Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 22-176
District Docket No. XIV-2020-0078E

In the Matter of

Matthew D. Rasmussen

An Attorney at Law

Decision

Decided: March 6, 2023

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

This matter was before us on a certification of the record filed by the Office of Attorney Ethics (the OAE), pursuant to R. 1:20-4(f). The formal ethics complaint charged respondent with having violated RPC 1.3 (lacking diligence); RPC 1.4(b) (two instances – failing to keep a client reasonably informed about the status of a matter and to comply with reasonable requests for information); RPC 1.15(a) (two instances – failing to safeguard client funds) 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(b) (two instances – failing to promptly deliver funds to client); RPC 1.15(c) (failing to provide an accounting at the conclusion of a contingent fee matter); RPC 1.15(d) (failing to comply with the recordkeeping requirements of R. 1:21-6); RPC 8.1(a) (two instances – making a false statement of material fact in a disciplinary matter); RPC 8.1(b) (two instances – failing to cooperate with disciplinary authorities);[1] and RPC 8.4(c) (two instances – engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

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

Respondent earned admission to the New Jersey bar in 2012. At the relevant time, he maintained a law office in Freehold, New Jersey.

Effective March 17, 2022, the Court temporarily suspended respondent for failing to comply with a fee arbitration award. In re Rasmussen, __ N.J. __ (2022). He remains temporarily suspended to date.

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[1] Due to respondent's failure to file an answer to the formal ethics complaint, and on notice to respondent, the OAE amended the complaint to include the second RPC 8.1(b) charge.

Service of process was proper. On July 1, 2022, the OAE sent a copy of the formal ethics complaint, by certified and regular mail, to respondent's home address of record in Jersey City, New Jersey. Neither the certified mail receipt nor the regular mail was returned to the OAE. United States Postal Service (USPS) tracking indicated that the certified letter was delivered on July 7, 2022.

On August 4, 2022, the OAE sent a second letter to respondent at his home address, by regular mail, and by e-mail to his personal and law firm e-mail addresses, informing him that, unless he filed a verified answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted, the record would be certified directly to us for the imposition of discipline, and the complaint would be amended to include a willful violation of RPC 8.1(b). The regular mail was not returned to the OAE. The OAE's e-mail sent to respondent's personal e-mail address was delivered; however, the e-mail sent to respondent's law firm e-mail address was not delivered.

On August 11, 2022, the OAE published a disciplinary notice, in the Asbury Park Press, informing respondent that a formal ethics complaint had been filed against him, that he had twenty-one days from the date of publication to file an answer, and that his failure to do so would be deemed an admission of the allegations of the complaint and the matter would be certified directly to us

for the imposition of discipline. On August 15, 2022, the OAE published an identical disciplinary notice in the New Jersey Law Journal.[2]

As of September 28, 2022, respondent had not filed an answer to the complaint, and the time within which he was required to do so had expired. Accordingly, the OAE certified this matter to us as a default.

On October 4, 2022, Acting Chief Counsel to the Board sent a letter to respondent, by certified and regular mail, at his home address, with an additional copy sent by e-mail, informing him that the matter was scheduled before us on November 17, 2022, and that any motion to vacate must be filed by October 18, 2022. Delivery to respondent's e-mail address was complete, although no delivery notification was sent by the destination server. The certified mail receipt was returned to the Office of Board Counsel (the OBC) bearing an illegible signature; however, USPS tracking indicated that, on October 8, 2022, the certified letter was delivered. The regular mail was not returned.

Moreover, on October 10, 2022, the OBC published a disciplinary notice in the New Jersey Law Journal, stating that a formal ethics complaint had been filed against respondent, that respondent had not filed an answer, and that we

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[2] Given the discrepancy in the two publication dates that directed respondent to file an answer within twenty-one days, we viewed the disciplinary notices in the light most favorable to respondent and found that he had until September 5, 2022, to file an answer to the verified ethics complaint in order to avoid a default in this matter.

would review the matter on November 17, 2022. The notice further informed respondent that, unless he filed a motion to vacate the default by October 18, 2022, his failure to answer would be deemed an admission of the allegations of the complaint.

Respondent did not file a motion to vacate the default.

We now turn to the allegations of the complaint.

Recordkeeping Violations

On June 5, 2019, the OAE conducted a random compliance audit of respondent's financial books and records at his law office in Freehold, New Jersey. By letter dated June 6, 2019, the OAE informed respondent that, during the random audit, it had uncovered fourteen recordkeeping deficiencies that required corrective action to conform with R. 1:21-6, including:

a) No running checkbook balance (R. 1:21-6(c)(1)(G));

b) Non-descriptive client ledger sheets (R. 1:21-6(d));

c) Earned legal fees not deposited in attorney business account (ABA) (R. 1:21-6(a)(2));

d) commingling personal funds with client trust funds (RPC 1.15(a));

e) Improper attorney trust account (ATA) and ABA designations (R. 1:21-6(a)(2));

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

g) Failure to perform monthly three-way reconciliations (R. 1:21-6(c)(1)(H));

h) Failure to maintain ABA and ATA records for seven years (R. 1:21-6(c)(1)); and

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

Following the random audit, the OAE made several unsuccessful attempts to obtain from respondent the information sought via the June 6, 2019 letter. On February 14, 2020, after respondent failed to cooperate with the random audit unit, the OAE docketed the matter for disciplinary investigation. To date, respondent has failed to provide proof that he maintained a running cash balance in his ATA checkbook or that the designations on his ATA and ABA were corrected.

