

Supreme Court of New Jersey  
Disciplinary Review Board  
Docket No. DRB 23-082  
District Docket No. IX-2019-0018E

---

In the Matter of  
Edward J. McKenna, Jr.  
An Attorney at Law

---

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

Decision

Argued: May 24, 2023

Decided: November 8, 2023

William E. Denver appeared on behalf of District IX Ethics Committee

Charles J. Uliano appeared on behalf of respondent.

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

This matter was before us on a recommendation for a reprimand filed by the District IX Ethics Committee (the DEC). The formal ethics complaint charged respondent with having violated RPC 4.1(a)(1) (making a false statement of material fact or law to a third person while representing a client)

and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

For the reasons set forth below, we determine to dismiss the charges against respondent.

Respondent earned admission to the New Jersey bar in 1975, to the District of Columbia bar in 1978, and to the New York bar in 1982. At the relevant times, he practiced law as a partner at McKenna, Dupont, Stone & Washburne, P.C., which maintained an office in Red Bank, New Jersey.

On February 22, 2023, we issued a decision granting the Office of Attorney Ethics's motion for discipline by consent and concluding that an admonition was the appropriate quantum of discipline for respondent's violation of RPC 1.15(a) (negligent misappropriation of escrow funds). In the Matter of Edward J. McKenna, Jr. DRB 22-230 (Feb. 23, 2023) (McKenna I). In that matter, in December 2014, respondent prematurely disbursed his legal fee from funds he held in escrow, in connection with multi-track litigation, without the permission of either the Superior Court or the other parties who held an interest in those funds.

We observed that, because respondent repeatedly had made proper escrow disbursements, at the direction of the Superior Court, throughout the multi-track litigation, respondent's failure to seek court approval in connection with the

disbursement of his own legal fee was reckless. We weighed, in mitigation, the passage of eight years since respondent's single act of negligent misappropriation, the lack of ultimate harm to his clients or to any third parties, and his lack of prior discipline in his forty-eight-year career at the bar.

We now turn to the facts of this matter.

Since approximately 1990, respondent has performed legal services for Tae Sun Pae, who owned commercial property in Red Bank, New Jersey (the Red Bank Property), and who served as the president of Heritage Liquors, Inc. (Heritage), which operated a liquor store at the Red Bank Property.

On April 14, 2008, Kyong Sophia Gavin provided Heritage a \$60,000 unsecured loan, via cash, to allow Pae to renovate the Red Bank Property. In connection with the loan transaction, Pae's accountant prepared a contemporaneous promissory note, which required Heritage to repay the entire loan amount to Gavin by April 14, 2009. Respondent was not involved in the preparation of the note, which the parties did not execute.

During the ethics hearing, respondent claimed that Gavin had contacted him, in or around 2005,<sup>1</sup> claiming that "she had a relationship with . . . Pae and that . . . Pae owed her some money." Respondent further claimed that Gavin did

---

<sup>1</sup> There is no indication in the record that Gavin had provided any loans to Pae prior to April 2008.

not inform him of the amount Pae owed. However, he invited Gavin to submit “any information or documentation” in connection with the “alleged debt.” Respondent did not receive the promissory note until sometime after Gavin had filed her ethics grievance, in January 2018.<sup>2</sup>

Following the loan transaction, Heritage requested a thirty-day extension of the loan deadline. Although Gavin agreed to extend the deadline to May 14, 2009, she required that, in return, Heritage provide collateral for the loan in the form of a UCC-1 financing statement.<sup>3</sup> Heritage agreed to execute the “UCC-1 financing statement pledging the inventory, stock in trade[,] and bank accounts as security” for the loan. Pae’s accountant prepared an undated “note modification,” executed by the parties, which reflected their modified loan arrangement. As with the original promissory note, respondent was neither involved in the preparation of the note modification nor did he review the modification until sometime after Gavin filed her January 2018 ethics grievance.

---

<sup>2</sup> Although Gavin claimed, during the ethics hearing, that she provided respondent with a copy of the promissory note, via hand delivery or facsimile, “countless times,” Gavin neither alleged when she purportedly had provided respondent with the note nor provided copies of any facsimiles to corroborate her claim. During the ethics hearing, respondent’s paralegal claimed that she never had seen a copy of the promissory note.

<sup>3</sup> A UCC-1 is a “required filing under the Uniform Commercial Code used to provide notice that a creditor has a security interest in a debtor’s personal property.” Black’s Law Dictionary 1754 (10th ed. 2014).

On February 10, 2009, Gavin, Pae, or Pae's accountant filed with the Monmouth County Clerk the UCC-1, which provided Gavin a security interest in all of Heritage's "inventory, stock in trade, fixtures and furnishings, bank accounts[,] and accounts receivable."<sup>4</sup>

Following Heritage's filing of the UCC-1, Pae began experiencing financial difficulties and defaulted on her loan obligations to Capstone WAB, LLC (Capstone), which held a 2006 mortgage on her Red Bank Property. At the time of her default, Pae owed Capstone approximately \$800,000. To resolve her indebtedness, Pae began to market for sale both the Red Bank Property and her liquor license.

