SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
Docket No. DRB 25-162
District Docket No. XIV-2021-0148E

In the Matter of David R. Cardamone
An Attorney at Law

Argued
October 23, 2025

Decided
January 20, 2026

Concurring Opinion

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

This matter arises out of respondent's representation of Andre Higgs in the sale of residential real estate. At the time of the sale, Higgs was incarcerated for a murder conviction. In order to facilitate the sale while in prison, Higgs had provided respondent a power of attorney in order to execute all documents necessary to close. Higgs also requested that respondent receive, and ultimately dispose per Higgs's instructions, the sales proceeds released for Higgs at closing.

We concur in the determination of the Board to impose discipline upon respondent, and with those Members recommending a censure. We write separately because, in our view, the Wilson analysis of the Office of Attorney Ethics (the OAE), the recommendation of the Special Ethics Adjudicator (the SEA), and the recommendation of the full Board, consistently refer to the proceeds released to respondent's client as money belonging to the client's mortgage lender. We respectfully submit that this view is fundamentally incorrect. This analysis also does not, in our view, adequately consider respondent's actual role in the real estate closing that clearly removes this matter from the ambit of Wilson and Hollendonner. We write separately out of concern that the advocacy of the OAE and the recommendation of the SEA continue to

unduly expose respondent to a sanction harsher than the split recommendations of the Board.

Specifically, in our view, this matter is far removed from a Wilson and Hollendonner case because 1) the funds in issue did not in fact constitute escrowed funds, 2) there is ample evidence in the record to support respondent's genuine belief that his client was entitled to exercise control over the funds in issue, and 3) the record is essentially uncontroverted that respondent genuinely – if erroneously – believed that he was ethically required to follow Higgs's clear directions for both the disbursing the funds in issue, and to withhold placing the other closing participants on notice of the ALTA error.

The recommendation of the SEA for disbarment rests upon the conclusion that respondent disbursed to his client funds that "belonged" to Higgs's mortgage lender. This starting point does not, in our view, correctly reflect the contractual relationship between Higgs and his lender.

The rights of a mortgage lender generally depend upon two instruments, a promissory note creating a repayment obligation, and a mortgage instrument providing for security against non-payment utilizing real estate as collateral. Unless and until there is full payment against the note, the borrower/seller of property remains directly and personally liable on the note. Further, unless the

seller's lender is paid in full, it retains a priority lien interest in the real estate against all subsequently created ownership and lien interests.

For this reason, a seller's mortgage lender does not have a seat at the closing table as a participant, with any enforceable rights against the sales proceeds. Neither is the seller's mortgage lender a party to either the sales contract, or the loan agreement between the buyer of the property and the buyer's own mortgage lender. If the seller's lender is not paid off at closing, its enforceable right to payments due on the mortgage note, and its priority lien interest, remain intact.

In the typical residential real estate sales transaction, the seller's mortgage loan is not discharged for the benefit of his lender. Indeed, paying off the existing loan typically will result in lost interest income to the seller's mortgage lender. Rather, this lender is paid off at closing for the benefit of the new buyer, who wants to receive clear title, and any new lender extending new funds to facilitate the purchase, for which it seeks to hold a first-lien position. But unless it is paid off, the seller's lender remains secure in its collateral, and is entitled to repayment of principal and the accrued interest charges.

Respondent was retained by Higgs to advance Higgs's interests. Respondent did not act as settlement agent, and therefore was not charged with assuming any dual responsibility to protect the interests of the buyer and any

new mortgage lender. Rather, that responsibility fell upon 1) the buyer's counsel, 2) the title company that acted as the settlement agent, and 3) the lender's own closing department responsible for reviewing the closing disclosures and ALTA as part of its process for clearing the loan to close.

Respondent's responsibility to the buyer and the new lender were extremely limited to two unrelated, discreet areas, arising out of narrowly crafted and agreed-upon escrow arrangements. These related to efforts to discharge the bail bond lien, for which $20,000 was retained in escrow by the title company, and $75,000 respondent received – separately from the sales proceeds – as security pending resolution of child support claims against the seller. Here, there is no dispute that respondent faithfully discharged these assumed duties.

The closing in this matter took place on January 29, 2021. At that time, all of the closing participants responsible for protecting the interests of the buyer and the buyer's mortgage lender – buyer's counsel, the title insurer and the closing department of the buyer's lender – had blessed the ALTA providing for Higgs to receive the full sales proceeds without reduction for the payoff of Higgs's existing mortgage loan. Consequently, these proceeds were released to Higgs via deposit into respondent's attorney trust account, which respondent received for the convenience of Higgs solely due to his client's incarceration.

