Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-448
District Docket Nos. XIV-2015-0078E;
XIV-2015-0079E; and XIV-2015-0080E

In the Matter of

Gary L. Mason

An Attorney at Law

Decision

Argued: June 18, 2020

Decided: October 20, 2020

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Marc D. Garfinkle 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 three-year suspension filed by a special master. The formal ethics complaint charged respondent with violating RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979), or In re Hollendonner, 102 N.J. 21 (1985) (knowingly

misappropriating client or escrow funds); RPC 1.5(b) (failing to set forth in writing the basis or rate of the fee); RPC 1.7(a)(2) and (b)(1) (engaging in a concurrent conflict of interest); RPC 1.8(a) (engaging in an improper business transaction with a client); RPC 1.15(b) (failing to promptly deliver funds to a third party); RPC 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects); and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons set forth below, we recommend respondent's disbarment.

Respondent earned admission to the New Jersey bar in 1990 and to the New York bar in 1991. Presently, he practices law with Garland & Mason, LLC, a law firm in Manalapan, New Jersey.

In 2008, the Court imposed a censure on respondent for engaging in a conflict of interest, in violation of RPC 1.9(a) and (c)(1), when, after he had terminated his representation of one party to a licensing agreement that was in dispute, he undertook the representation of the other party in that same dispute. In re Mason, 197 N.J. 1 (2008). Respondent also engaged in conduct prejudicial to the administration of justice, in violation of RPC 8.4(d), when, notwithstanding a court order barring him from performing any legal work

involving his former client and from making any disclosures regarding the former client, he continued to be involved in the dispute.

In 2013, the Court imposed a reprimand on respondent for threatening to present criminal charges to obtain an improper advantage in a civil matter, a violation of RPC 3.4(g). In re Mason, 213 N.J. 571 (2013).

At the time of respondent's conduct in this matter, he was a partner with the Manalapan law firm of Klafter & Mason, LLC (the firm). Respondent testified that, throughout his nearly thirty-year career, he has been "involved in a multitude of various business transactions from small asset purchases to seven figure mergers and acquisitions."

In June 2006, respondent was introduced to Michael Attardi, who sought funding to produce several animated films based on his movie scripts. Attardi's first project was *Once Upon a Christmas Village*, an animated film short that Attardi intended to serve as the springboard for a full-length animated film titled *Snowyville*.

Attardi asked respondent to provide legal representation for three of his media and film companies: Dream Balloon Productions, Inc. (DBP), MDA Entertainment, Inc. (MDA), and Once Upon a Christmas Village, LLC (Christmas Village LLC). DBP was a management company for producing films, and Attardi was the majority owner.

On June 27, 2006, Attardi and respondent signed a retainer agreement providing that, in lieu of fees for respondent's legal services, he would receive a one-percent equity interest in distributions from Christmas Village LLC, and that, once DBP received stock to be returned by its former attorney, respondent would be entitled to a one-percent equity interest in that company.[1] Thus, if Attardi's movies were successful, respondent admittedly stood to gain financially. The retainer agreement further provided that "[a]ny and all future equity interests in any other business entity will be agreed upon at a later date and memorialized in the appropriate agreement which shall supplement this retainer agreement."

Also on June 27, 2006, Attardi signed a conflict of interest waiver respondent had prepared. The waiver acknowledged that Attardi had retained respondent to represent DBP, Christmas Village LLC, MDA, and, "potentially, future business entities created by [Attardi] for similar purposes," and that respondent had agreed to accept an equity interest in these and other companies, in lieu of legal fees.

The waiver further provided that, in exchange for legal services that respondent provided "to these and future business entities," he would receive an

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[1] Respondent later received a one-percent equity interest in DBP, in accordance with the retainer agreement.

ownership interest in those businesses "and may, at some later time, be entitled to an equity distribution from the profits realized by those entities." The letter informed Attardi of his right to seek independent counsel for the purpose of evaluating and counseling him in respect of both "the business transaction described therein" and the retainer agreement.

In July 2006, respondent introduced Attardi to grievant Matthew Phillips to discuss a possible investment in Christmas Village LLC. Respondent and Phillips knew each other through their children's pre-school. In July or August 2006, Phillips decided to invest in Christmas Village LLC.

Grievant Dr. Harry August Bade, III, who had been friends with Attardi for twenty-five to thirty years, also invested in Christmas Village LLC. Bade had invested in prior Attardi projects, before respondent's involvement.

Ultimately, *Once Upon a Christmas Village* was produced and had a successful run throughout the 2007 film festival circuit.[2]

On March 21, 2008, respondent, Attardi, and other members of DBP, including Attardi's friend, Andy Van Roon, formed Dream Balloon Enterprises, LLC (Dream Balloon), for the purpose of managing the

[2] In 2007, Attardi received the Grand Jury Award for Best Animation at the DC Independent Film Festival, in Washington, D.C.

production of *Snowyville* and other movies that Attardi had written. Respondent was a managing member of Dream Balloon.

In exchange for equity shares in Dream Balloon, investors funded the company. The investors included Bade, grievant Patrick Scire, and Phillips, who estimated that he invested $400,000 to $500,000.

Respondent also served as counsel for Dream Balloon. In exchange for his legal services, he was to receive a one-percent ownership interest in the company. However, respondent and Dream Balloon did not enter into a written retainer agreement, which, respondent stipulated, violated RPC 1.5(b).[3] In addition to respondent's one-percent equity interest in Dream Balloon, in 2008, he received a $1,000 monthly retainer for six or eight months. After 2008, none of Attardi's companies paid respondent a monthly retainer. He estimated that Attardi's companies owed him at least $100,000 for his work over the years.

Respondent failed to obtain informed, written consent to the conflict from Dream Balloon's other managers and members, including Attardi. Thus, respondent stipulated that he violated RPC 1.7(a)(2).[4] Further, respondent

[3] Respondent and the OAE entered into an extensive stipulation of facts.

[4] Although the complaint charged respondent with having violated RPC 1.7(a)(2) and (b)(1), we refer only to RPC 1.7(a)(2), which identifies the nature of the concurrent conflict and proscribes it. RPC 1.7(b) merely permits the attorney to proceed with the representation, despite the conflict, provided the attorney complies with certain, enumerated conditions, such as informed, written consent.

stipulated that he violated RPC 1.8(a) by entering into a business transaction with Attardi without fully disclosing to him, in writing, the terms of the transaction; informing Attardi of the desirability of seeking the advice of independent counsel, and giving him a reasonable opportunity to do so; and, finally, obtaining Attardi's informed written consent, as that Rule requires.