On November 6, 2012, Pae and Chris Matthaei executed an agreement whereby Pae agreed to sell both her liquor license and Heritage's business assets to Matthaei for \$350,000. The agreement, however, was contingent on Matthaei qualifying for a loan to purchase the Red Bank Property, the sale of which was governed by a separate agreement not included in the record before us.

Following the execution of Pae and Matthaei's November 2012 sale contract, respondent notified Gavin of the contract and advised her to retain counsel. In December 2012, Gavin retained Bonnie M. Wright, Esq., and told

---

<sup>4</sup> The term "fixtures and furnishings" did not appear as collateral in the note modification.

Wright that she had a “lien” on Pae’s liquor license and a security interest in Heritage’s business assets, based on the UCC-1 filed in January 2009.

On January 28, 2013, Wright sent respondent a letter, noting that Gavin could not, by law, hold a lien on Pae’s liquor license.<sup>5</sup> However, Wright noted that, although Gavin did not intend “to forestall the sale” of the business and the Red Bank Property, Gavin would not “release her lien against” the Red Bank Property<sup>6</sup> until Heritage provided “sufficient security to ensure that” her loan would be repaid. After Wright sent that letter, Gavin, who was now aware that her UCC-1 did not operate as a lien on Pae’s liquor license, terminated Wright’s representation.

Meanwhile, sometime in 2013, respondent discovered that Matthaei did not qualify for a loan to purchase the Red Bank Property. Consequently, Matthaei could not fulfill his contractual requirements to purchase Pae’s liquor license and Heritage’s business assets.

---

<sup>5</sup> See Boss Co. v. Board of Comm’rs, 40 N.J. 379, 383 (1963) (noting that a New Jersey liquor license shall, “under no circumstances,” be subject to any “pledge, lien, levy, attachment, execution, seizure for debts, or any other transfer or disposition” except as provided under New Jersey’s Alcohol Beverage Law) (citation omitted).

<sup>6</sup> It appears, based on Wright’s letter, that she was under the mistaken impression that Gavin held a lien on the Red Bank Property. Although Gavin’s UCC-1 may have constituted a subordinate lien on the “fixtures” of the property, Gavin otherwise held no lien or any other security interest on the Red Bank Property.

Following the collapse of Pae and Matthaei's sale contract, in August 2013, Pae and Wadsworth Properties, LLC, executed an agreement whereby Pae agreed to sell only her Red Bank Property, and not her liquor license, to Wadsworth for \$700,000. Because the \$700,000 sale price was insufficient to satisfy her \$800,000 debt to Capstone, Pae and Capstone executed an agreement whereby Capstone agreed to discharge its mortgage on the Red Bank Property in exchange for its receipt of the projected \$567,845.59 in net sale proceeds. The agreement further required that Capstone receive the net bulk sale funds released by the State of New Jersey.

The agreement also required that Pae continue to actively market her liquor license. Moreover, upon the sale of Pae's liquor license, the agreement required that Capstone receive the sum of \$800,000, minus (1) the \$567,845.59 in net proceeds from the sale of the Red Bank Property and (2) the net bulk sale funds released by the State of New Jersey. Finally, the agreement allowed Pae to occupy the Red Bank Property, as a tenant, for no more than one year following the closing, in order to continue operating Heritage.<sup>7</sup>

Two months later, in or around October 2013, Gavin claimed that she and respondent came to an agreement whereby she would accept a \$50,000 payment

---

<sup>7</sup> During the ethics hearing, respondent noted that he had requested that Wadsworth allow Pae to remain as a tenant on the Red Bank Property, for up to one year, following the closing.

from Pae in satisfaction of her \$60,000 loan. Gavin claimed that she had agreed to reduce her loan balance because respondent had advised her that Pae was “losing money” in connection with the “short sale” of her Red Bank Property. Gavin further alleged that, upon her receipt of the \$50,000 payment, she would discharge her UCC-1. Finally, Gavin claimed that respondent’s law office sent her, via facsimile, the following letter, dated October 31, 2013, and not addressed to any specific entity, for her signature:

Re: [the Red Bank Property]

Dear Sir/Madam

The undersigned is the holder of the UCC financing statement # [XXXXXXXX] filed on February 10, 2009 encumbering the above-referenced property. I will accept funds in the amount of \$50,000 and upon receipt of same, I will release my lien on the property. Please forward your check payable to Kyong Gavin at the address above.

...

Very truly yours,

Kyong “Sophia” Gavin

[J-8; 1T38-40.]<sup>8</sup>

---

<sup>8</sup> “J” refers to the parties’ joint exhibits.

“1T” refers to the transcript of the November 22, 2021 ethics hearing.

“R” refers to respondent’s exhibits.

During the ethics hearing, Gavin conceded that, prior to the closing on the Red Bank Property, respondent had advised her that she would not be receiving any funds from the sale of the property.

Respondent denied Gavin's version of events regarding the October 31 letter. Specifically, respondent claimed that Gavin herself had drafted the October 31, 2013 letter and sent it directly to Pae, who, in turn, provided it to respondent's law office. Upon receiving the letter, respondent instructed his paralegal not to sign the letter but to send it back to Gavin, via facsimile. Respondent claimed that he then called Gavin and advised her that neither his firm nor Pae would be signing the letter because none of the proceeds from the sale of the Red Bank Property could be provided to her, given Capstone's priority lien on the property.