The Lory Topper Matter

During its investigation, the OAE learned that, on March 7, 2017, Lory Topper, a resident of Arizona, retained respondent to represent her in a matter related to the estate of her deceased father, James Marzano. The retainer agreement provided that Topper would pay respondent an initial $1,500 retainer fee and, thereafter, she would pay respondent's $300 hourly rate. Additionally,

Topper was responsible for paying vendor invoices directly if respondent requested payment from her. Topper paid respondent the $1,500 retainer fee and, on March 17, 2017, he deposited those funds in his ATA.

Respondent provided Topper with Invoice #72, dated March 16, 2017, which documented that, as of that date, respondent had charged her $366 in legal fees for work performed from March 7 through March 15, 2017.

Thereafter, respondent prepared a complaint on Topper's behalf and, on April 13, 2017, filed it with the Probate Part of the Superior Court of New Jersey, Monmouth County. Less than one month later, on May 4, 2017, Topper agreed to settle her claims against her father's estate for $15,000.

On May 16, 2017, respondent sent Topper a handwritten note on his law firm letterhead stating, "please find enclosed our billing to-date on the file. I anticipate another ½-1 hour to finish the matter, which we will take out of the settlement proceeds. Let me know if you have any questions." With the note, respondent enclosed Invoice #141,[3] dated May 8, 2017, which documented that, from March 22 through May 4, 2017, respondent charged Topper $2,490 in legal fees.

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[3] There is no explanation in the record as to how respondent numbered his invoices, i.e., by individual clients or by invoices prepared for all law firm clients. Presumably, because Topper's first invoice, which respondent generated in March 2017, began with number seventy-two, the invoices were numbered as they were generated for all law firm clients.

Invoice #141 also documented that, on April 24, 2017, respondent applied $600 from the retainer funds toward Topper's legal fees and, on May 16, 2017, he applied an additional $534 from the retainer funds toward Topper's legal fees. Thus, as of May 16, 2017, Invoice #141 reflected that Topper owed respondent a balance of $1,356 in legal fees and that $369 remained of the retainer fee Topper paid respondent at the beginning of the representation.

On June 8, 2017, Topper signed a release and settlement agreement to resolve the litigation against her father's estate; on June 14, 2017, Aurora Marzano, the executrix of Marzano's estate, signed the release on behalf of the estate. On June 14, 2017, Aurora Marzano issued a $15,000 check to "Rasmussen Law Attorney Trust Acct" to settle Topper's claims. The same date, Aurora Marzano's attorney sent the check, the executed release and settlement agreement, and other settlement documents to respondent, via Federal Express. Also on June 14, 2017, respondent and counsel for the estate signed a stipulation of dismissal, a consent order, and a certification of services.

Two days later, respondent deposited the $15,000 settlement check in his ATA. Respondent did not advise Topper that he had received the settlement check or that he had deposited the check in his ATA.

On June 19, 2017, respondent electronically transferred $3,338.50 from his ATA to his attorney business account (ABA) and documented the transfer as

"earned legal fee" on the Topper client ledger card. Respondent's bank records concerning the transfer noted "Invoice 195 Payment Topper."

The source of funds for the $3,338.50 transfer from respondent's ATA to his ABA was the $359 balance of Topper's retainer fee, supplemented by $2,979.50 of her settlement funds. Respondent did not speak to Topper before or after transferring the $3,338.50 and she was unaware that respondent used her $15,000 settlement to pay his legal fees.

Moreover, respondent's retainer agreement did not authorize him to deduct legal fees from any settlement funds he received from Topper. However, as respondent wrote in his May 16, 2017 handwritten letter to Topper, he anticipated deducting legal fees from the settlement proceeds for the thirty minutes to one hour of work remaining on the matter. There is no evidence in the record that Topper objected to respondent deducting legal fees of up to one hour from her settlement proceeds.

However, respondent failed to send Topper an updated invoice to reflect that her outstanding legal fees of $1,356 were paid on June 19, 2017, when respondent deducted them from her settlement proceeds. Respondent also failed to advise Topper that he had prepared Invoice #195 for legal services rendered in May and June 2017, totaling $1,982.50, and did not provide her with Invoice #195 to document the work done on the matter. However, only one month

earlier, respondent estimated that it would take him one hour or less to "finish [Topper's] matter," which, at respondent's hourly billing rate, should have cost Topper $300 or less. Thus, as of June 19, 2017, respondent failed to provide Topper with an accounting for approximately $1,682.50 of Topper's settlement funds. The only invoices Topper received from respondent were Invoice #72 and Invoice #141.

Beyond his representation on May 16, 2017 – that he anticipated it would only take him an hour or less to conclude Topper's matter – respondent failed to discuss with Topper any additional legal work or legal fees.

