash for her own business and personal expenses, and that Carolyn was unaware that respondent used her funds for business and personal expenses.[10]

Respondent's decision to utilize her ATA to assist Carolyn with hiding her assets from the Social Security Administration, however, was problematic, according to Gwen Orlowski, Esq. Orlowski is the Executive Director of Disability Rights New Jersey, the "designated protection and advocacy agency for the State of New Jersey." At the ethics hearing, Orlowski was admitted as an expert in the field of Medicaid and Social Security reporting requirements and the receipt of SSI benefits. Orlowski's unrebutted expert testimony reflected that an individual, such as Carolyn, who receives SSI benefits, must remain income and resource eligible each month she receives the benefits.

[10] Although respondent admitted that she used the excess cash for personal and business expenses, without Carolyn's authorization or knowledge, she denied that her conduct constituted the knowing misappropriation of client funds.

Although the proceeds from the sale of a home may, generally, be excluded for purposes of financial need, the proceeds must be used to purchase another home within three months. If another home is not purchased within three months, the SSI recipient must timely report those proceeds as a change in financial circumstances within ten days after the month in which the change occurred.

Orlowski opined that because, in Carolyn's matter, the proceeds of the sale of her marital home were placed in respondent's ATA, her obligation to report the receipt of those funds was likely not triggered until Judge Chrystal incorporated the PSA in the May 13, 2016 judgment of divorce. However, if respondent was providing her with cash, Carolyn would have been required to report the change in financial circumstances to the Social Security Administration when respondent began disbursing the cash.

Indeed, Carolyn, and not respondent, was the individual who was obligated to report to the Social Security Administration that she had a change in her financial circumstances. However, Orlowski opined that, if respondent provided the cash payments to Carolyn, respondent clearly assisted Carolyn with her attempt to defraud the Social Security Administration, because, as respondent admitted, she was aware that Carolyn was concerned the sale proceeds would jeopardize her SSI benefits and respondent, therefore, agreed to

maintain the funds in her ATA and disburse the funds in cash sporadically upon request.

Orlowski testified that respondent could have set up a special needs trust for the home sale proceeds so that Carolyn could have retained her SSI benefits. Indeed, respondent was aware that Carolyn had meetings with attorneys whose practice focused on Social Security law, for the purpose of discussing the establishment of a special needs trust. Thus, Orlowski opined that respondent's decision to disburse the cash from her ATA demonstrates that respondent was aware that Carolyn did not want to disclose her financial assets to Social Security, and that one need not be an expert in Social Security law to understand that a request to disburse cash in piecemeal fashion was likely done to perpetrate a fraud upon the Social Security Administration.

Commingling and Recordkeeping Violations

Respondent represented Rommy Hadef in a matrimonial matter. On November 9, 2015, respondent deposited $20,000 in her ATA in connection with the Hadef matter. The funds represented the proceeds from the sale of Hadef's former marital home. Although respondent did not represent Hadef in the sale of the marital home, the funds also represented the balance of the legal fees that Hadef owed to respondent for her representation in the underlying matrimonial

matter. Thus, the fees were earned at the time the funds were deposited in respondent's ATA and should immediately have been transferred to her ABA.

Nevertheless, respondent admitted to the OAE that she left the funds in her ATA until she needed them, like a "savings account," and admitted that she commingled her earned fees in her ATA.

Respondent also admitted that she was deficient in her recordkeeping. Specifically, respondent admitted the follow deficiencies:

> a) No separate ledger sheet identifying any attorney funds held in ATA for bank charges (R. 1:21-6(d));
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> b) Attorney trust account receipts and disbursements journal not maintained (R. 1:21-6(c)(1)(A));
>
> c) Inactive balances left in the trust account (R. 1:21-6(d));
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> d) Improper designation of the attorney business account on deposit slips (R. 1:21-6(a)(2));
>
> e) Business receipts and disbursements journal not maintained (R. 1:21-6(c)(1)(A));
>
> f) No monthly trust account reconciliation with client ledgers, journals, and checkbook (R. 1:21-6(c)(1)(H));
>
> g) Attorney business account disbursements journal not fully descriptive (R. 1:21-6(c)(1)(A));
>
> h) Failure to maintain all required financial records for seven years (R. 1:21-6(c)(1)); and

i) Failure to maintain a copy of the Arias retainer agreement (R. 1:21-6(c)(1)(C)).