Meanwhile, prior to the scheduled November 7, 2013 closing on the Red Bank Property, the title company discovered the February 2009 UCC-1 that provided Gavin a security interest in Heritage's business assets. Following its discovery, the title company would not allow the closing to take place because the UCC-1 provided Gavin a security interest in Heritage's "fixtures." Respondent contacted Gavin regarding the title company's discovery and urged her to remove the term "fixtures" from the UCC-1 to allow the closing to take place. Specifically, respondent told Gavin that, other than "shelving and

lighting,” there were no fixtures in the “700” or “750 square f[oo]t” liquor store and, thus, she was, in essence, “giving away nothing.” During the ethics hearing, respondent maintained that, even after the term “fixtures” had been removed, the UCC-1 may “still [have had] some value to . . . Gavin” given the other collateral listed in the document.

On November 6, 2013, respondent sent Gavin a letter, noting that he had prepared a UCC-1 amendment to remove the term “fixtures” from the original UCC-1.<sup>9</sup> Respondent’s letter also advised Gavin that:

this office will notify you when . . . Pae has a buyer for the liquor license. Upon the sale of the liquor license, the net proceeds of the sale will be sent to this office and this law firm will see to it that you are paid all sums due to you pursuant to your UCC lien.

[J-9.]

On the bottom of the letter, Gavin signed her name under the following statement: “I will agree to the deletion of the word ‘fixtures’ on my UCC lien, Instrument # [XXXXXXXX].”

During the ethics hearing, Gavin claimed that she had agreed to remove the term “fixtures” from her UCC-1 based on respondent’s promise that her loan would be repaid upon the sale of Pae’s liquor license. Gavin also claimed that,

---

<sup>9</sup> Although respondent claimed that his paralegal had drafted the letter, which he did not sign himself, respondent conceded that, because the letter was sent by his office, he “accepted responsibility” for it.

prior to the November 7, 2013 closing, respondent's office had called her ten to fifteen times per day pressuring her to "release" her UCC-1. During those telephone conversations, Gavin claimed respondent never advised her to seek counsel.

During the ethics hearing, respondent claimed that, at the time he sent the November 6, 2013 letter to Gavin, he had intended to pay Gavin from the sale proceeds of Pae's liquor license, provided that Gavin had a "valid claim"<sup>10</sup> for debt and that her UCC-1 "was in effect when" Pae sold her license. Moreover, at the time of the November 6, 2013 letter, respondent believed that Pae had a Class C plenary retail consumption liquor license,<sup>11</sup> based on Pae's prior discussions with respondent regarding her intent to construct a "wine bar" on the second floor of the Red Bank Property. Although respondent claimed that he "never had anything to do with" Pae's liquor license, he estimated that her license "would probably sell for at least \$500,000" based on his prior experience approving such licenses as the mayor of Red Bank. Consequently, respondent maintained that, when Pae sold her license, there would be "more than enough

---

<sup>10</sup> Respondent noted that Pae had denied any loan obligation to Gavin and that she had not "sign[ed]" any loan documents.

<sup>11</sup> A Class C plenary retail consumption license generally allows the holder of the license "to sell any alcoholic beverages on the licensed premises by the glass" and "to sell any alcoholic beverages in original containers for consumption off the licensed premises." N.J.S.A. 33:1-12.

money” to satisfy Pae’s remaining debt to Capstone and any valid loan obligation to Gavin. Respondent also expressed his view that there would even be “money left over for . . . Pae.” Respondent, however, did not review Pae’s liquor license at the time of his November 6, 2013 letter to Gavin.

On November 7, 2013, the closing on the Red Bank Property took place, following which Capstone received the \$567,845.59 in net sale proceeds towards its secured loan. On February 18, 2014, the title company filed with the Monmouth County Clerk the UCC-1 amendment removing the term “fixtures” from Gavin’s original UCC-1, in accordance with respondent and Gavin’s November 6, 2013 agreement. Approximately one year later, between March and May 2015, respondent sent Capstone two attorney trust account (ATA) checks, made payable to Capstone and totaling \$63,439.46, which represented the bulk sale funds released by the State of New Jersey after collecting taxes owed by Pae.

Meanwhile, following the closing on the Red Bank Property, Pae continued to operate Heritage, as a tenant, until late 2014 or early 2015, when she shuttered her business. Thereafter, Pae and respondent began to actively market Pae’s liquor license. After receiving “some very discouraging offers,” respondent contacted a local broker to help sell Pae’s license. Days later, the broker informed respondent that Pae’s license was only a Class C “plenary

distribution license” and, thus, had a value of between only \$100,000 and \$150,000.<sup>12</sup>

Following his discussion with the broker, respondent spoke with Gavin and advised her that, because of the limited value of Pae’s liquor license and Pae’s outstanding \$250,000 debt to Capstone, she would not be paid from the sale proceeds of Pae’s license. Respondent also urged Gavin to retain counsel if she sought to pursue a claim against Pae for unpaid debt.<sup>13</sup> Respondent, however, claimed that Gavin “kept fighting with [him]” regarding her views that she had a valid lien on Pae’s liquor license. Respondent claimed that Gavin continued to call him every month and argue that she had either a valid lien on Pae’s liquor license or that she was the owner of the license. During each of those conversations, respondent maintained that he had urged Pae to retain counsel. Respondent’s paralegal, likewise, testified that, between November 2013 and January 2018, respondent spoke with Gavin “many times” and advised her to retain counsel.