Due to many factors, including the 2008 downturn in the economy, Attardi had a difficult time securing financing for *Snowyville*, which would have been Dream Balloon's first animated film project. Attardi, thus, began working on a screenplay for a live feature film entitled *Numba One*, a mafia-inspired comedy with a much lower production budget than *Snowyville*.

On June 9, 2010, Numba One, LLC, a Florida limited liability company, was formed for the purpose of producing *Numba One*. Respondent, Attardi, and Van Roon were its managing members.

Although respondent was legal counsel for Numba One, LLC, he did not have a separate retainer agreement with that company and, thus, admitted another instance of having violated RPC 1.5(b). Respondent never received any legal fees from Numba One, LLC; however, he had the right to receive a share of any profits realized from the making of the film.

In a July 1, 2010 memorandum from respondent to Dream Balloon's Class B members and Christmas Village LLC's "angel investors," respondent stated

that they had the right of first refusal in respect of purchasing membership interest units in Numba One, LLC (the Class B memorandum). Bade, Phillips, and Scire each received the Class B memorandum.

A September 2, 2010 operating agreement governed Numba One LLC's operations. Under the agreement, Attardi, respondent, and Van Roon would serve as the initial managers. Only the managers, or their designees, would be authorized to act on behalf of and manage the business affairs of the company.

In addition to respondent's position as a managing member of Numba One, LLC and his financial interest in the film, he provided legal representation to Numba One, LLC and to the other managers and members. However, he never obtained an executed, written waiver of the conflict of interest presented by his positions as both counsel to, and managing member of, Numba One, LLC, and his right to receive a share of the net profits from the film. Thus, respondent stipulated that he violated RPC 1.7(a)(2) and RPC 1.8(a) in that respect.

According to Numba One LLC's operating agreement, "[t]otal capitalization shall mean receipt by the Company of cash Capital Contributions totaling up to $3 million and other services." For the managers to raise the $3 million, the operating agreement authorized them to sell and issue up to fifty individual membership interest units at $60,000 per unit. For each unit

purchased, the investor would receive a one-percent interest in Numba One, LLC.

The operating agreement further provided that

> [t]he monies shall be placed into a dedicated escrow bank account and will be released to the Company only when the total budget amount of Three Million Dollars ($3,000,000.00) has been achieved, provided however, that all such monies will be returned to Investor Members in full, without interest, if the total budget amount has not been raised by the "Termination Date" as set forth in the "Confidential Private Offering Memorandum [POM]."
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> [Ex.P7,¶5(b).][5]

On September 2, 2010, Numba One, LLC issued a confidential private offering memorandum, which set the "Termination Date" as September 2, 2011.

According to respondent, Attardi prepared the operating agreement and the private offering memorandum, which he based on legal documents that another lawyer had prepared in connection with the *Snowyville* project. As Numba One LLC's managing member and attorney, respondent admittedly reviewed the terms of the operating agreement and the private offering memorandum and, thus, was fully familiar with them.

Attardi, who was in charge of procuring funding, prepared marketing materials and circulated all documents to Dream Balloon investors. Prior to

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[5] "Ex." refers to the exhibits admitted during the ethics hearing.

making their investments in Numba One, LLC, potential investors received a "Bullet Overview," which provided that all private capital would be placed in escrow in respondent's attorney trust account and specifically designated for *Numba One*. The "Bullet Overview" mirrored the escrow terms of Numba One LLC's operating agreement, stating that investor funds would not be released prior to receipt of the remainder of the budget required for the production of the film and that, if the remainder of the production budget were not secured, no investor funds would be released and all monies immediately would be returned to the investors.

Another document distributed to potential investors was a page from a PowerPoint presentation titled "Numba One Overall Financing Structure." That document also stated that the investors' funds would be deposited in an escrow account and that the monies would remain "[u]ntouched until 100% financing secured."

Numba One LLC's original investors were Bade, Phillips, and Scire, who invested $180,000, $300,000, and $90,000, respectively. All three testified that they understood, based on the language in the operating agreement, that there would be zero risk to their investments prior to Numba One LLC's achieving full funding of the movie production budget.

Phillips, who described respondent as a very good friend, stated that he was comfortable investing his money, "knowing that it was in [respondent]'s escrow account." Phillips emphasized that all investors' funds were to be held in escrow unless and until there was full funding for the movie. Thus, there was no financial risk until after the movie was released. In Phillips' view, the absence of risk was one of the biggest marketing pitches presented to investors.

According to Phillips, this point was made to all the investors that bought in:

> the biggest thing over and over and over again was that there is no risk in you losing your money unless the movie is made. And that was very specific to all the investors that bought in. . . . It wasn't vague. It was very clear that there was no possibility that we would lose our money by throwing it out there to some company hoping that we would get the rest in. We had to have all of that money in [respondent]'s escrow account to then be released as needed to produce the film.
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> [1T91-9 to 19.][6]

Prior to investing in Numba One, LLC, Bade received and reviewed promotional materials, including the "Bullet Overview" and financial summary. Bade also understood that his $180,000 would be placed in respondent's attorney trust account, where it would remain "until he would inform us that he had the amount of money that he needed to produce this, and, therefore, market

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[6] "1T" refers to the transcript of the December 17, 2018 hearing before the special master.

his film." Based on Bade's conversations with attorney friends, he believed that an attorney's trust account was like a bank and, therefore, the funds are "like locked in there, and . . . will never be used unless I release that money."

Scire testified that he "retired out of Wall Street in 2002" and, since then, has been involved in many private equity deals, along with some trading. He and his group of investors "decided to take a shot" because Attardi was very talented, and they believed that "this could be a chance to bring Dream Balloon back with virtually zero risk." He explained:

> when I say zero risk, I mean the way the deal was structured was money was going to sit in escrow in [respondent]'s escrow account, and no money will be used unless we got a film funded. So, in our view, this was a completely zero [risk] investment, other than getting a film done and a film flopping.
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> [2T152-12 to 17.][7]

On November 23, 2010, Phillips, Scire, Bade, and Numba One LLC's managers (respondent, Attardi, and Van Roon) executed an addendum to the operating agreement and private offering memorandum. The addendum moved the "Termination Date" forward, from September 2, 2011 to January 31, 2011. Thus, if Numba One, LLC failed to commence "principal photography" by

[7] "2T" refers to the transcript of the December 18, 2018 hearing before the special master.