The Ethics Proceedings

Following the ethics hearing, both respondent and the OAE submitted written summations.

In her summation, respondent "acknowledged a knowing misappropriation in the Arias matter." Nevertheless, respondent attempted to explain that she knowingly misappropriated $2,000 from Arias due to her use of an ATA "starter check," which she forgot about and "through oversight did not enter it on the ledger card for Rosalyn Arias." Rather, respondent asserted that her recordkeeping deficiencies "were responsible for the problems she has experienced with her trust account."

Additionally, respondent argued that there was "no proof that any money is owed to Ms. Roentgen" because Carolyn has not alleged that respondent owes her any funds. Respondent asserted that, during the period she provided Carolyn with cash payments, she "did not know that she should not be handing cash to a client without documentation." Furthermore, respondent denied that she assisted Carolyn with perpetrating a fraud upon the Social Security Administration because she was not knowledgeable about Social Security law.

With respect to her admission that she knowingly misappropriated client funds in the Arias matter, respondent adopted the position the New Jersey Bar Association (the NJSBA) asserted in In re Lucid, 248 N.J. 514 (2021), arguing that "absent clear and convincing evidence of theft or fraud, notions of justice and fairness based on the merits of the particular facts presented require consideration of alternate appropriate sanctions, if any, short of disbarment under Wilson." Respondent, thus, argued that disbarment under Wilson should occur only when clear and convincing evidence demonstrates that an attorney intended to steal from or defraud the person whose funds they misappropriated. Therefore, respondent asserted that discipline short of a disbarment or suspension was appropriate for her misconduct. In its decision in In re Wade, 250 N.J. 581 (2022), the Court rejected the NJSBA's attempt to limit the application of the Wilson rule in this manner.

In its summation, the OAE argued that respondent should be disbarred because she knowingly misappropriated funds in both the Arias and Roentgen matters, in violation of Wilson and Hollendonner; RPC 1.15(a); RPC 8.4(c); and RPC 1.15(b). The OAE also contended that respondent's knowing misappropriation of client and escrow funds further violated RPC 8.4(b) because her conduct was contrary to N.J.S.A. 2C:20-4 (theft by deception); N.J.S.A. 2C:20-2(b)(1)(a) (consolidation of theft and computer criminal activity

offenses);[11] and N.J.S.A. 2C:21-15 (misapplication of entrusted property and property of government or financial institutions).

Furthermore, the OAE argued that respondent violated RPC 8.1(a) and RPC 8.4(c) by providing "shifting and inconsistent explanations" regarding her disbursement of funds to Carolyn.

Additionally, the OAE maintained that respondent's agreement to hold and distribute cash payments to Carolyn so that Carolyn's SSI benefits were not impacted was a criminal act, in violation of RPC 8.4(b). Specifically, the OAE argued that, by assisting Carolyn with a fraud upon the Social Security Administration, respondent's conduct violated 42 U.S.C. § 408(a) (social security fraud); 26 U.S.C. § 7201 (attempt to evade or defeat tax); 26 U.S.C. § 7206 (fraud and false statements relating to the Internal Revenue Service); 18 U.S.C. § 2 (crimes against the United States); 18 U.S.C. § 371 (conspiracy to defraud the United States); N.J.S.A. 54:52-9 (failure to pay tax owing to New Jersey); and N.J.S.A. 2C:2-6 (liability for conduct of another; complicity).

In particular, the OAE contended that, when respondent issued a $2,000 check to herself in the Arias matter, she committed knowing misappropriation

[11] N.J.S.A. 2C:20-2(a) provides that "theft or computer criminal activity [. . .] constitutes a single offense, but each episode or transaction may be the subject of a separate prosecution and conviction." N.J.S.A. 2C:20-2(b)(1)(a) concerns the grading of theft offenses when the theft involves $75,000 or more.

of client funds because she knew she was not entitled to those funds. Moreover, respondent's actions also constituted knowing misappropriation of escrow funds because a portion of the settlement funds belonged to Kuttner, who did not give respondent permission to take $2,000 even before Arias signed the settlement paperwork.

Additionally, the OAE argued that respondent committed knowing misappropriation of the Roentgen's marital home proceeds because respondent issued, at a minimum, $14,000 to herself without Daniel's knowledge or authorization. The OAE also asserted that respondent committed knowing misappropriation of client funds because respondent admitted that, after she transferred Carolyn's funds to her ABA, she used them for personal expenses due to her own financial needs.