Respondent first discovered that Higgs's existing mortgage had not been paid off on April 6, 2021, about two and a half months after closing. In the interim, none of the closing participants actually responsible for protecting the interests of the buyer and the buyer's lender had discovered the failure to either pay off the existing mortgage loan, or to cancel that loan of record. Neither had any other party asserted a claim to the sales proceeds that had remained in respondent's attorney trust account for over ten weeks. (1T224).[1]

As an experienced real estate attorney, respondent understood that the failure of the title insurer to pay off the prior mortgage did not alter Higgs's direct responsibility for payment of the underlying note. As a consequence, he desperately tried to convince his client to pay off the mortgage to avoid his client from being in breach of his obligation to deliver clear title.

At the same time, because the ALTA reviewed and approved by all parties designated his client as the proper recipient of the remaining sales proceeds, he viewed those funds as already in the constructive possession and control of his client. When combined with Higgs's clear and direct instructions to withhold discussing the matter with any other party, and to turn over the funds that were

[1] "1T" refers to transcript of the January 21, 2025 ethics hearing.
"2T" refers to the transcript of the January 22, 2025 ethics hearing.
"SEA" refers to the Special Ethics Adjudicator's report, dated June 25, 2025.
"OAEb" refers to the OAE's letter brief to the Board, dated August 19, 2025.

already released by the title company to the respondent's client, respondent's belief that he had no choice to follow his client's direction under a misguided understanding of RPC 1.2(a) is both plausible and credible.

Here, the OAE contended, and the SEA concluded, that respondent should be disbarred for failing to protect the interests of non-clients in direct contravention of the instruction of his actual client. The notion that respondent should be denied his chosen livelihood, while the closing participants actually responsible for protecting the buyer and the buyer's lender suffer no adverse professional consequences, seems a perverse outcome.

The disbarment recommendation depends solely upon the misguided notion that the funds held by respondent "belonged" to Higgs's mortgage company, when that was not in fact the case for the reasons discussed above. It also rests upon a contention and conclusion of what respondent "should have known" or "should have understood," an analysis which we respectfully submit would extend the Wilson and Hollendonner rule well beyond the intention of the Court.

It is well-settled that an attorney's ignorance of his or her ethical obligations is no excuse or defense for violating the Rules of Professional Conduct. That does not, of course, make the RPCs a code of strict liability. Many ethics rules impose violations only for knowing or intentional misconduct.

The Wilson and Hollendonner rule imposes just such a requirement for a "knowing" misappropriation. The automatic disbarment rule is triggered only if the attorney uses funds she or he "knows" belongs to one party, for the benefit of the attorney or another party. A genuine mistake as to ownership of the funds will still result in a violation of RPC 1.15, but without the "ultimate" sanction of disbarment. In re Cotz, 183 N.J. 23 (2005).

The recommendation of disbarment by the OAE and SEA under Wilson and Hollendonner – because respondent "should have known" those funds belonged to his client's mortgage lender – is therefore wrong on at least two counts. First, those funds did NOT belong to the client's mortgage lender. Second, "should have known" is simply negligence, and not the same as actually "knowing."

Testimony taken during the hearing before the SEA is instructive. It is replete with uncontroverted evidence showing that respondent believed he had no choice but to follow the instructions of his client for the handling of funds released at closing to his client.

- The firm's real estate paralegal made sure they properly provided the payoff information to the closing participants actually responsible for the interests of the buyer and new lender. (1T72).

- The supervising attorney, who eventually fired respondent because of this incident, testified that he did not believe respondent knowingly violated his ethical obligations. (1T170).

- Respondent clearly viewed the excess sales proceeds designated in the ALTA for distribution to his client, and held by him for the convenience of his client, as distinct from any funds received by him in escrow pursuant to negotiated escrow agreements. (1T220-221, 1T239).

- Respondent did not believe he could use the funds received by him to pay off the mortgage without the consent of his client, even though his client remained liable to discharge the mortgage lien. (1T230).

- Respondent did not believe he could communicate with the title insurer about the error after his client specifically directed him not to do so. (1T246; 2T112).

- Because the title insurer had already released the proceeds to his client, via delivery to respondent's attorney trust account, respondent genuinely believed the client had the right to dictate its disposition. (2T110-11).

- The client demanded release of his sales proceeds "immediately." (2T105, 2T122).

Additional considerations lead to the conclusion that this was an unusual closing taking place under circumstances that belie intentional misconduct warranting disbarment.

First, respondent represented an incarcerated client who could not be present in person to receive the sales proceeds. This placed respondent in the singular position of receiving into his trust account, for the first time, the sales proceeds delivered to his client. (2T91, 2T95).