Nevertheless, on September 28, 2017, respondent transferred an additional $3,150 of Topper's settlement funds from his ATA to his ABA without Topper's knowledge or authorization. Respondent documented the transfer on Topper's client ledger card as "earned legal fee." However, respondent failed to prepare an invoice for Topper reflecting the $3,150 transfer and failed to provide Topper with a bill before or after transferring $3,150 to himself for legal fees.

On October 17, 2017, respondent transferred $2,280 of Topper's settlement funds from his ATA to his ABA without Topper's knowledge or authorization. Respondent documented the transfer on Topper's client ledger card as "earned legal fee." However, respondent failed to prepare an invoice for

Topper reflecting the $2,280 transfer and failed to provide Topper with a bill before or after transferring $2,280 to himself for legal fees.

On November 16, 2017, respondent transferred $2,295.50 of Topper's settlement funds from his ATA to his ABA without her knowledge or authorization. Respondent documented the transfer on Topper's client ledger card as "Earned legal fee." However, respondent failed to prepare an invoice for Topper reflecting the $2,295.50 transfer and failed to provide Topper with a bill before or after transferring $2,295.50 to himself for legal fees.

The four unauthorized transfers were made via electronic wire transfer from respondent's ATA to his ABA in violation of R. 1:21-6(c)(1)(A).

On November 16, 2017, after respondent's transfer of $2,295.50 of Topper's settlement funds, the Topper client ledger card reflected that just $4,295 remained from Topper's $15,000 settlement. At the time, Topper was unaware that respondent had even received her settlement check.

On December 3, 2017, Topper sent an e-mail to respondent and Caralee Bava-Grygo, an associate at respondent's firm, stating that she was "writing in regard to my settlement. Almost three months ago my sons received their inheritance checks. I have heard nothing from your office, since June. It would appear as if Mrs. Marzano has not kept her agreement. Please look into this matter." Nine days later, on December 12, 2017, respondent replied to Topper's

e-mail, claiming that the e-mail "went to my spam box for some reason and Cara brought it to my attention today. I will check into this and get back to you shortly."[4]

On February 4, 2018, Topper again sent an e-mail to respondent inquiring about her settlement check, stating that she was "hoping you have contacted Ms. Marzano's, [sic] lawyer by now? This matter should have been settled as it is a legal agreement, already agreed to by both parties. Please, inform me on any current action you have taken."

On April 12, 2018, Bava-Grygo sent Topper an e-mail, stating "please find attached the [settlement] documents you requested. The check will be resent in today's mail or tomorrow's mail."[5] Seven days later, on April 19, 2018, Topper sent another e-mail indicating that, "on last Thursday4/12/18, [sic] you asked me to call your office if the check did not arrive by Wednesday 418/18. [sic] Today is 4/19/18, the check has not been delivered. I will call your office tomorrow about this matter." The next day, Bava-Grygo sent an e-mail to Topper

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[4] When respondent told Topper he would "check into" the receipt of the settlement funds, he knew that he had already received and deposited the check in his ATA and, in fact, had disbursed $10,705 of the funds to himself. However, the OAE did not charge respondent with making a false statement of material fact to Topper, in violation of RPC 8.4(c). However, we are permitted to consider the uncharged misconduct in aggravation. See In re Steiert, 220 N.J. 103 (2014) (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).

[5] There is no evidence in the record that respondent or Bava-Grygo replied to Topper's December 2017 request for information prior to Bava-Grygo's April 12, 2018 e-mail.

requesting Topper's bank information because respondent thought the "best and fastest way [to send the settlement funds] will be to wire you the funds on Monday so there is no further delay." Topper and Bava-Grygo agreed to speak on April 23, 2018 about the bank information.

However, on April 23, 2018, Topper sent Bava-Grygo an e-mail indicating they were supposed to speak by telephone at noon, but that no one from respondent's law firm called Topper. Topper wrote "you have had my inheritance money since last June. Where is my inheritance?" The next day, Bava-Grygo sent Topper an e-mail informing her that she had just regained access to her e-mail and that, "as we discussed yesterday the service was down. [Respondent] was in a client meeting the entire afternoon yesterday and was unable to make the transfer. He will do so as soon as possible and forward you the confirmation." Topper acknowledged receipt of Bava-Grygo's e-mail and reminded her that she had "waited almost one year for my inheritance to be given to me, by Mr. Rasmussen. I expect this wire to be done this week."

On July 27, 2018, Topper filed an ethics grievance with the OAE; nearly five months later, on December 11, 2018, respondent released Topper's settlement funds to her via a $15,000 ATA check. The check represented full payment of the settlement, despite respondent's earlier claims that Topper owed

him substantially more in legal fees than the initial $1,500 retainer fee Topper paid at the beginning of the representation.

As detailed above, in November 2018, respondent was holding only $4,295 of Topper's settlement funds in his ATA, having made multiple disbursements against the $15,000. Yet, on November 28, 2018, respondent transferred $15,000 from his ABA to his ATA so that he could issue an ATA check for the full settlement amount. Indeed, between June 19, 2017, and November 27, 2018, when respondent was obligated to safeguard Topper's $15,000 settlement funds, his overall ATA balance was less than $15,000 on thirty-one occasions.