Citing In re DiLieto, 142 N.J. 492, 507 (1995) (holding "it is not enough to simply follow a client's instructions" and that an attorney must conduct a reasonable inquiry into the client's request), the OAE rejected respondent's assertion that, by issuing cash payments to Carolyn to avoid SSI income reporting requirements, she was merely acting in accordance with Carolyn's request.

Furthermore, the OAE argued that respondent's reliance on Lucid was misplaced. The OAE correctly asserted that, in Lucid, the Court found that the

attorney had negligently, and not knowingly, misappropriated funds. The OAE pointed to the absence of a pronouncement from the Court that Lucid stood for the proposition that "absent clear and convincing evidence of theft or fraud, that a sanction short of disbarment would be appropriate."[12] Nevertheless, the OAE contended that, in this matter, respondent engaged in both theft and fraud because she misappropriated funds in the Arias and Roentgen matters; admitted to knowing misappropriation; and "was an accomplice to committing fraud by engaging in criminal acts when she gave cash in piecemeal amounts to Ms. Roentgen and [her boyfriend] in order to deceive the Social Security Administration."

In addition to asserting that disbarment was appropriate for respondent's knowing misappropriation of client and escrow funds, the OAE further asserted that, pursuant to In re Goldberg, 142 N.J. 557 (1995) (disbarment for attorney who pleaded guilty, in separate jurisdictions, to three counts of mail fraud, in violation of 18 U.S.C. §§ 2, 1341 and 1343; and conspiracy to defraud the United States, in violation of 18 U.S.C. § 371), respondent's crime in assisting her client with defrauding the Social Security Administration warrants her disbarment. Additionally, the OAE contended that, even though respondent knew Carolyn

[12] The OAE's summation was dated three months before the Court issued its decision in Wade, where the Court expressly rejected the NJSBA's position that the OAE must prove intent to steal in knowing misappropriation cases.

struggled with her health, so much so that a judge appointed a guardian ad litem to protect Carolyn's interests in the matrimonial action, respondent victimized, rather than protected, her client by taking her money to pay respondent's own personal and business expenses, which would also warrant her disbarment under In re Torre, 223 N.J. 538 (2015) (holding that if there were clear and convincing evidence that an attorney knew at the time she borrowed funds from a trusting client that she could not repay the loan, disbarment would be appropriate).

Finally, the OAE argued that respondent's commingling of funds in the Hadef matter violated RPC 1.15(a). Likewise, respondent's admitted recordkeeping deficiencies violated RPC 1.15(d).

Following the ethics hearing, the special master concluded that the OAE had proven, by clear and convincing evidence, that respondent (1) knowingly misappropriated client funds in the Arias matter, and (2) knowingly misappropriated client and escrow funds in the Roentgen matter.

The special master found that respondent's testimony featured "numerous contradictions," particularly regarding how she handled the purported cash payments to Carolyn. The special master detailed how respondent initially stated that she transmitted all the funds – less her $15,900 legal fee – to Carolyn in cash, and then repeatedly changed her explanation regarding her handling of Carolyn's funds after the OAE confronted her with financial records.

The special master accepted respondent's admissions that she commingled funds in the Hadef matter and failed, in numerous respects, to comply with the recordkeeping requirements of R. 1:21-6.

The special master found that the OAE had proven the most serious allegations – that respondent knowingly misappropriated client and escrow funds. With respect to the Arias matter, the special master accepted respondent's admission that she knowingly misappropriated $2,000 in client funds.

With respect to the Roentgen matter, the special master determined that respondent's misconduct "was even more severe" than in Arias. For example, the special master determined that respondent issued two checks ($6,500 and $7,500) to herself without notifying either Carolyn or Daniel. The special master reasoned that "substantially aggravating this action was the deliberate obfuscation by the Respondent, blacking out those two entries on her attorney Trust Account Ledger" during the OAE's random audit. The special master also was troubled that respondent issued the two checks at a time when she admitted that she represented both Carolyn and Daniel in the sale of the martial home, which the special master found to be a conflict of interest.