January 31, 2011, the addendum provided the investors with the right to obtain the return of their investments.

Phillips solicited other potential investors, including his in-laws, Florida residents Ed and Marilyn Grad. Ultimately, the Grads and their friends and neighbors, Alan and Gloria Abraskin, each invested $60,000.

Marilyn Grad and Alan Abraskin testified that, prior to making their investments, they and their spouses were provided with a booklet containing some documents, including the Power Point presentation. Both witnesses were adamant in their understanding that the funds would be held in escrow until all monies had been raised to proceed with the movie; that the monies could be returned to them "at any time that [they] asked for it;" and that they would not have invested the funds if the investment were not safe.

Phillips testified that he never would have involved the Grads in the investment if he believed there was risk. He reiterated that there were numerous conversations during which respondent stated "[o]ver and over again" that the money "would stay in his escrow account, and that there was no possible way that we would lose this money. Zero."

By November 24, 2010, $690,000 in investors' funds had been deposited in respondent's trust account. According to respondent, after the investors' funds were deposited in his trust account, he did not have much contact with

them "in that end of 2010 period of time." Phillips testified, however, that all communications regarding the investment were through respondent.

Respondent testified that Numba One LLC's spokespersons were Attardi and Van Roon, neither of whom testified at the disciplinary hearing. Respondent maintained that the Grads and Abraskins allowed Phillips to represent their interests during meetings with Numba One LLC's managers, and Bade permitted Scire to represent him.

Respondent stated that, originally, the investors' funds were to be placed in a separate Numba One, LLC account. At some point, Attardi resigned as a Numba One, LLC manager, due to a Writers Guild Association rule, and the Numba One, LLC certificate of formation was amended to remove Attardi and to include Van Roon as a manager. According to respondent, at that point, "we all kind of agreed that it would be easiest to just keep everything in my trust account for the benefit of Numba One."[8] He acknowledged that the funds deposited in his trust account were intended for the use of Numba One, LLC; that his duty was to his clients and; that, therefore, if money were posted in his trust account for the benefit of the client, he took his "marching orders" from the client.

[8] Respondent testified that, prior to the Numba One, LLC endeavor, he had held other investors' funds in his trust account for other clients' projects.

Respondent testified that, despite Attardi's resignation, when decisions had to be made, respondent contacted Van Roon, but continued to contact Attardi, because he was "the company" and was still "calling the shots."

During the formation of Numba One, LLC and preparation of the private offering memorandum, Attardi was working with broker Vaughn Richmond, president of Ark Capital Ventures (Ark), on a loan from John Bailey, a California resident. Bailey would fund the difference between the $690,000 and the amount needed for the production budget, which was approximately $3.6 million at the time.

Respondent testified that, when Bailey requested that the investors' $690,000 be transferred to a Bank of America account, Attardi, Van Roon, and respondent agreed to transfer the funds to an account in the name of Numba One, LLC, which would be controlled by signatories on a signature card. At the time, respondent believed that he had the authority to take this action, because the operating agreement gave Numba One LLC's managers the right to use the investors' monies to secure financing for the film.

According to respondent, Phillips and Scire "wanted to know what was going on around every corner." Thus, respondent "kept them advised more so than [he] otherwise would have for investors . . . because they wanted to participate."

In a November 29, 2010 e-mail exchange, Phillips stated that he was going to withdraw from the Bailey transaction if he was not comfortable. In reply, respondent acknowledged that the funds were not to be released from escrow prior to the receipt of the balance of the production budget. He, thus, told Phillips that "[a]ll I care about is that no one except us has access to that $690,000.00 until the remaining" funds are available for the movie. According to Phillips, this statement was consistent with his understanding of how the investors' funds were to be used. Respondent was supposed to protect the investors' monies and ensure that the deal was not a scam.

In an early December 2010 e-mail exchange among respondent, Attardi, and Van Roon, respondent acknowledged that, as a consequence of his decision to hold funds belonging to each individual investor in his firm's attorney trust account, he owed a duty of care to each of the investors. Respondent also acknowledged that his failure to protect the money in his trust account might expose him to liability to each of the investors.

Eventually, the Bailey transaction fell through due to fraud and, on December 20, 2010, Bank of America returned the $690,000 in investors' funds to respondent's trust account. According to Phillips, this had been one of several scams and, thus, going forward, respondent "should have been on the lookout

for all these different scams that were out there, doing due diligence and making sure that he was protecting our money."

Respondent did not believe that the Bailey transaction raised ethics implications. The proper signatories solely controlled the Bank of America escrow account. Although respondent could not recall the signatories' identities, he stated that "nothing . . . was going to happen to that money without explicit authorization."

Near the end of December 2010, "everyone was advised that the Bailey deal was a scam" and that Attardi "was now looking for alternative funding sources." In January 2011, Richmond approached Attardi with another potential investment opportunity, through Atlantic Gulf Oil Holdings, Inc. (Atlantic Gulf). Jason Castenir was the Vice President of Atlantic Gulf.

At the time, Atlantic Gulf allegedly was negotiating a $50 million letter of credit from Hamilton Guaranty Capital, LLC (Hamilton Guaranty), a purported Texas hedge fund. As a precondition, Atlantic Gulf would have to post "upfront capital." Because Atlantic Gulf did not have enough cash to meet the precondition, Richmond proposed that Numba One, LLC post the $690,000 for Atlantic Gulf and, when Hamilton Guaranty issued the $50 million letter of credit, Atlantic Gulf would fund the balance of the production budget.

Although Attardi was no longer a Numba One, LLC manager, he, Van Roon, and respondent agreed to accept that deal. Respondent maintained that Attardi was "running the show" and was involved in all the communications and discussions about the deal.