On May 11, 2020, after receiving Topper's grievance, the OAE sent respondent a letter scheduling a demand audit interview and requiring that he provide financial records and an explanation for his failure to hold Topper's $15,000 settlement inviolate. Respondent failed to reply to the OAE's May 11, 2020 letter.

Eventually, on September 17, 2020, respondent participated in a demand audit with the OAE. During the demand audit, respondent told the OAE that, soon after receiving the settlement funds in June 2017, he had advised Topper that he had received the settlement check. Additionally, respondent told the OAE that he had "processed" and sent invoices to Topper before he took

portions of the settlement funds as legal fees, so that she was aware he was deducting legal fees from her settlement funds.

With respect to the legal fees, respondent claimed that the fees he billed to Topper from September through November 2017 were related to other work he pursued for her. Respondent asserted that, after Topper had contacted him in December 2017 and demanded the release of her settlement funds, he explained to her that they were "doing work" for her which "costs money." Furthermore, respondent told the OAE that the delay in sending the settlement funds to Topper was because he was trying to come to an agreement with her regarding his legal fees. However, when the OAE asked respondent why he eventually paid Topper the full $15,000 after he "earned these legal fees and she was aware of them," he claimed that "it's just [his] practice" and he did not want Topper to be unhappy.

On September 21, 2020, following the demand audit interview, the OAE sent respondent a letter requesting eleven categories of information, including production of contemporaneous billing statements he had prepared in the Topper matter, as well as any letters he had sent to Topper explaining his legal fees. The OAE requested that respondent produce the information no later than October 1, 2020.

Respondent failed to reply to the OAE's September 21, 2020 letter. Respondent also failed to reply to three follow-up letters the OAE sent to him from October 9, 2020, through December 3, 2020. Consequently, on July 1, 2021, the OAE filed a motion with the Court, pursuant to R. 1:20-3(g)(4) and R. 1:20-11(a), seeking respondent's immediate temporary suspension from the practice of law for his failure to cooperate with the OAE's disciplinary investigation. That motion remains pending with the Court.

On July 15, 2021, respondent sent the OAE a letter and purported billing records for the Topper matter. In his letter, respondent apologized for his "extremely tardy submission." Respondent claimed that he did not intend to be non-cooperative with the OAE's investigation and that "a lot has occurred in between our correspondences, including me having COVID-19, which I did not know I had the last time I emailed with your office – simply stating that I had been 'very sick.'"

With respect to the Topper matter, respondent wrote that he "simply had a retainer agreement and paid myself from funds held in escrow pursuant to the retainer agreement." Respondent asserted that Topper did not complain initially, so he thought that "everyone was happy with the arrangement." However, when Topper did complain to him, he "did [his] best to set the situation aright [sic] and refunded the amounts in question."

Along with Invoice #72 and Invoice #141, which respondent had sent to Topper during the litigation, respondent produced to the OAE Invoice #194; Invoice #195; Invoice #333; and Invoice #385, which he did not produce when he initially replied to Topper's grievance. Topper did not receive a copy of Invoice #194; Invoice #195, Invoice #333; or Invoice #385.

On Invoice #194, respondent charged Topper $1,794 in legal fees for attorney time billed by "CB" from May 31 through June 15, 2017, which was not marked as paid. Invoice #194 and Invoice #195 contained nearly identical charges. On Invoice #195, respondent charged Topper $1,982.50 in legal fees for May 9 through June 15, 2017, which was marked as paid on June 17, 2017.

Invoice #333 and Invoice #385, which covered March 12 through June 28, 2017, charged Topper legal fees for internal communication between respondent and his associates; file reviews by respondent; and secretarial tasks. Not only do Invoice #333 and Invoice #385 overlap in time with each other, as well as Invoice #72 and Invoice #141, but Invoice #333 is dated June 17, 2017, yet, reflects billing charges through June 28, 2017. Furthermore, Invoice #385, which is dated November 15, 2017, billed Topper for legal work done on March 12, 2017 and June 28, 2017, including a charge for 4.7 hours, on June 28, 2017, for "research on how to conduct nonprobate asset search," and listed telephone calls to banks, life insurance companies, and private detectives to find life

insurance policies. Respondent's claimed research was conducted more than one month after Topper had agreed to settle her claims against her father's estate. There is no evidence in the record that Topper directed respondent to search for non-probate assets or to conduct legal work on the matter settled.

Consequently, the OAE asserted that respondent's $1,982.50 transfer represented a knowing misappropriation of Topper's settlement funds. Moreover, the OAE argued, by taking legal fees from Topper's settlement without her authorization, respondent separated his interest in the funds from Topper's interest in the funds without providing Topper with an accounting of the money.