Furthermore, the special master rejected respondent's multiple explanations for the transfers from her ATA to her ABA, finding that:

> Respondent's story changed repeatedly, each time countered by the OAE with financial records

> disproving same. The Respondent was clearly lying. Needless to say, the testimony of the Respondent regarding any of these alleged defenses was incredible. Perhaps more troubling still is the Respondent's defense that she was entitled to some of the monies as counsel fee and some distributed to the client. It is a difficult dichotomy. Either the Respondent retained all of the monies for her personal use, or some were distributed to the client. There is no record of any such distribution to the client. [. . .] However, were any monies distributed to the client, it would have been a criminal act, seeking to avoid the reporting requirements of these [sic] Social Security Administration.
>
> [SEM19.][13]

Thus, the special master reasoned that either respondent misappropriated client funds or she committed a criminal act by assisting her client in perpetrating a fraud upon the Social Security Administration.

Nevertheless, the special master found that respondent committed knowing misappropriation in the Roentgen matter, although "the amount of the misappropriation remains a mystery" because of respondent's failure to maintain any records demonstrating where the funds went. The special master accepted respondent's admission that she used some of Carolyn's funds to pay for her own personal expenses and found that such conduct, alone, constituted knowing misappropriation.

[13] "SEM" refers to the special ethics master's undated hearing report, which the OAE received on May 6, 2022.

Therefore, the special master concluded that, pursuant to Wilson, there was no escaping a disbarment recommendation because "not only did the Respondent misuse client's funds, she willfully altered her financial records in both the Arias and Roentgen matters to conceal that defalcation." Alternatively, the special master concluded that respondent's disbarment was warranted due to her active participation in a conspiracy to defraud the Social Security Administration.

Specifically, the special master found that respondent's victimization of a vulnerable client was a significant aggravating factor, in addition to respondent's misstatements to the OAE and to Judge Chrystal in the PSA. Additionally, respondent's criminal conduct in assisting Carolyn with her fraud of the Social Security Administration was an aggravating factor. The special master noted that respondent's financial needs, due to her husband's disability, was not a mitigating factor.

During oral argument before us, the OAE reiterated its argument that respondent should be disbarred for her knowing misappropriation of client and escrow funds, noting that she had admitted, during the ethics proceeding, that she committed knowing misappropriation, yet, elected to have a hearing. The OAE emphasized that, although respondent knew she was not authorized to use the Arias or Roentgen funds for personal use, she did so anyway. Indeed, the

OAE contended that the instant matter is unlike Lucid, where the Court found negligent misappropriation, because there is overwhelming evidence in this case – including respondent's admissions – that respondent committed knowing misappropriation, for which she must be disbarred.

Conversely, during oral argument before us, respondent, through counsel, repeatedly argued that, notwithstanding "what occurred," her actions were not done to benefit herself. Respondent emphasized that she was "foolish" and "not as smart as she should have been," and knows better now, but did not deny her admission that she knowingly misappropriated client funds, because "that's in the record." Nevertheless, respondent urged us to impose discipline less than disbarment.

Following a 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. Specifically, we determine that respondent knowingly misappropriated client and escrow funds, in violation of RPC 1.15(a) and the principles of Wilson and Hollendonner, and, thus, we recommend to the Court that she be disbarred. Moreover, when respondent knowingly misappropriated funds in the Arias and Roentgen matters, she invaded trust funds belonging to other clients, without their knowledge or authorization, in violation of RPC 1.15(a). Additionally, even if respondent had not committed

knowing misappropriation, her piecemeal disbursements of cash to Carolyn, a vulnerable client with severe health struggles, in order to assist Carolyn with defrauding the Social Security Administration, would warrant her disbarment, pursuant to Goldberg and its progeny.

Preliminarily, there is no dispute respondent knowingly misappropriated $2,000 in client funds in the Arias matter, in violation of the principles of Wilson. Respondent wrote herself a $2,000 check from Arias' settlement funds four months before Arias even signed the settlement paperwork. Respondent did so because she needed to pay her mortgage and did not have sufficient personal funds to pay that expense. Respondent conceded, multiple times, that she did not have Arias' authorization to take the $2,000.

However, respondent's $2,000 disbursement to herself also constituted the knowing misappropriation of escrow funds, in violation of Hollendonner, because Kuttner was entitled to a portion of the settlement proceeds, due to his work on the matter before he transferred it to respondent. Regardless of whether respondent and Kuttner had a dispute over the fee split or which attorney did more work on the matter, respondent admitted that, under no scenario was she entitled to $2,000 in the Arias matter and, thus, her conduct constituted knowing misappropriation of funds, in violation of RPC 1.15(a); RPC 1.15(b); RPC 8.4(b); and the principles of Wilson and Hollendonner.