In a January 20, 2011 e-mail, Richmond sent respondent a proposed letter of intent, outlining the funding of the Numba One, LLC project, which would now include two private lenders, Ark and NGE Funding (NGE). According to the letter, Dream Balloon would contribute $690,000 toward Numba One LLC's $3.45 million production budget, and Ark and NGE would contribute the remaining $2.76 million. The $690,000 was to be "posted as leverage towards the consummation of the Hamilton and Atlantic Gulf transaction."

The letter of intent provided that Dream Balloon was to transfer $690,000

> into a to-be-designated escrow fund held by JP Morgan Chase, upon written confirmation that these funds will not be utilized for any purpose whatsoever, and will not be disbursed to anyone or any entity, without prior written consent from [Dream Balloon], and that in the event Lender is unable to facilitate its share of the production budget, the entire $690,000 shall be returned to [Dream Balloon] or its counsel, without any consent or participation required from Lender.
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> [Ex.P31¶3.]

The letter of intent further provided:

> [i]n the event Lender does not produce its share of the production budget within the time frame set forth in the

> formal documentation, [Dream Balloon] shall not be liable for any costs, fees, or charges or [sic] any kind, and shall be entitled to the return of the entire $690,000 transferred into the JPMorgan Chase escrow account upon written direction to JPMorgan Chase.
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> [Ex.P31¶5.]

Attached to the letter of intent was a proposed one-page deposit acknowledgment (DA1), which was described as an escrow agreement. DA1 provided that Dream Balloon would deposit $690,000 in the escrow account of Hamilton Guaranty's legal counsel, Ferguson Law Group, P.C. (FLG). That escrow account was maintained at Chase Bank in Plano, Texas, where FLG was located. Once the funds were deposited in FLG's escrow account, FLG would deduct a $500 non-refundable fee.

On January 21, 2011, Richmond sent an e-mail to FLG attorney Michael Walenciak, to which he had attached a revised draft of the escrow agreement, (DA2). This version provided that Ark would pay the $500 non-refundable escrow fee. Respondent signed DA2 and sent it, via e-mail, to Walenciak, who made a handwritten change, described below, and signed the document.

Also on January 21, 2011, the investors' $690,000 was transferred from respondent's attorney trust account to FLG's trust account. The next version of the escrow agreement (DA3), signed that date by respondent and Walenciak, acknowledged the $690,000 wire transfer and stated

> [u]nless a definitive escrow agreement (an "Escrow Agreement") is entered into by the Depositor, the Deposit will be returned to the Depositor at the originating account below upon written request of the Depositor, or thirty (30) days after the date of this letter, whichever comes earlier. Upon execution of an Escrow Agreement, the Deposit will be retained and dispersed [sic] according to the terms of the Escrow Agreement.
> . . .
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> [Ex.P34.]

Ark did not explain to respondent why the funds had to be transferred to FLG's trust account. Because DA3 safeguarded the investors' funds and provided for their return, respondent believed the investor funds were safe.

Respondent transferred the funds to FLG without the investors' consent. He claimed a belief that he was not obligated to seek the investors' authorization, as the decision had been made by Numba One LLC's managers and Attardi, and the monies were "still safe," which was consistent with his fiduciary obligation to the investors.

Respondent testified that, given the managers' past experience with shady deals, particularly the Bailey transaction, they thoroughly discussed the Hamilton Guaranty/Atlantic Gulf proposal, searching for the Achilles heel that would leave them "screwed." They found none. He explained:

> [e]veryone's saying it's got to be [Atlantic Gulf] . . . the company who claimed to have millions and millions of dollars in oil refineries. We saw their tax returns, we saw bank statements that their representative produced

> to us, but the one thing about [Atlantic Gulf] was that at no time were they getting our money. So there was no opportunity for [Atlantic Gulf] to run away with the money. So then we turned to Hamilton [Guaranty], and we were thinking well, you know, where could Hamilton be the scammer in this transaction? And we followed up with . . . Walenciak at [FLG] who confirmed for me that he had worked on several of these deals on other occasions as counsel for Hamilton. We spoke with the underwriter for Hamilton, and the big point was if Hamilton performed, [Atlantic Gulf]'s next step was to pay them or to demonstrate that they had the ability to make this payment guarantee, which was $6 million and change. So then the question was well, how am I going to make this payment? So Jason Castenir from [Atlantic Gulf] said well, we work with Citibank in Korea. They've committed to post the $6 million for us because once the letter of credit is issued, they're going to get paid that money back.
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> [2T115-25 to 2T116-23.]

Consequently, respondent called a Citibank representative in Korea, who confirmed that the bank was ready to post the $6 million. Thus, he testified, there appeared to be no Achilles heel. Respondent had no contact with Numba One LLC's investors while he was investigating the Hamilton Guaranty/Atlantic Gulf deal.

After the $690,000 had been transferred to FLG's trust account, a flurry of activity took place. On January 26, 2011, Richmond sent an e-mail to Carello, Attardi, and Van Roon, attaching a form "Depositor Acknowledgment," of the

same date (DA4). Unlike DA3, DA4 was a formal agreement among Numba One, LLC, Atlantic Gulf, Ark, NGE, Hamilton Guaranty, and FLG.

In respect of protecting the investors' funds, DA4 was very different from DA3, which provided that, in the absence of "a definitive escrow agreement," the $690,000 would be returned upon written request or within thirty days. DA4 provided that an unspecified "Escrow Agreement" would be "the only controlling agreement" governing the $690,000 held in escrow by FLG and governing "the instructions which Escrow Agent [FLG] is to follow" in respect of the funds.

Further, under DA4, Numba One, LLC would have to agree to indemnify and hold harmless Hamilton Guaranty and FLG from claims arising from Atlantic Gulf's decisions. Finally, Numba One, LLC would have to "waive, release and relinquish any and all claims or causes of action of any type" that Numba One, LLC might have against Hamilton Guaranty "which arose, result from or relate in any way to decisions made by [Atlantic Gulf]." DA4 also referred to a January 25, 2011 Financial Services Agreement (FSA) between Atlantic Gulf and Hamilton Guaranty, the significance of which will be explained below.