The OAE argued that, in the Topper matter, respondent knowingly misappropriated client and escrow funds, in violation of Wilson, Hollendonner, and RPC 1.15(a). The OAE emphasized that, during his demand audit interview with the OAE, respondent was unable to provide a credible explanation regarding his repeated disbursement of Topper's settlement funds. The OAE also contended that respondent's failure to safeguard Topper's settlement and his failure to promptly deliver the settlement funds to Topper further violated RPC 1.15(a) and RPC 1.15(b).

Moreover, the OAE asserted that respondent knowingly made false statements to the OAE during its investigation, in violation of RPC 8.1(a) and

RPC 8.4(c), by misrepresenting that (1) he had told Topper, in June 2017, that he had received the settlement funds; (2) Topper had asked him to perform additional legal work after agreeing to settle the matter; (3) he had sent invoices to Topper informing her of the funds he withdrew from the settlement, contemporaneous to the time of the withdrawals; and (4) he had spoken with Topper in an attempt to resolve his claim for legal fees before he sent her the full $15,000 settlement on December 11, 2018.

Finally, the OAE argued that respondent failed to keep Topper reasonably informed about the status of her matter by failing to inform her that he had received the settlement funds, in violation of RPC 1.4(b), and failed to provide Topper with an accounting of the settlement prior to deducting a portion of the funds to pay his legal fees, in violation of RPC 1.15(c).

The Saka Estate Matter

On September 1, 2016, Adrienne Batdorf retained respondent to administer the Estate of Solange Saka (the Saka Estate). Saka had passed away in July 2016. The Saka Estate had few assets and, as of June 2017, there was less than $10,000 of the decedent's funds in Batdorf's bank account.

Respondent's retainer agreement provided that Batdorf would pay a flat fee of $5,000 for the representation. Batdorf advanced $1,000 of her personal

funds as a partial payment of the flat fee and later refunded herself from the Saka Estate funds. Batdorf later paid respondent the remaining $4,000 from the Saka Estate funds to satisfy the flat fee. Both respondent and Bava-Grygo communicated with Batdorf about the Saka Estate.

Batdorf repeatedly asked respondent what she could do about Saka's funeral expenses; how to pay for a headstone for the gravesite; and whether she had to satisfy Saka's medical bills when the funeral expenses had not been paid. In a June 7, 2017 e-mail to Batdorf, respondent assured her that he would help contact the synagogue to negotiate a lower price for a headstone.

On August 16, 2017, Batdorf sent an e-mail to respondent and Bava-Grygo to remind respondent that he previously had promised to help her negotiate the costs of acquiring a headstone for Saka, but that he had not done so. Batdorf lamented that it was "over a year [since the decedent's passing and] she doesn't have a monument and that is so awful." Batdorf asserted to respondent and Bava-Grygo that it was "so embarrassing" that Saka did not have a headstone and wondered how she could "get [respondent] to answer [her]" about the headstone. However, respondent did not follow through with his promise and Batdorf eventually had to address the headstone on her own.

Saka had owned a condominium in Long Branch, New Jersey (the Property), but the liabilities of the Property exceeded its value. The Property

was listed for sale after a real estate broker was engaged.

In June 2017, Janet Dweck and her daughter, Diane Silverman, made an offer to purchase the Property from the Saka Estate for $202,000. On June 8, 2017, Batdorf signed an agreement of sale to sell the Property to Dweck and Silverman for $202,000. The agreement of sale provided that the Property was being sold as a "short sale" and required the approval of CIT Group, the mortgage holder. The agreement of sale also listed Bava-Grygo as the attorney representing Batdorf in the real estate transaction.

Although Dweck and Silverman were represented by counsel in the real estate transaction, Silverman primarily handled discussions of the transaction with respondent, Bava-Grygo, and Batdorf, because Silverman was a licensed real estate broker.

On June 8, 2017, after the parties had signed the agreement of sale, Dweck issued a $1,000 check to the "Rasmussen Law Trust," representing an earnest money deposit toward the Property. The same date, Silverman sent a copy of the check; proof of funds for the purchase of the Property; and other documents to her counsel, the broker for the Estate, and Bava-Grygo.

On June 16, 2017, respondent deposited Dweck's $1,000 check in his ATA. Seven days later, Dweck issued a $9,000 check to the "Rasmussen Law Trust," constituting the second and final payment toward the deposit on the

Property. On June 27, 2017, respondent deposited the $9,000 check in his ATA.

Approximately one month later, Financial Freedom, on behalf of CIT Group, prepared a short sale approval letter for the sale of the Property.

On August 16, 2017, Silverman sent an e-mail to the Saka Estate's real estate broker advising that, during an inspection of the Property, a substantial number of problems were identified and that the condominium association was demanding additional special assessments to repair the parking lot. Silverman requested that (1) the Saka Estate real estate broker contact CIT Group, and (2) the purchase price of the Property be reduced, reflecting the problems identified in the inspection report.

Although the deadline for Dweck and Silverman to accept and sign CIT Group's short sale approval letter was extended to September 16, 2017, CIT Group did not agree to lower the purchase price, did not grant any further extensions, and, on September 16, 2017, canceled the short sale. Despite the cancelation of the short sale of the Property, Silverman did not immediately request that respondent release the $10,000 deposit advanced by Dweck.