---

<sup>12</sup> A Class C “[p]lenary retail distribution license” allows the license holder to sell alcoholic beverages, in their original containers, for consumption off the licensed premises. N.J.S.A. 33:1-12.

<sup>13</sup> During the ethics hearing, respondent reiterated that, at the time of his conversation with Gavin, he had not been provided with the 2008 promissory note or the 2009 note modification.

During the ethics hearing, Gavin claimed that, for approximately four years following the closing on the Red Bank Property, she contacted respondent's office every two to three months regarding the sale of Pae's liquor license. Gavin alleged that, during each telephone call, respondent's staff would advise her that Pae's liquor license had not yet been sold. Gavin also claimed that, during that timeframe, she never spoke with respondent.

Sometime in 2017, respondent met with Robert Sickles, whom he had known "for many years," and who wished to open a liquor store in Red Bank. On June 28, 2017, Pae and Sickles executed a contract whereby Pae agreed to sell her liquor license to Sickles for \$190,000.

On January 15, 2018, approximately two weeks prior to the closing on Pae's liquor license, Gavin called respondent's office requesting an update on the sale of Pae's license. Gavin claimed that respondent had disavowed any knowledge of her or the November 6, 2013 letter, wherein respondent noted that, upon the sale of Pae's liquor license, respondent would arrange for Gavin to be paid "all sums due to you pursuant to your UCC lien."

During the ethics hearing, respondent claimed that, on January 15, 2018, he had advised Gavin of the upcoming closing on Pae's liquor license. Respondent, however, noted that Gavin then attempted to argue that the closing could not take place in light of her "lien" on Pae's license. Respondent claimed

that he again advised Gavin that she could not, by law, hold a lien on Pae's liquor license and that she should retain counsel.

On January 30, 2018, the closing in connection with Pae's liquor license took place, following which, on February 2, 2018, respondent deposited the net \$173,592.55 sale proceeds in his ATA. In accordance with Pae and Capstone's August 2013 agreement, Capstone was to receive the entirety of the net sale proceeds, given that Pae still owed \$250,000 in priority debt to Capstone. However, prior to his receipt of the net sale proceeds, respondent contacted Capstone and explained that Pae owed him almost twenty years of unpaid legal bills, totaling approximately \$65,000, which Pae and her family were unable afford. Respondent, thus, inquired whether Capstone could provide him "something toward[]" his unpaid legal fees. Capstone agreed to provide respondent \$40,000 of its net sale proceeds, and to discharge Pae's remaining debt, in exchange for respondent eliminating his legal fee in connection with the closing.

On February 5, 2018, three days after respondent deposited the net \$173,592.55 sale proceeds in his ATA, respondent disbursed, via wire transfer, \$133,592.55 to Capstone, in accordance with their agreement, and kept the remaining \$40,000 to satisfy Pae's unpaid legal bills.

Four months later, on June 14, 2018, Gavin sent respondent an e-mail, claiming that respondent had promised her that she would be paid \$50,000 following the sale of the liquor license “in my name and one in your name.” Gavin stated that she had not received any payment towards her debt and requested that respondent reply, by July 13, 2018, or else she would contact a local news station or file an ethics grievance.<sup>14</sup>

On June 20, 2018, respondent sent Gavin a reply e-mail stating that:

I had advised you at the time of the sale of the [Red Bank Property] that there was a significant deficit left over owed by [Pae] to [Capstone]. In fact, the amount I believe was over \$250,000. The liquor license was never in your name and was never in my name. You indicated to me in a prior telephone conversation that you thought I had placed a lien on the liquor license. I have told you repeatedly that you cannot put a lien on a liquor license in the State of New Jersey. I have no idea where you would have gotten that impression. What I did tell you when you contacted me recently about the sale of the liquor license was that the monies received from the sale were inadequate to even come close to satisfying the outstanding obligations that were owed previously by [Pae]. In fact, the primary lienholder lost approximately \$100,000 in monies owed to him.

.....

Simply put, Ms. Gavin, as I indicated to you previously, all that you had was a lien or a [UCC] document that you had filed on the fixture's in [Pae]'s building. That 'lien' was worthless. The fixtures in the building went

---

<sup>14</sup> Gavin filed her ethics grievance against respondent in connection with this matter on January 28, 2018.

with the property when it was sold. Your lien was well after the lien on the first mortgage holder, who is party that ended up receiving all of the proceeds from the sale of [the Red Bank Property] and was left with a \$250,000 plus shortage. The situation could not be any clearer.

[R-9.]