Just before midnight on January 26, 2011, Attardi forwarded to respondent Richmond's e-mail with the DA4 attachment, but not the FSA. The next day,

respondent, in his capacity as a managing member of Numba One, LLC, signed DA5, which provided in part:

> **WHEREAS,** Indemnitor [Numba One] has made a wire transfer in the amount of $690,000 USD (the "Funds") to the [FLG] ("Escrow Agent") to be held in escrow per the terms of a certain preliminary escrow letter agreement, dated January 20, 2011 and executed by and between Escrow Agent and Indemnitor (the "Escrow Agreement").
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> **WHEREAS,** the Funds have been supplied by Indemnitor for the purpose of funding its project entitled, "Numba One" via the syndicated financing transaction with Atlantic Gulf Oil Holdings, Inc., a Nevada corporation ("AGOH"), NGE Enterprises, Inc., a New York Company ("NGE"), and ARK Capital Ventures, LTD a Cayman Islands Company ("ARK").
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> **WHEREAS,** the funds have been earmarked for the exclusive use of AGOH, NGE and ARK (hereby referred to jointly as and under "AGOH") in connection with a transaction being executed between AGOH and HGC, provided that the terms of formal and permanent escrow and funding documents are agreed upon by and between Indemnitor and AGOH.
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> * * * * * * * *
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> **WHEREAS,** the parties to this Agreement desire that the Escrow Agreement be the only controlling agreement with regard to the Funds and the instructions which Escrow Agent is to follow with regard to the Funds, until such time as Escrow Agent is provided with written instructions executed by an authorized representative of Indemnitor providing Escrow Agent with further instructions regarding the disbursement of the Funds.

[Ex.P43.]

Thus, the parties stipulated, under the terms of DA5, DA3 was "the only controlling agreement" in respect of the $690,000 of investor funds in FLG's escrow account or until such time as FLG was provided with written instructions by respondent or another authorized representative of Numba One, LLC regarding its disbursement.

On Thursday, January 27, 2011, prior to the "Termination Date" set forth in the Numba One, LLC operating/escrow agreement, Phillips sent an e-mail to respondent, requesting that he return "the money for Al [Grad], Ed [Abraskin] and me since the remaining funding for Numba One never came through. It's unfortunate that we were again misled by some investors but unfortunately I can't wait any longer."

Respondent sent the following reply:

> Matt - the money has been wired to an attorney's trust account in Texas in connection with another deal on which we're awaiting final word. We've been working with a broker over the last 2 weeks who was able to hook us up with a hedge fund that is finalizing a $300 million fund for a variety of projects, including ours. This is a legitimate deal with attorneys involved on all sides. In order to include us in their package of funds, we needed to wire our 20% into the attorney's trust account. The firm is Ferguson Law Firm www.dallasbusinesslaw.com. I have a signed escrow letter from them which essentially provides that unless a more formal escrow agreement is entered into within 30 days, they automatically return the funds to the

> originating account, which is my trust account. I am 1000% comfortable with the legitimacy of the transaction, as opposed to our last fiasco with John Bailey, **but a final commitment for the balance of the funding has not yet been received.** We're hoping to have final word if not by tomorrow, than [sic] early next week. If you want to call Mike [Attardi], he can fill in more details for you. (emphasis added)
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> [Ex.P38.]

Phillips believed that respondent was involved in another scam. He replied, in part:

> I wish you would have discussed this with me first. Everyone knew that if we didn't have the funding by Feb 1st then a refund would be forthcoming. I hope this deal closes but it does put me in a bind because I really can't tie up that money for a long period of time.
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> [Ex.P38.]

Respondent replied to Phillips, Attardi, and Van Roon:

> Matt - the money was being held in my trust account for the purpose of securing financing, so I believe I was authorized to use those funds in connection with securing that financing, **provided that safeguards were in place to recapture those funds if the funding did not come through**. Jan 31 is Monday. If you're not comfortable with the state of potential funding on Monday than [sic] I will instruct the Ferguson Law Firm to return those funds as per your instructions. However, my advise [sic] would be to allow at least another 7-10 days for this hedge fund deal to play out because they are the real thing, and if they can fund our budget I would hate to lose those funds because we can no longer deliver our 20 percent. (emphasis added)

[Ex.P39.]

According to Phillips, this was "when the bomb was dropped." Phillips was shocked, as he had informed the Grads and Abraskins that he would "have their money back by the 31st if we didn't have the funding, and now we didn't have the money back." Still, Phillips understood that, even though the funds had been placed in another account, respondent could "simply make a call and say give it back . . . to me so I can give the money back to the investors."

On Friday, January 28, 2011, Walenciak sent respondent, via e-mail, yet another version of the Depositor Acknowledgment (DA6). DA6 was dated January 25, 2011, whereas DA5 was dated January 26, 2011.

The parties stipulated that DA6 removed all references to the "Escrow Agreement" and provided that the FSA was "the only controlling agreement" in respect of the $690,000 that FLG held in escrow. Furthermore, Ark and NGE were no longer listed as parties to the agreement.

Respondent replied:

> We have a problem. This is not the agreement I signed. You are not authorized to release or disburse any portion of the $690,000 without prior written consent from me. Thank you.
>
> [Ex.P41.]

Walenciak replied: "[w]e won't do anything with the funds until this gets straightened out. Thanks."

On the evening of January 28, 2011, respondent sent DA5, which he had approved and signed, to Castenir, via e-mail. The e-mail stated:

> Jason - please disregard the last email and attachment, which had my stamped signature on it. I am attaching the document without my signature so you can coordinate all other signatures and send to me for my signature as the last party to sign. In addition, the version I sent you has a stamped signature which my secretary stamped yesterday morning. I'd like this document to have my original signature on it. Thank you.
>
> [Ex.P44.]

Castenir thanked respondent and stated that he looked forward to a successful transaction. Later that evening, Castenir signed DA5 and sent it to all the parties, via e-mail.

Also on January 28, 2011, respondent sent Walenciak an e-mail, stating that respondent would be "the person who provides the final controlling document to you. Jason [Castenir] and Vaughn [Richmond] are coordinating the other signatures and once the document is signed by everyone else, they will send to me for my signature and I will forward to you."

Respondent stated that Walenciak's claim that respondent had signed a different document had been a red flag, but explained that the real warning bell was what Richmond was doing with the Depositor Acknowledgment forms. Over the course of the weekend, respondent, Van Roon, and Attardi exchanged

e-mails. Respondent testified that, by this point, "most of the folks involved" had become "uncomfortable" with Richmond and, thus, they decided to deal exclusively with Castenir.