Second, the parties were under time pressure to close, as the buyer's mortgage commitment was scheduled to expire in one day. (1T50, 1T178). Leading up to the closing, respondent's primary efforts were setting up escrow accounts for the lien claim of the bail bondsmen and for outstanding child support obligations. (1T65, 1T84, 1T239).

Third, in the continuing aftermath of the COVID-19 pandemic, respondent often handled matters from home. On the day of closing, however, his internet service was down, forcing him to rely on the small screen of his cell phone to review documents. (1T181-82).

Fourth, respondent's client disputed that his lender was entitle to full payment of the mortgage note. Higgs persistently claimed he had causes of action against his lender that would offset his liability to them under the promissory note secured by the mortgage. (1T225).

Fifth, respondent's client also purported to terminate respondent and the firm from further representation, creating a genuine issue whether the firm should continue holding onto to sales proceeds that were designated under the ALTA for distribution to the client. (1T214-16, 1T219, 2T105).

Last, despite weeks having passed, no one had ever made a claim to those funds, so as to put respondent on notice of a challenge to his client's right to receive the proceeds already released at closing to Higgs. (1T224).

The decision in In re Hollendonner, 102 N.J. 21 (1985), is instructive. It invokes the Wilson disbarment rule for funds held in escrow, while retaining the requirement of knowledge as an intent element, reasoning that:

> [I]t is a matter of elementary law that when two parties to a transaction select the attorney of one of them to act as the depository of funds relevant to that transaction, the attorney receives the deposit as the agent or trustee for both parties. The parallel between escrow funds and client trust funds is obvious. So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of [Wilson]. We do not apply that rule in these proceedings in view of the absence of clear and convincing evidence that [r]espondent invaded the escrow funds **with knowledge** that the use of those funds was improper.
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> [Id. at 28-29 (citations omitted) (emphasis added).]

Here, there is no dispute concerning the total absence of any escrow agreement purporting to make respondent an agent of multiple parties for purposes of receiving and later disbursing the sales proceeds already delivered for his client.

Similarly, nothing in the record suggests that respondent knew or believed that his client was not entitled to control funds already distributed to Higgs at closing, so as to trigger Wilson and Hollendonner.

In In re Goldstein, 116 N.J. 1 (1989), the Court publicly reprimanded an attorney for the improper withdrawal of interest, for his personal benefit, on

funds held in his attorney trust account. At the time, Opinion No. 326 of the Advisory Committee on Professional Ethics left no doubt that interest earned on client funds held in trust belonged to the client.

In limiting discipline to a public reprimand, the Goldstein Court adopted our decision, which reasoned that the attorney's ignorance as to the proper ownership of the accrued interest was insufficient to trigger a knowing misappropriation.

> The Board is unable to find that respondent knowingly misappropriated client funds. Because respondent was unaware of Opinion 326, he failed to realize the impropriety of withdrawing trust account interest for his benefit. While it is true that respondent's ignorance of the rules does not excuse his unethical conduct, it does bear directly on the issue of knowledge in the context of "knowing misappropriation."
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> The Court has defined "knowing misappropriation" as ". . . the mere act of taking your client's money knowing that you have no authority to do so. . . " Matter of Noonan, 102 N.J. 157, 160 (1986). See also Matter of Hollendonner, supra, 102 N.J. at 29 (absence of sufficient evidence that attorney knew that his invasion and use of escrow funds was improper did not justify the application of the disbarment rule). There is no clear and convincing evidence that respondent knew that his withdrawal of trust account interest was improper.
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> [Goldstein, 116 N.J. at 5 (emphasis added).]

Here, the SEA's recommendation of disbarment is contrary to this reasoning. The SEA's closing remark in his recommendation demonstrates this by concluding that respondent should "be disbarred pursuant to [RPC 1.15] for

the misappropriation of funds entrusted to his care, ***albeit mistakenly***." (SEApp16-17) (emphasis added).

The OAE did not take issue with this conclusion of the SEA when it adopted, wholesale, the findings of the SEA. (OAEbp1) ("the OAE agrees with the SEA's factual findings, his legal analysis and his recommendations").

We respectfully submit censure is the appropriate sanction for respondent's conduct in this matter. Although his conduct may not rise to the level of a knowing misappropriation, he certainly failed to act responsibly when, despite his concern about his client's intentions, he neither 1) researched alternatives to releasing the funds to the client, 2) consulted with his supervisor, nor 3) availed himself of ethics resources to determine alternative actions that he could have taken to protect the interests of third parties.

Disciplinary Review Board
Peter Petrou, Esq., Member
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By: */s/ Timothy M. Ellis*
Timothy M. Ellis
Chief Counsel