During his interview with the OAE, respondent claimed that, while the Property transaction was still pending, his firm sent a letter to Silverman and Dweck's counsel advising that, if they failed to close on the Property, they would forfeit their $10,000 and the Saka Estate would retain the funds. However,

when the OAE requested that respondent produce that letter, he failed to do so.

Batdorf never agreed that the Saka Estate was entitled to retain any portion of Dweck's $10,000 deposit. In fact, shortly after the short sale contract expired, Batdorf exchanged e-mails directly with Silverman, encouraging her to enter into a new contract with CIT Group in order to purchase the Property. Additionally, on November 2, 2017, Batdorf contacted CIT Group herself to seek information about the status of the foreclosure, and provided that information to Silverman, via e-mail.

The next day, Silverman sent an e-mail to respondent because she was "a bit confused as to the dynamics taking place." Silverman informed respondent that she was aware he had taken a flat fee for the representation of Batdorf and accused respondent of not wanting to "entertain a short sale as there's no [financial] benefit to your firm." Furthermore, Silverman blamed respondent's lack of diligence in following up with the lender as the reason the transaction did not close. Silverman told respondent that his actions "breached your fiduciary responsibilities" and urged him to act in order to sell the property for Batdorf.

Respondent sent a reply e-mail approximately one hour later to inform Silverman that he would "respond to [her] spurious claims in full on Monday," but reminded Silverman that communication "must be through counsel's office

and not from you if you are represented (which by your own admission, you are).[6] I am asking that your counsel send an admonishment to that effect as this is not the first time that this has happened."

On November 4, 2017, Batdorf sent an e-mail to respondent apologizing for Silverman's e-mail. Batdorf explained that she gave Silverman respondent's e-mail address and had spoken to Silverman about continuing her attempt to purchase the Property. Respondent told Batdorf there was no reason to apologize because Silverman was a "realtor and knows better. If she makes a good offer, I'm sure the bank will accept as long as she doesn't reduce the offer at the last moment again. [. . .] dont [sic] worry about this!"

On November 21, 2017, David Shakarchi, Esq., an attorney who represented Saka's sister, contacted Batdorf seeking information about the Estate. Batdorf replied immediately to Shakarchi's e-mail and provided respondent's contact information. On December 15, 2017, Shakarchi again sent an e-mail to Batdorf, copying respondent, and asserting that he had sent multiple requests to respondent for an unofficial accounting of the Estate, but had not received a reply. Shakarchi expressed that he was "truly bewildered by [the] lack of response and cooperation," since the Estate "allegedly has debts and no

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[6] Respondent should have been aware, by virtue of the closing paperwork, that Silverman was represented by counsel.

assets," and accused Batdorf of breaching her fiduciary duty to the estate. Shakarchi warned that, if he did not receive an unofficial accounting of the Saka Estate by December 20, 2017, he would file a motion to compel the accounting. Approximately one hour later, respondent sent Shakarchi a reply e-mail, stating "if you contact my client directly again, I will report you to the ethics committee. We can discuss this Monday along with the court rules allowing specifics [sic] amount of time to respond to accounting requests."[7]

On December 26, 2017, Shakarchi sent respondent an e-mail requesting that respondent call him because respondent was "supposed to call [him] last week." The next day, Shakarchi sent respondent another e-mail explaining that he was "tired of chasing" respondent and that they needed to speak. Respondent replied to inform Shakarchi that his office was "closed for Christmas" and that respondent was, once again, "astonished that [Shakarchi] reached out to [respondent's] client individual [sic] despite [his] direct instructions for you not

[7] N.J.S.A. 3B:17-2 provides that "a personal representative may settle his account or be required to settle his account in the Superior Court. Unless for special cause shown, he shall not be required to account until after the expiration of 1 year after his appointment." Saka passed away in July 2016. On September 1, 2016, Batdorf retained respondent to assist her in the administration of Saka's Estate. Although it is not clear from the record when Batdorf was appointed the executrix of the Saka Estate, presumably it predated her retention of respondent, in September 2016.

to do so."[8] Respondent offered to speak with Shakarchi the following day and expected the conversation to be "short" because respondent had "no new information apart from the Estate having no assets."

During the remainder of 2017 and through 2018, Silverman continued to attempt to acquire the Property but was unable to finalize the purchase. Unfortunately, Silverman experienced personal issues in 2018 which distracted her from demanding that respondent return the $10,000 deposit that Dweck had paid in June 2017.

On January 25, 2018, respondent electronically transferred from his ATA to his ABA $2,730 of Dweck's escrow funds that he held, in trust, as an earnest money deposit in connection with the unconsummated sale of the Property.[9] Respondent documented this transfer as "Earned Fee and Expense Reimbursement" on the Saka Estate client ledger card and as "Saka payment" on his bank records.

On March 1, 2018, respondent electronically transferred from his ATA to his ABA an additional $350 of Dweck's escrow funds that he held, in trust, toward the Property. Respondent documented this transfer as "Fee

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[8] Other than copying Batdorf on the December 15 and December 27, 2017 e-mails to respondent, there is no evidence in the record that Shakarchi reached out to Batdorf directly after being informed she was represented by counsel.