On Sunday, January 30, 2011, at 9:47 p.m., Castenir sent respondent yet another form identified as the Depositor Acknowledgment (DA7); contrary to respondent's instruction, the document did not reflect the signatures of all other parties, only Castenir. Yet, three minutes later, respondent replied: "Thanks Jason. I also enjoyed our chat and am looking forward to concluding this deal and speaking with you about future projects. I'll get this document to [FLG] first thing Monday morning."

Apart from the missing signatures, DA7 omitted ARK and NGE as parties. Otherwise, the document contained the same language as DA5, which respondent had approved and signed earlier. Thus, in respondent's view, the $690,000 remained protected.

On Monday, January 31, 2011, which was the investor "Termination Date," respondent sent the following e-mail to Castenir:

> Jason-I just spoke with Mike at Ferguson who has an issue with the Depositor Acknowledgment because it is apparently in conflict with the Financial Services Agreement with Hamilton. Can you please reach out to either Hamilton and/or Mike at Ferguson and clear this up.
>
> [Ex.P51.]

Four minutes later, Castenir sent an e-mail to respondent, attaching DA6, which respondent previously had rejected and, for the first time, a copy of the draft FSA between Atlantic Gulf and Hamilton Guaranty. Both DA6 and the FSA, which a Hamilton Guaranty representative allegedly had signed, were effective January 25, 2011. DA6 provided that the FSA between Hamilton Guaranty and Atlantic Gulf would be "the only controlling agreement" in respect of the $690,000 presently held in escrow by FLG. Thus, the parties stipulated, this iteration of the proposed transaction required respondent to release the $690,000 of investor funds he held in his trust account to third parties without meeting any of the conditions for breaking the escrow set forth in the operating agreement, private offering memorandum, or the addendum.

Also on January 31, 2011, a conference call took place among Attardi, Van Roon, respondent, Phillips, and Scire. Scire testified that the conference call took place after Phillips told Scire that he was going to request the return of his investment. Scire let Phillips "drive the bus" during the call because Phillips had invested more money.

Respondent maintained that his first obligation was to his client Numba One, LLC. However, he felt obligated to keep Phillips and Scire "in the loop as to what was going on," given their significant investments in Dream Balloon over the years. Thus, respondent testified that, during the January 31, 2011

conference call, he explained “the essence of the transaction” and answered questions. He did so “[i]n the spirit of full disclosure” because “they were a part of this business to such an extent on a regular basis.” He continued:

> They weren’t just passive investors. They wanted to be part and parcel of everything. You know, we had dinners all the time, they were, they were present. You know, they wanted to be more than just investors. They really wanted to have a piece of what was going on, and to know everything about what was going on. And that’s why I wanted them to know what was happening.
>
> [2T120-16 to 23.]

Respondent testified that, by speaking to Phillips and Scire, he believed that he was speaking to all the investors, because Phillips and Scire “had represented that they were speaking on behalf of the other three,” with whom respondent had “little to no contact.” Respondent claimed that he told Phillips and Scire that, “if there’s an issue,” to say so at that time. As of that date, he “absolutely” would have been able to have the funds returned, “with a phone call.” He received no response; no one asked him to do that.

Respondent also claimed that, while the conference call was taking place, he sent the FSA to Phillips and Scire, via e-mail, with the subject line “Financial Services Agreement.” The copy of the e-mail produced at the hearing contained a large black square, and had no attachment.

Scire acknowledged that respondent purportedly sent the FSA to him during the call. Scire did not review the FSA, however, because he did not "care what this thing says," – "[i]f you don't get the money, don't release the funds." Scire considered respondent his attorney, because respondent was negotiating with "these people," and, thus, "[i]t was his obligation to find out if they were legitimate or not."

Phillips testified that, if the FSA had been attached to the e-mail, he would have read it. If there were no attachment, he probably would have replied to the e-mail, asking what he was supposed to be looking at. Phillips stated that respondent knew that he required Phillips' authority to enter into the FSA. Still, Phillips claimed that he never saw the FSA, until months later.

Scire testified that, as the result of the conference call, respondent "convinced [Phillips] to let him have another week" on the claim that he was "1,000 percent sure this is going through." Scire claimed that Phillips gave respondent more time, "not knowing that the money was going to be released." Both Phillips and Scire testified that, at no time did respondent explain that the agreement would eliminate the escrow precondition regarding the release of the monies. Indeed, Scire testified that, in short, they told respondent "do not release our money under any circumstances unless we have funded money in our account."

Respondent testified that, on the conclusion of the conversation, he understood, and he thought that Attardi and Van Roon "also believed that everybody was on board;" the investors "understood what was going on, that they agreed with moving forward with the – with posting the 690 pursuant to the [FSA]." Respondent claimed a belief that, at that point, Phillips and Scire would discuss the FSA, which he described as "the controlling document," with their attorneys. He did not discuss the matter further with the investors.

According to respondent, as a result of the January 31, 2011 conference call, "it was decided to go forward and to post that money as per the FSA. So I signed off, I responded to . . . Walenciak's [February 2, 2011] e-mail confirming that those documents" controlled. On February 2, 2011, respondent executed DA6 and a loan agreement between Numba One, LLC and Atlantic Gulf, thus, abandoning the escrow protections he had consistently demanded to protect the investors' funds, as required by the escrow provision of the operating agreement.

The loan agreement, signed by respondent and Castenir, provided that Numba One, LLC had placed its funds in escrow with FLG for use according to the terms and conditions set forth in the FSA between Atlantic Gulf and Hamilton Guaranty. The loan agreement also stated that "Escrowed Funds have been supplied by [Numba One, LLC] on behalf of [Atlantic Gulf], and for the exclusive use of [Atlantic Gulf], in connection with a transaction being executed

between [Atlantic Gulf] and Hamilton [Guaranty], which transaction is subject to and governed by the terms of the FSA."

The underlying FSA put the investor funds at risk of total loss if certain events occurred completely outside the control of Numba One, LLC or respondent. Specifically, the FSA contemplated that, within two days of its signing, Atlantic Guaranty would wire transfer the $690,000 (called an "Advance Fee" in the FSA) to FLG.[9] Upon receipt of the Advance Fee, FLG was entitled to deduct an "Escrow Charge" of 1.5 percent (or $10,350), "regardless of the outcome of transaction."