In the formal ethics complaint and through its presentation at the ethics hearing, the DEC alleged that respondent violated RPC 4.1(a) and RPC 8.4(c) by encouraging Gavin to consent to the removal of the term “fixtures” from her UCC-1, to her own detriment and for the benefit of Pae, in exchange for respondent’s false promise, set forth in his November 6, 2013 letter to Gavin, that she would be paid “all sums due to you pursuant to your UCC lien” upon the sale of Pae’s liquor license. The DEC presenter emphasized Gavin’s testimony that she had agreed to amend her UCC-1 based solely on respondent’s promise that, upon the sale of the liquor license, her loan would be repaid.

In his verified answer and in his presentation during the ethics hearing, respondent denied having engaged in any knowing acts of deception in connection with his November 6, 2013 letter to Gavin. Specifically, respondent argued that, at the time he had sent the letter to Gavin, he believed that Pae had a Class C plenary retail consumption license, which, based on his experiences approving such licenses as the mayor of Red Bank, had a value of approximately \$500,000, funds which would have been more than sufficient to cover both

Capstone's remaining \$250,000 in priority debt and Gavin's purported \$50,000 in subordinate debt. Moreover, respondent emphasized that, until the filing of Pae's 2018 ethics grievance, the only loan-related document that he had reviewed purporting to demonstrate Pae's debt to Gavin was the UCC-1. Respondent also claimed that Gavin had, for years, refused to provide him with the promissory note or the note modification, and that Pae had denied executing any loan documents with Gavin. Accordingly, respondent noted that, to the extent that Gavin had a "valid claim" for debt against Pae, and assuming her UCC-1 was still "in effect" when Pae sold her liquor license, he had intended, in November 2013, for Gavin "to be paid from those proceeds, period. And I meant it at that time."

Moreover, respondent stressed that, upon learning that Pae's liquor license was, in fact, a plenary retail distribution license with a value of between \$100,000 and \$150,000, he had informed Gavin she would not be paid from the sale of the license, given Capstone's outstanding \$250,000 in priority debt.

In mitigation, respondent emphasized his long career of almost fifty years at the bar, his dedication to the community, and his prior, four-year service as a member of the District IX Ethics Committee, for which he served as the Committee's Chairman during his final year of service. Finally, respondent

presented the testimony of three-character witnesses, who each attested to respondent's reputation for honesty and integrity.

The DEC found that, although Gavin is an intelligent, sophisticated businessperson, English is not her primary language and, thus, she "appeared confused by many of the questions" posed during cross-examination. The DEC emphasized that Gavin "was genuinely angered and felt helpless" after she learned that she would not be receiving any proceeds from the sale of Pae's liquor license. The DEC concluded that Gavin's testimony was credible based on her "demeanor" during the ethics hearing.

The DEC, however, found that respondent lacked credibility "on many relevant issues," including (1) his explanation regarding the October 31, 2013 letter sent, via facsimile, by his office to Gavin; (2) his testimony that he did not personally draft the November 6, 2013 letter to Gavin; and (3) his receipt of \$40,000 of Capstone's funds in connection with the sale of Pae's liquor license, despite providing no billing statements in support of his claim that Pae owed him approximately \$65,000 in unpaid legal fees. The DEC also found that respondent offered no reliable evidence to refute Gavin's claim that she had provided Pae a \$60,000 loan, which was later secured, via the UCC-1, by Heritage's business assets.

The DEC observed that respondent “based his conduct” in connection the November 6, 2013 letter to Gavin on his “admitted inability to close on the sale of” the Red Bank Property without Gavin releasing the term “fixtures” on her UCC-1. The DEC further stressed that Gavin and Wright were both “unambiguous” in their positions that Gavin would not release her UCC-1 “without consideration.”

The DEC also found that respondent or his law firm had prepared and sent to Gavin the October 31, 2013 letter, which stated that Gavin would accept \$50,000 in exchange for the “release” of her “lien on the [Red Bank P]roperty.” Additionally, the DEC noted that respondent had “approved the content of the” November 6, 2013 letter to Gavin in order to induce Gavin to limit the scope of her UCC-1 for the benefit of Pae. The DEC also found that respondent never intended for any of the sale proceeds of Pae’s liquor license to be paid to Gavin based on his view that her UCC-1 was “worthless.”

The DEC concluded that respondent violated RPC 4.1(a)(1) and RPC 8.4(c) by misleading Gavin, via his “intentionally and artfully drafted” November 6, 2013 letter, into believing that she would be paid “all sums due,” while allowing himself “the legal safe harbor of paying only what [was] due pursuant to the UCC lien, which he asserted at the time was nothing.” (Emphasis in original). The DEC also stressed that respondent made no effort to repay

Gavin from the sale proceeds of the liquor license and, instead, arranged for Capstone to allow him to keep \$40,000 of the proceeds for himself towards his purported unpaid legal fees.

In recommending the imposition of a reprimand, the DEC emphasized that respondent, as an attorney “with enviable experience and talent,” carefully crafted his November 6, 2013 letter to Gavin with the intent to mislead her, to her detriment, and for the benefit of his own client. The DEC noted that respondent took advantage of Gavin’s difficulties with the English language “with the apparent presumption” that Gavin would be unable “to navigate a challenge to him on her own.” The DEC weighed, in mitigation, respondent’s lack of prior, final discipline in his nearly fifty-year career at the bar and his otherwise impeccable reputation. The DEC also found that respondent’s conduct, although “purposeful and egregious,” amounted to an “isolated case of misjudgment under frustrating circumstances.”