[9] As noted above, on September 16, 2017, CIT Group canceled the short sale of the Property.

Reimbursement" on the Saka Estate client ledger card and as "Saka Fee Reimbursement" on his bank records.

Neither Batdorf, Dweck, nor Silverman authorized respondent to utilize the escrow funds.

Respondent claimed to the OAE that Batdorf had authorized him to take $3,080 of Dweck's deposit to satisfy outstanding legal fees; however, not only did Batdorf not give respondent authorization to use the funds, the retainer agreement provided that respondent would receive a flat fee for the representation, which Batdorf paid at the beginning of the representation, in September 2016.

Respondent also contended that, prior to taking $3,080 of Dweck's escrow funds, he prepared an invoice for additional legal fees – notwithstanding the flat fee retainer agreement – that Batdorf owed him. However, the OAE requested a copy of the invoice and respondent failed to produce it.

Similarly, respondent contended that the January 2018 transfer of $2,730 did not represent legal fees, but reimbursement for the costs he incurred in shipping certain items to Saka's relatives in Israel. Respondent previously had undertaken to help Batdorf ship these items. However, he did not provide her with any proof of shipping, or confirm to her that the items had been shipped, despite her requests for information. When the OAE requested documentation

of the alleged shipping expenses, respondent failed to provide it.

On January 25, 2018, when respondent transferred $2,730 of Dweck's deposit funds from his ATA to his ABA, his ABA balance was $1,159.20. Following the transfer, he made three disbursements from his ABA, totaling $2,913.72, in order to satisfy his law office's payroll obligations. During his demand interview with the OAE, respondent conceded that, without the infusion of Dweck's escrow funds into his ABA, he would have "missed" making payroll that month.

In November 2019, Silverman contacted respondent and requested that he return Dweck's $10,000 deposit. After one of Silverman's friends, who was an attorney, intervened, respondent, with Batdorf's consent, agreed to return the entire $10,000 deposit. Consequently, on November 29, 2019, almost two years after the bank had canceled the short sale of the Property, respondent issued a $10,000 check, payable to Dweck, as a refund of her deposit funds. However, on December 2, 2019, respondent had to deposit $3,080 in his ATA so that the check would clear.

As of October 3, 2020, the Saka Estate matter was still open. Indeed, in an October 3, 2020 e-mail exchange among respondent, Bava-Grygo, Batdorf, and an accountant respondent retained to file an inheritance tax return for the Estate, respondent provided incorrect information regarding the value of the

Property. As a result, Batdorf had to contact the bank directly to get the Property's correct appraised value. Additionally, respondent failed to inform Batdorf that he had retained an accountant to prepare the inheritance tax return and, further, failed to pay the accountant his $1,200 fee following his preparation of the inheritance tax return.

The OAE argued that respondent violated RPC 1.3 by failing to act with reasonable diligence in representing Batdorf, and that he violated RPC 1.4(b) by failing to reply to Batdorf's requests for information. Additionally, the OAE asserted that respondent's failure to pay the accountant was a violation of RPC 1.15(b). The OAE also asserted that respondent violated RPC 8.1(a) and RPC 8.4(c) by misrepresenting during the investigation that he had notified Silverman and Dweck that their deposit was forfeited, and that Batdorf had approved his use of Dweck's escrow funds to pay his legal fees.

Finally, the OAE asserted that respondent's failure to safeguard Dweck's escrow funds, and his knowing misappropriation of those funds to pay his firm's payroll violated RPC 1.15(a), Wilson, and Hollendonner.

Following our de novo review of the record, we determine that the facts recited in the complaint support all the charges of unethical conduct. Respondent's failure to file a conforming answer to the complaint is deemed an

admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

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. We, therefore, recommend to the Court that he be disbarred.

In the Topper matter, respondent received the settlement check in June 2017. Within three days of receiving the check, respondent began to disburse the settlement funds to himself, without Topper's authorization. Moreover, for nearly one year after his receipt of the funds, respondent failed to inform Topper that he had received the settlement check, despite having used $10,705 of the funds for his own purposes. In fact, when Topper questioned why her sons received an inheritance, and she had not, respondent intentionally misled her by informing her he would "check" into it for her.

Respondent's dishonesty continued in connection with the disciplinary proceedings against him. Once the OAE began investigating respondent's knowing misappropriation of Topper's settlement funds, he generated fictitious invoices in an attempt to legitimize his unauthorized transactions. He also sought to mislead the OAE by claiming that he transferred Topper's funds to satisfy earned legal fees.

However, the record clearly demonstrates that Topper did not authorize these transfers. Nor could she – she was unaware that respondent had received the settlement check and, by virtue of his failure to provide her with any invoices after she had agreed to settle the matter, she was unaware that he was charging her legal fees for continuing work on the matter. Thus, under no scenario was respondent permitted to use Topper's settlement funds, and his conduct constituted the knowing misappropriation of funds, in violation of RPC 1.15(a); RPC 1.15(b); RPC 8.4(c); and the principles of Wilson and Hollendonner.