Furthermore, we find that respondent also committed knowing misappropriation of client and escrow funds in the Roentgen matter. Respondent admitted that she used Carolyn's funds, without her authorization, for respondent's own personal and business expenses. The Court has long held that misappropriation is "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." Wilson, at 455 n.1. Peculiarly, respondent admitted that she took Carolyn's funds without her authorization so that respondent could pay her personal and business expenses. Yet, she refused to admit that conduct constituted knowing misappropriation, even though she admitted to the same misconduct in the Arias matter, and correctly identified the misconduct as knowing misappropriation.

Nevertheless, respondent's knowing misappropriation of the Arias and Roentgen funds violated RPC 8.4(b) because her misconduct represented the theft of client and escrow funds. Furthermore, respondent was aware that Carolyn wanted her funds distributed piecemeal, in cash, in order to defraud the Social Security Administration, and respondent acquiesced to the illegal request, in violation of RPC 8.4(b) and RPC 8.4(c).

Additionally, during the ethics investigation and ethics hearing, respondent provided inconsistent and varying explanations for how she disbursed Carolyn's funds – first claiming she transferred the funds from her ATA to her ABA so that she could provide Carolyn with cash. When the OAE confronted her with financial records that failed to support that explanation, respondent modified her defense, claiming she used her own funds to pay Carolyn in cash. When the OAE confronted respondent with her personal financial records to demonstrate that she did not have sufficient funds to support payment from her personal accounts, respondent reverted to claiming that she transferred the funds to her ABA. Only then did respondent admit she used the cash for personal and business expenses. Respondent's refusal to provide truthful answers to the OAE violated RPC 8.1(a) and RPC 8.4(c). Furthermore, during the OAE's random audit of her financial records, respondent blacked out entries and omitted entries from client ledgers, another brazen violation of RPC 8.4(c).

Finally, respondent violated RPC 1.15(a) by commingling her legal fees in her ATA and violated RPC 1.15(d) by virtue of her admitted recordkeeping deficiencies.

In sum, we find that respondent violated RPC 1.15(a) (two instances); the principles of Wilson and Hollendonner (two instances); RPC 1.15(b) (two

instances); RPC 1.15(d); RPC 8.1(a); RPC 8.4(b) (two instances); and RPC 8.4(c). There remains for determination the appropriate quantum of discipline to impose on respondent for her misconduct.

The crux of respondent's misconduct was her knowing misappropriation of client and escrow funds in the Arias and Roentgen matters.

In New Jersey, "[d]isbarment is mandated for the knowing misappropriation of clients' funds." In re Orlando, 104 N.J. 344, 350 (1986) (citing In re Wilson, 81 N.J. 451, 456 (1979)). 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. at 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.
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> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

This year, more than forty years after Wilson was decided, the Court re-affirmed its "bright-line rule [. . . .] that knowing misappropriation will lead to disbarment." In re Wade, 250 N.J. at 601. In Wade, the Court observed that, "[w]hen clients place money in an attorney's hands, they have the right to expect the funds will not be used intentionally for an unauthorized purpose. If they are, clients can confidently expect that disbarment will follow." Ibid.

The Wilson rule also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21. 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 [. . .] ." Hollendonner,

102 N.J. at 28-29.

As we opined in In the Matter of Robert H. Leiner, DRB 16-410 (June 27, 2017):

> [c]lient funds are held by an attorney on behalf, or for the benefit, of a client. Escrow funds are funds held by an attorney in which a third party has an interest. Escrow funds include, for example, real estate deposits (in which both the buyer and the seller have an interest) and personal injury action settlement proceeds that are to be disbursed in payment of bills owed by the client to medical providers.
>
> [Id. at 21.]

The Court agreed. In re Leiner, 232 N.J. 35 (2018).

Regardless of whether the funds in question are held on behalf of a client or a third party, there must be clear and convincing proof of an attorney's knowing misappropriation to apply the ultimate sanction of disbarment. "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).

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 [. . . .] [C]ircumstantial 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).