At oral argument and in his brief to us, respondent urged the dismissal of the complaint based on his view that he had a reasonable belief that, at the time of his November 6, 2013 letter to Gavin, there would have been sufficient proceeds from the sale of Pae’s liquor license to satisfy both Pae’s priority debt to Capstone and her subordinate debt to Gavin. Given that he did not discover the true value of Pae’s liquor license until 2014 or 2015, respondent emphasized

that he could not have engaged in any knowing acts of deception in connection with his November 2013 letter. Although respondent conceded that it may have been “negligent” to draft his November 2013 letter without first investigating the nature of Pae’s liquor license, he stressed that his conduct did not rise to the level of a knowing act of dishonesty. Respondent also noted that, when he eventually learned from the broker that Pae’s liquor license had a limited value, he notified Gavin that she would not be paid from the proceeds of Pae’s liquor license.

Additionally, respondent argued that the DEC misunderstood that the allocation of the sale proceeds of both the Red Bank Property and Pae’s liquor license were controlled by Capstone, the priority creditor, and not by respondent. Respondent also noted that the DEC appeared to accept Gavin’s uncorroborated version of events “wholeheartedly.”

Finally, respondent urged, as mitigation, his prior service as a DEC member and his stellar reputation in the legal community spanning more than forty years.

The presenter urged us to adopt the findings set forth in the hearing panel report and to impose a reprimand based on the view that respondent had engaged in deception. Specifically, the DEC emphasized that, in November 2013, prior to the closing of the Red Bank property, respondent knew that Gavin was not

represented by counsel and that her UCC-1 could affect Pae's ability to close on the sale of the property. Moreover, the DEC claimed that respondent urged Gavin to amend her UCC-1 to remove the term "fixtures" to her detriment and for the benefit of Pae. Further, the DEC argued that respondent provided no billing records to support his claim that Pae had owed him approximately \$65,000 in unpaid legal fees. The DEC also stressed that respondent had convinced Capstone to allow him to retain \$40,000 of its funds towards his purported unpaid legal fees, again to the detriment of Gavin. Finally, the DEC urged, as mitigation, respondent's lack of prior final discipline throughout his lengthy career at the bar.

Following a review of the record, we determine to respectfully part company with the DEC's finding that respondent engaged in a knowing act of deception in connection with his November 6, 2013 letter to Gavin.

RPC 4.1(a) prohibits an attorney from "knowingly" making "a false statement of material fact or law to a third person" while "representing a client." Similarly, RPC 8.4(c) prohibits an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." It is well-settled that a violation of RPC 8.4(c) requires proof of intent. See In the Matter of Ty Hyderally, DRB 11-016 (July 12, 2011).

In our view, there is insufficient evidence to prove, by clear and convincing evidence, that respondent induced Gavin into relinquishing her interest in Heritage's "fixtures," to her detriment, in exchange for respondent's false promise that her loan would be repaid upon the subsequent sale of Pae's liquor license.

The DEC emphasized that respondent's representations in his November 6, 2013 letter caused Gavin to agree to the removal of the term "fixtures" from her UCC-1 to her own detriment, in order to allow the closing of the Red Bank Property to take place, to the benefit of Pae.

Although the removal of the term "fixtures" from Gavin's UCC-1 lifted the cloud of title on the Red Bank Property, in our view, respondent did not induce Gavin to act to her own detriment. Specifically, Gavin's February 2009 UCC-1, which provided her a security interest in Heritage's business assets, including its "fixtures," was subordinate to Capstone's 2006 mortgage encumbering the entire Red Bank Property. Moreover, Gavin's UCC-1 did not afford her an interest in any assets owned by Pae individually, who herself, and not Heritage, owned the Red Bank Property. Consequently, given that Pae owed Capstone at least \$800,000 in priority debt at the time of the closing on the Red Bank Property, Gavin was guaranteed to receive none of the \$567,845.59 in net proceeds via her subordinate UCC-1. Indeed, had the sale of the Red Bank

Property taken place without Gavin relinquishing her interest in Heritage's fixtures, the result would have been the same – the entire \$567,845.59 in net sale proceeds would have gone to Capstone, and Gavin's interest in Heritage's fixtures would have been eliminated by virtue of Wadsworth's acquisition of the Red Bank Property from Pae. As respondent correctly noted during the ethics hearing, Gavin was, in essence, "giving away nothing" by agreeing to amend her UCC-1 to remove the term "fixtures," which, as respondent testified, constituted nothing more than a subordinate interest in the shelving and lighting of the liquor store.

Additionally, the DEC found that respondent acted knowingly based on its view that he never had intended for Gavin to receive any of the proceeds from the sale Pae's liquor license. In support of its view, the DEC stated that respondent held a continuous belief that Gavin's UCC-1 was "worthless."