Likewise, in the Saka Estate matter, Dweck sent respondent a $10,000 deposit in furtherance of her attempt to purchase the Property as a short sale. Ultimately, the bank canceled the sale. Thereafter, respondent retained the deposit and used a portion of it, without permission, to satisfy his firm's expenses. He then falsely claimed to the OAE that, while the sale was still pending, he had sent Dweck and Silverman a letter stating that if they did not close on the Property, they would forfeit their deposit. However, the record reflects that respondent never sent that letter or even spoke with Batdorf about retaining the deposit in the event the Property transaction did not close. Thus, respondent withdrew funds from the deposit without the knowledge or authorization of Batdorf, Dweck, or Silverman, in violation of the escrow

agreement. As he admitted to the OAE, he would not have been able to make his January 2018 law office payroll without misappropriating the funds.

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." In re Wilson, 81 N.J. 451, 455 n.1 (1979). Thus, although respondent ultimately refunded the deposit to Dweck in full, his use of the funds constituted knowing misappropriation in violation of RPC 1.15(a); RPC 8.4(c); and the principles of Wilson and Hollendonner.

Additionally, in the Topper matter, respondent violated RPC 1.4(b) and RPC 1.15(b) by failing to inform his client that he had received the settlement funds. He also violated RPC 1.15(c) by providing Topper with no accounting of the settlement funds or updated invoices prior to deducting legal fees from the settlement funds.

In the Saka Estate matter, respondent violated RPC 1.3 by failing to act with diligence in representing Batdorf in the administration of the Estate. Furthermore, respondent's failure to communicate with Batdorf or to provide answers to her reasonable requests for information, such as her inquiry regarding the status of the headstone negotiation, violated RPC 1.4(b).

Respondent made several false statements to the OAE in the Topper matter: that he had notified Topper upon receipt of the settlement funds; that Topper had asked him to perform additional legal work; that he had attempted to resolve a fee dispute with Topper; and that he had prepared and sent contemporaneous invoices to Topper. Each of these statements violated RPC 8.1(a) and RPC 8.4(c).

In the same vein, respondent made two untruthful statements in connection with the Saka Estate matter: he represented to the OAE that (1) he had informed Dweck and Silverman of the forfeiture of their funds in the event they failed to close on the property, and (2) Batdorf approved of his use of Dweck's escrow funds to pay legal fees. These statements constituted further violations of of RPC 8.1(a) and RPC 8.4(c).

Additionally, respondent violated RPC 1.15(d) by failing to maintain proper financial records, as R. 1:21-6 requires.

Finally, respondent's failure to cooperate with the OAE's investigation and his failure to file a verified answer to the ethics complaint constituted two violations of RPC 8.1(b).

In sum, we find that respondent violated RPC 1.3; RPC 1.4(b) (two instances); RPC 1.15(a) (two instances); the principles of Wilson and Hollendonner (two instances); RPC 1.15(b) (two instances); RPC 1.15(c); RPC

1.15(d); RPC 8.1(a) (two instances); RPC 8.1(b) (two instances); and RPC 8.4(c) (two instances). The sole issue left our determination is the appropriate quantum of discipline for respondent's misconduct.

The crux of respondent's misconduct was his knowing misappropriation of client and escrow funds in the Topper and Saka Estate 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 at 456). 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).]

Last 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. 581 (2022). 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." Id. at 39.

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 (1985). In Hollendonner, the Court extended the Wilson disbarment rule to cases involving the knowing misappropriation of escrow funds. The Court noted the "obvious parallel" between client funds and escrow funds, holding that "[s]o akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the [Wilson] disbarment rule [. . .] ." 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 admitted, in connection with the Saka Estate matter, that he used $2,730 of Dweck's funds so that he could make his January 2018 law office payroll. He knew those funds did not belong to him but took them without permission. Respondent's improper taking of those funds is particularly egregious because he should have promptly returned the money after Silverman and Dweck failed to close on the Property. Thus, respondent's admission that he used Dweck's deposit funds without her authorization or permission mandates his disbarment under Wilson and Hollendonner.

Even after he had satisfied his law firm's obligations, respondent transferred an additional $350 from Dweck's deposit funds to his ABA, purportedly as a "fee reimbursement." Respondent made this transfer even though he was not entitled to additional fees, considering that he and Batdorf had signed a flat-fee retainer agreement, and Batdorf already had satisfied the flat fee.

In the Topper matter, respondent transferred $10,705 of Topper's settlement funds to himself, without Topper's knowledge or authorization, in clear violation of Wilson and Hollendonner. This offense again mandates his disbarment.

Because disbarment is the only appropriate sanction for respondent's misconduct, we need not address the appropriate quantum of discipline for his additional ethics violations.

Additionally, because respondent reimbursed Topper the full $15,000 of her settlement, and reimbursed Silverman the $10,000 that Dweck paid as a deposit on the Property, we need not order the disgorgement of funds.

However, we direct respondent to relinquish control of any physical property that belonged to Saka, which he may still possess, and which he was obligated to ship to Israel.

Member Hoberman was absent.

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 Matthew D. Rasmussen
Docket No. DRB 22-176

Decided: March 6, 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