Here, respondent made an inculpatory statement in one client matter, admitting that she knowingly misappropriated a portion of the Arias funds by issuing a $2,000 check to herself so that she could pay her mortgage. She knew those funds did not belong to her (due to the admittedly low balance in her ATA) but took the funds anyway. Respondent's improper taking of those funds before Arias had even signed the settlement paperwork is particularly egregious. Cf. In re Cicala, __ N.J. __ (2022), 2022 N.J. LEXIS 663 (June 23, 2022) (disbarment for attorney who committed knowing misappropriation by repeatedly disbursing

legal fees to himself prior to depositing corresponding settlement checks, thus, invading other clients' trust funds, without their consent or authorization). Indeed, respondent knew that under no circumstances was she entitled to $2,000 from the Arias matter and, in fact, when Arias finally signed the Closing Statement, respondent additionally disbursed to herself the legal fees to which she was entitled. Thus, respondent's admission that she committed knowing misappropriation in the Arias matter mandates her disbarment under Wilson.

Respondent also disbursed to herself $84,300 of Carolyn's funds and claimed she provided Carolyn with all but $15,900 of the funds, in cash. However, the OAE's audit of respondent's business and personal financial records revealed that respondent, on multiple occasions, transferred funds from her ATA to her ABA in almost the exact amounts she needed to pay her personal bills. For example, respondent transferred $15,200 of Carolyn's funds to her ABA and the next day, wrote a $15,224.20 check to pay her past-due rent which, without Carolyn's funds, she would not have been able to pay. That fact is consistent with respondent's admission that she used Carolyn's funds for her own personal and business expenses.

Additionally, respondent failed to offer any evidence whatsoever that she provided Carolyn with the cash. To the contrary, respondent put forth as a defense that she provided cash to Carolyn – a woman for whom a matrimonial

judge appointed a guardian ad litem – supposedly to assist Carolyn in what amounted to a fraud upon the Social Security Administration. Respondent also admitted that she used some of the cash that she transferred to her ABA to pay her personal and business expenses – without Carolyn's authorization or knowledge. That misconduct constitutes the further knowing misappropriation of client funds, and under Wilson, mandates her disbarment.

Furthermore, during respondent's improper dual representation of Carolyn and Daniel – two individuals in the midst of a divorce proceeding – in connection with the sale of their marital home, respondent disbursed $46,900 to herself without Daniel's authorization, a clear violation of Hollendonner. That misconduct further mandates her disbarment.

Even if we found that respondent did not commit knowing misappropriation in the Arias or Roentgen matters, respondent still is subject to disbarment, considering her active participation in a scheme to defraud the Social Security Administration.

In its 1995 Goldberg opinion, the Court enumerated the aggravating factors that normally lead to the disbarment of attorneys convicted of crimes:

> Criminal convictions for conspiracy to commit a variety of crimes, such as bribery and official misconduct, as well as an assortment of crimes related to **theft by deception and fraud**, ordinarily result in disbarment. We have emphasized that when a criminal conspiracy evidences 'continuing and prolonged rather

> than episodic, involvement in crime,' is 'motivated by personal greed,' and **involved the use of the lawyer's skills 'to assist in the engineering of the criminal scheme,' the offense merits disbarment**. (citations omitted).
>
> [In re Goldberg, 142 N.J. at 567.] (emphasis added)

Notwithstanding the lack of a criminal conviction for fraud or theft in this matter, we find that respondent's misconduct was criminal. See In re McEnroe, 172 N.J. 324 (2002) (finding violations of the federal tax code even though the United States Government never charged the attorney with a crime).

Therefore, in addition to her clear violations of Wilson and Hollendonner, respondent's knowing participation in Carolyn's scheme to defraud the Social Security Administration mandates that she be disbarred to protect the public, the integrity of the bar, and the confidence of the public in the legal profession. Thus, we recommend to the Court that respondent be disbarred on both lines of precedent.

Because disbarment is the only appropriate sanction in this matter, pursuant to the principles of Wilson, Hollendonner, and Goldberg, we need not address the appropriate quantum of discipline for respondent's additional ethics violations.

Finally, respondent should be required to disgorge to Arias the $2,000 she took without authorization. Because the record does not clearly reflect how

much money respondent took from Carolyn without authorization, it is not possible to recommend an amount that respondent should be required to return.

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
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),
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 Esther Maria Alvarez
Docket No. DRB 22-133

Argued: October 20, 2022

Decided: January 12, 2023

Disposition: Disbar

Members	Disbar	Absent
Gallipoli	X	
Boyer	X	
Campelo	X	
Hoberman	X	
Joseph	X	
Menaker		X
Petrou	X	
Rivera	X	
Total:	7	1

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