After the Advance Fee was deposited in FLG's account, Hamilton Guaranty was supposed to issue a "Preadvice," confirming its "capability and intention" to issue a Standby Letter of Credit or Bank Guarantee for $50 million in favor of Atlantic Gulf. Within two days of receiving the Preadvice, Atlantic Gulf was to deliver to Hamilton Guaranty a "Fee Guarantee acceptable to [Hamilton Guaranty]." The Fee Guarantee essentially promised that Atlantic Gulf would pay Hamilton Guaranty $6.56 million upon issuance by Hamilton Guaranty of the $50 million Standby Letter of Credit.

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[9] According to the Federal Bureau of Investigation's website, in an "advanced fee scheme," a victim pays money to someone in anticipation of receiving something of greater value, such as a loan, contract, investment, or gift, and then receives little or nothing in return.

The FSA provided that Atlantic Gulf's "failure to deliver the Fee Guarantee on time shall result in Advance Fee immediately being earned by and transferred to [Hamilton Guaranty], as equitable compensation for issuing The Preadvice." The FSA also provided that there were no third-party beneficiaries "of or to this Agreement and no third party has any standing to enforce any provision hereof."

On February 2, 2011, at 3:27 p.m., Walenciak sent an e-mail to respondent, Hamilton Guaranty Manager Faisal Qureshi, and Castenir, attaching signed copies of DA6 and the FSA. The e-mail asked the parties to acknowledge that they had received the documents and that the papers were "the only controlling documents relating to the escrow and the transaction, superseding any emails or other communications between any of the parties." At this point, respondent did not know whether Attardi had discussed DA6 and the FSA with the investors.

Respondent did not communicate with either Phillips or Scire after receiving Walenciak's February 2, 2011 e-mail. He stipulated, and testified during his OAE interview, that he did not know why he had not called them and obtained their authorization to enter into the FSA-controlled loan agreement. At the hearing, respondent testified that he, Van Roon, and Attardi discussed the issue and "decided to go forward and to post that money as per the FSA. So I

signed off, I responded to . . . Walenciak's e-mail confirming that those documents controlled." Specifically, respondent replied, "[r]eceived and acknowledged."

Phillips vehemently denied that respondent had asked the investors for permission to place their funds in a transaction that put the monies at risk of total loss if certain events occurred that were completely outside the control of Numba One, LLC or respondent. He testified that that "would be contrary to everything that we believed in investing in this." Phillips further denied that respondent had told him that he planned to sign an agreement that put his money at risk of a total loss. Indeed, "no way" would the investors "ever agree to taking a risk on a company that coincidentally he did not due diligence on except running an internet search." Moreover, respondent had not asked the Grads or Abraskins for permission to release their funds from his trust account, and they had not authorized him to do so. Phillips did not even see the FSA until June 2011

Respondent admitted that the FSA put the investors' funds at risk, "if certain events occurred completely outside the control of" Numba One, LLC or respondent; and that, if Atlantic Gulf failed to provide the fee guarantee, the investors would lose their entire investment.

Respondent stipulated that he did not have the authorization of any of the investors to sign DA6, which eliminated the investors' precondition that their $690,000 investment would not be released from escrow unless and until the rest of the financing for the film was in place. Yet, he disagreed that he was unauthorized to proceed with the matter in the absence of the investors' consent. Respondent repeated that "[w]e had a conversation with the investors where we explained what this transaction was, and everybody appeared to be on board with moving forward." Yet, he conceded, there was no written authorization, and "no investor said yes, you are authorized to do this."

Respondent testified that, on the morning of February 7, 2011, Phillips called him and said, "I can't have that risk." Based on that comment, respondent assumed that Phillips had read the FSA, which respondent purportedly had e-mailed to him during the January 31 conference call. At this point, respondent considered that "maybe [he] didn't do that great of a job in explaining what was going on here."

On February 7, 2011, at 9:00 a.m., respondent, through e-mail communication, provided Phillips with two "scenarios" he was exploring regarding the financing. Phillips replied that he was fine with either one of the scenarios as long as there was "absolutely 0 risk." Phillips did not know, at this

point, that the funds had been released to Hamilton Guaranty. He believed that FLG still maintained the monies.

Respondent again failed to inform Phillips that he already had signed DA6 and the loan agreement, which put the investor funds at risk before the company achieved 100% financing for the film. Indeed, respondent failed to forward the executed copies of the loan agreement and the FSA to Phillips until June 2, 2011.

On February 7, 2011, respondent sent an e-mail to FLG, Hamilton Guaranty, and Atlantic Gulf, attempting to rescind Numba One LLC's acceptance of DA6 and the FSA, and noting that Atlantic Gulf had failed to include in its payment guarantee "language protecting our funding." Respondent also stated that Numba One, LLC would move forward "only if [its] $690,000 is held in [FLG's] trust account until such time as [Atlantic Gulf] monetizes the Letter of Credit and funds [Numba One, LLC's] $4.2M." In other words, once the letter of credit was issued and monetized, and Atlantic Gulf wired the $4.2 million into FLG's trust account, FLG would release the $690,000 to Hamilton Guaranty and wire the $4.2 million into respondent's trust account. These were the "only terms" upon which Numba One, LLC could move forward. The e-mail concluded by stating that, "[i]f the mechanism is not acceptable, than [sic] Numba One, LLC hereby demands the return of its $690,000.00."

Respondent acknowledged that he sent the e-mail "a little too late." He wrote the e-mail because he was asked to do so and, at that point, he did not "have any choice." Phillips wanted the funds released only after the $4.2 million was received.

On February 9, 2011, Hamilton Guaranty allegedly issued the Preadvice in accordance with the FSA. However, Atlantic Gulf never issued the Fee Guarantee and, as a result, defaulted under the FSA, thereby forfeiting the $690,000 "Advance Fee" to Hamilton Guaranty.

On March 8, 2011, in response to a query from respondent as to whether "our 690K [is] still in escrow," Walenciak replied, "the 690K was released to [Hamilton Guaranty] per the escrow instructions as the preadvice was issued, but the fee guarantee was not." At the hearing, respondent admitted that the transaction between Hamilton Guaranty and Atlantic Gulf was a scam and, consequently, the investors lost their entire investment. The $690,000 was gone.