Respondent, however, only characterized Gavin's interest in Heritage's fixtures as "worthless," as he stated in his June 20, 2018 reply e-mail to Gavin, more than four-and-a-half years after the closing on the Red Bank Property. At the time of his November 6, 2013 letter to Gavin, respondent maintained that Gavin's UCC-1 may "still [have had] some value" to Gavin, even after the term "fixtures" had been removed, in light of the other collateral listed in the document, including Heritage's "inventory, stock in trade . . . bank accounts[.]"

and accounts receivable.” Moreover, following the November 2013 sale of the Red Bank Property, respondent knew that Wadsworth and Capstone had agreed to allow Pae to continue operating Heritage, as a tenant on the property, while she actively marketed her liquor license. Based on these circumstances, it appears that respondent viewed Gavin’s UCC-1 as a potentially valuable instrument, given that it afforded Gavin a security interest in Heritage’s business assets, which, other than the “fixtures,” Heritage would continue to own and utilize in connection with its continued operation of the liquor store, as a tenant.

The DEC further found that respondent “intentionally and artfully drafted” his November 6, 2013 letter by stating that Gavin would be paid “all sums due to you pursuant to your UCC lien.” In the DEC’s view, such language allowed respondent “the legal safe harbor of paying only what [was] due pursuant to the UCC lien[,]” which the DEC reiterated that respondent viewed as worthless.

In respondent’s November 6, 2013 letter to Gavin, he noted that he had prepared an amended UCC-1 removing the term “fixtures” and advising her that, “[u]pon the sale of the liquor license, the net proceeds of the sale will be sent to this office and this law firm will see to it that you are paid all sums due to you pursuant to your UCC lien.” In November 2013, respondent knew that Pae may have owed Gavin \$50,000, in light of Gavin’s October 31, 2013 correspondence

indicating that she would accept that amount in exchange for the release of her UCC-1 on the Red Bank Property. Respondent, however, never received the 2008 promissory note or the 2009 note modification until sometime after Gavin had filed her ethics grievance in January 2018, prior to which Pae had denied executing any loan documents with Gavin. Consequently, it appears that respondent carefully selected the language in his November 6, 2013 letter not to deceive Gavin, but to protect Pae from any invalid claim for debt. Indeed, as respondent testified, to the extent that Gavin had “a valid claim” for debt against Pae, and assuming that her UCC-1 was still “in effect” when Pae sold her liquor license, respondent fully intended to pay Gavin from those proceeds.

Although respondent arguably should have informed Gavin, in writing, of his concerns regarding the existence of her loan, respondent’s statement in his November 6, 2013 letter that Gavin would be “paid all sums due to you pursuant to your UCC lien” does not suggest that he was creating a “legal safe harbor” to avoid paying Gavin altogether from the liquor license proceeds. Rather, if respondent had received evidence that Pae and Gavin had entered into a valid loan transaction, respondent appeared to have intended to satisfy that obligation from the liquor license proceeds.

Significantly, at the time of his November 6, 2013 letter to Gavin, respondent anticipated that the liquor license proceeds would have been more

than sufficient to satisfy both the purported \$50,000 debt to Gavin and the remaining priority debt to Capstone, which, at that time, could not have totaled more than \$250,000. In support of his claim, respondent noted that, in November 2013, he believed that Pae possessed a Class C plenary retail consumption liquor license based on Pae's prior intent to construct a wine bar on the second floor of the Red Bank Property. Based on respondent's experiences as the mayor of Red Bank approving such liquor licenses, respondent estimated that Pae's license had a value of "at least \$500,000."

Respondent, however, subsequently learned, from a sale broker in 2014 or 2015, that Pae's license was only a Class C plenary distribution license, which had a value of between \$100,000 and \$150,000. Although respondent should have inspected Pae's liquor license before sending his November 6, 2013 letter to Gavin, respondent appeared to have a reasonable, good faith belief that Pae possessed a valuable liquor license, the sale of which would have been sufficient to satisfy Pae's obligations to both Capstone and Gavin.

Specifically, respondent knew that Pae and Matthaei had executed a November 2012 agreement whereby Pae had agreed to sell her liquor license and business assets for \$350,000, which sum did not include the sale price for the Red Bank Property. Had respondent received a similar offer, between 2014 and 2018, for the sale of Pae's liquor license, there likely would have been

sufficient funds to cover both the remaining \$250,000 in priority debt to Capstone and the subordinate \$50,000 debt to Gavin. The fact that respondent was ultimately mistaken regarding the value of Pae's liquor license does not, by itself, demonstrate that respondent had engaged in any dishonest conduct. See In the Matter of David Uffelman, DRB 08-355 (June 19, 2009) at 11 (noting that a misrepresentation "does not occur simply because an attorney is mistaken or his statement is later proved false, due to changed circumstances;" we dismissed the RPC 8.4(c) charge because the attorney's unmet assurances to the client that he was working on various aspects of the case were the result of gross neglect rather than dishonest conduct), so ordered, 200 N.J. 260 (2009). Indeed, upon learning that the limited value of Pae's liquor license would be insufficient to satisfy both Capstone and Gavin, respondent contacted Gavin, informed her that she would not be paid from the proceeds of Pae's liquor license, and advised her to retain counsel if she wished to pursue a claim against Pae.

The DEC's remaining findings do not clearly and convincingly demonstrate that respondent had acted deceptively in connection with his November 6, 2013 letter to Gavin.

Frist, the DEC found that respondent, and not Gavin, was the author of the October 31, 2013 letter, which was (1) dated approximately one week before the closing on the Red Bank Property; (2) signed by Gavin; and (3) stated that

Gavin would accept \$50,000 in exchange for the “release” of her “lien on the [Red Bank P]roperty.” The DEC, however, did not explain how it had determined that respondent had authored the letter.

By contrast, during the ethics hearing, respondent claimed that Pae had received the letter and provided it to respondent’s office, following which respondent instructed his paralegal to return the letter to Gavin, unsigned, via facsimile. The letter incorrectly stated that Gavin’s UCC-1 operated as a lien on the Red Bank Property when, in fact, the UCC-1 operated only as a security interest in Heritage’s business assets and fixtures. Based on the letter’s fundamental mischaracterization of the scope of Gavin’s UCC-1, and the lack of corroborating evidence demonstrating who had prepared the October 31, 2013 letter, there is no clear and convincing evidence that respondent authored the document. Indeed, contrary to the implication of the letter that Gavin would “release” her “lien” on the Red Bank Property upon receiving \$50,000 in sale proceeds, Gavin herself acknowledged, during ethics hearing, that, prior to the closing on the Red Bank Property, respondent had advised her that she would not be receiving any funds from the sale of the property.

Second, the DEC found incredible respondent’s claim that he did not personally draft the November 6, 2013 letter to Gavin. During the ethics hearing, respondent claimed that his paralegal had drafted and signed the letter, in his

name. However, regardless of whether respondent or a member of his staff prepared the letter, respondent accepted full responsibility for the content of the document.

Third, the DEC found that respondent lacked credibility regarding his receipt of \$40,000 of Capstone's funds in connection with the sale of Pae's liquor license.

It is undisputed that Capstone agreed to provide respondent \$40,000 of its \$173,592.55 in net proceeds from the sale of Pae's liquor license, based on respondent's claim that Pae owed him approximately \$65,000 in unpaid legal fees. Although the DEC noted that respondent failed to provide billing statements in support of his claim for unpaid legal fees, respondent was not required to do so, given that Capstone agreed to provide respondent with \$40,000 its funds, without the need for billing statements, in exchange for respondent waiving his legal fee in connection with the closing of Pae's liquor license. Moreover, respondent did not serve as Gavin's attorney and, thus, had no obligation to request that Capstone relinquish any portion of its funds to Gavin.

Finally, although the DEC observed that Gavin "was genuinely angered and felt helpless" upon learning that she would not be receiving any proceeds from the sale of Pae's liquor license, in our view, there is no clear and

convincing evidence demonstrating that respondent engaged in any knowing acts of deception in connection with his November 6, 2013 letter to Gavin. Rather, at the time of the letter, respondent reasonably believed that the value of Pae's liquor license would have been more than sufficient to satisfy both Pae's priority debt to Capstone and any subordinate debt she may have owed to Gavin. The fact that respondent ultimately was mistaken regarding the value of Pae's license does not demonstrate that he engaged in deceit.

Although Gavin never received any funds towards her outstanding debt, respondent was not responsible for her unfortunate predicament. Rather, it appears that Gavin provided Pae a subordinate \$60,000 cash loan, without any involvement from respondent, years after Capstone, or its predecessor, had provided several hundred thousand dollars in secured loan proceeds to Pae. After Pae encountered financial difficulties and was unable to repay her debt, respondent reasonably, though mistakenly, believed that the value of Pae's liquor license would have been sufficient to satisfy Pae's purported subordinate debt to Gavin. Based on that reasonable belief, respondent did not appear to have misrepresented his willingness to provide Gavin with the liquor sale proceeds, provided that Gavin had demonstrated that she had a valid claim for debt.

In conclusion, although respondent's conduct in this matter was not completely above reproach, given the lack of clear and convincing evidence

demonstrating that he had engaged in any knowing acts of deception in connection with his November 6, 2013 letter to Gavin, we determine to dismiss the charges against respondent.

Members Campelo, Joseph, and Petrou voted to sustain the RPC 4.1(a)(1) and RPC 8.4(c) charges, based on their view that there is clear and convincing evidence that respondent engaged in deception toward Gavin. Those Members determined that a reprimand was the appropriate quantum of discipline for that misconduct.

Member Boyer was absent.

Disciplinary Review Board  
Hon. Maurice J. Gallipoli, A.J.S.C. (Ret.),  
Chair

By: /s/ Timothy M. Ellis  
Timothy M. Ellis  
Chief Counsel

SUPREME COURT OF NEW JERSEY  
DISCIPLINARY REVIEW BOARD  
VOTING RECORD

In the Matter of Edward J. McKenna, Jr.  
Docket No. DRB 23-082

Argued: May 24, 2023

Decided: November 8, 2023

Disposition: Dismiss

<i>Members</i>	Dismiss	Reprimand	Absent
Gallipoli	X		
Boyer			X
Campelo		X	
Hoberman	X		
Joseph		X	
Menaker	X		
Petrou		X	
Rivera	X		
Rodriquez	X		
Total:	5	3	1

/s/ Timothy M. Ellis

Timothy M. Ellis  
Chief Counsel