Phillips told Scire that the monies were lost. When Scire called respondent to find out what happened, respondent assured him that the investors would get the money back.

On March 17, 2011, respondent sent an e-mail to Phillips and Scire, which stated, in part:

> By the way, Matt and Pat, the fact that I am pursuing the legal route with Atlantic [Guaranty] and will

> enforce our contractual rights under the loan agreement by filing a complaint in federal court, should not be construed as sidestepping or forgetting that none of this would be necessary had I done my job better a month ago. As per my prior conversations with both of you, I take full responsibility and will be simultaneously preparing a claim summary to be submitted to my carrier, which is something that needs to be prepared with extreme care and attention to every word.
>
> [Ex.P82.]

Respondent repeatedly took steps to convince the investors that the transaction was legitimate and that their funds eventually would be returned, along with the additional financing necessary to produce *Numba One*. For example, in a March 21, 2011 e-mail to Phillips and Scire, he emphasized the importance of having faith in Castenir, and described Castenir's involvement in valid transactions. In the same e-mail, respondent provided an example of a "valid transaction" involving Castenir, Atlantic Gulf, and "2 Billion in precious stones." Respondent attached documents ostensibly substantiating the precious stone transaction.

In an e-mail dated March 22, 2011, respondent acknowledged that, rather than conduct his own inquiry, he "relied considerably on [Hamilton Guaranty] and their underwriter's own due diligence." Respondent further suggested that "NOT finding anything negative is just as good as finding something positive." Ultimately, however, respondent stipulated that he had released the investor

funds without conducting adequate due diligence regarding the transaction and the credibility of the participants.

In the e-mail, respondent accepted blame and surmised that he "will most likely be uninsurable for the rest of [his] professional career." He also offered to assume responsibility for all costs and expenses in connection with a lawsuit.

In April 2011, respondent placed his professional liability insurance carrier on notice of the claim. His carrier refused to provide respondent either a defense or coverage, based on an exclusion pertaining to lawyers who hold a management position with a client.

At the carrier's suggestion, respondent sued Atlantic Gulf in Florida, where he recovered a judgment in excess of $20 million. The judgment was not collectible, however. Respondent also retained counsel in Texas to seek redress from Hamilton Guaranty. However, respondent could not afford the hourly rate.

In August 2013, the investors filed a civil lawsuit against respondent, his then law partner, and his law firm, in the Superior Court of New Jersey, Law Division, Monmouth County.[10] Respondent's partner was dismissed from the litigation.

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[10] Respondent did not attempt to interplead Attardi as a defendant, because Attardi had filed for bankruptcy.

On October 31, 2016, the court entered two consent judgments against respondent and the firm, each in the amount of $890,000, which included the $690,000, plus pre-judgment interest and attorneys' fees. As of respondent's December 17, 2018 testimony, he had neither repaid any money to the investors nor intended to do so.

On August 18, 2017, Castenir pleaded guilty to a three-count information, in the United States District Court for the Eastern District of Kentucky, charging him with conspiracy to commit wire fraud, commodities fraud, and transactional money laundering. The charges stemmed from Castenir's operation of a criminal Ponzi scheme in an unrelated matter.

Both Atlantic Gulf and Hamilton Guaranty failed to return the investor funds.

On April 21, 2017 respondent filed a Chapter 7 bankruptcy petition. Bade v. Mason (In re Mason), 2019 Bankr. LEXIS 2580 (U.S. Bankr. N.J. August 14, 2019). We take judicial notice that, in the bankruptcy matter, Bade, Phillips, Scire, the Grads, and the Abraskins (the investors) instituted an adversary proceeding against respondent. Id. at 1. Specifically, the investors objected to the discharge of a debt "arising from the alleged unauthorized release of investment funds from [respondent's] trust account." Ibid.

On August 14, 2019, the Honorable Michael B. Kaplan, U.S.B.J., found that the debt was not dischargeable, due to defalcation. Id. at 12. According to the judge, respondent "had a fiduciary responsibility to [the investors] as a managing member of Numba One and also in his capacity as escrow agent." Ibid. Respondent breached that duty when he released the funds from escrow, "without authorization, and without any meaningful examination of the transaction or the parties associated therewith." Id. at 14.

In addition to the RPC violations stipulated to by respondent, the formal ethics complaint charged him with knowingly misappropriating "funds entrusted to his care," contrary to RPC 1.15(a) and the principles set forth in Wilson and Hollendonner. The complaint also charged respondent with having violated RPC 1.15(b).

In addition, the complaint charged respondent with having violated RPC 8.4(b), arising from his release of the investor funds under the terms of the FSA without the investors' authorization, contrary to N.J.S.A. 2C:21-15 (misapplication of entrusted funds).

Although the complaint does not allege facts underlying the charged violation of RPC 8.4(c), the OAE contends in its brief that respondent violated the Rule by "purposely fail[ing] to correct a false impression, which he

previously created or reinforced, that he had acted in accordance with the investors' expectations and instructions."

In mitigation, respondent testified that, throughout his legal career, he has been involved with the Monmouth County, New Jersey, and American Bar Associations. He has served on many county bar association committees and has held officer positions in the Young Lawyers Division of the New Jersey and American Bar Associations.

Respondent also was active in his synagogue, where he had served as vice president for four years and as chair of the membership committee for eight years. In addition, respondent has volunteered at Make-A-Wish foundation charity events and, for the past six years, had provided pro bono legal services to Kickin' It, a non-profit anti-bullying organization. Further, respondent performed a significant amount of pro bono work for Monmouth Ocean Legal Services, mostly in the area of bankruptcy law.

In 2000, respondent, whose younger sister died when he was fourteen, became involved with an organization now known as Comfort Zone Camp, which sponsors weekend camp experiences for children whose sibling, parent, or primary caregiver has died. In particular, in 2001, he spearheaded the effort to move Comfort Zone Camp's programming from Virginia to New Jersey to

provide a camp experience for children who lost family members during the September 11, 2001 terrorist attacks on the United States.

Respondent's friend and character witness, New Jersey attorney Mark S. Levy, testified that, although he did not believe that he had spoken to respondent about the ethics case, given what he knows about respondent's character, he was "shocked" to learn of the charges. He explained that respondent always has been straightforward in their discussions about cases and legal issues; that he "just always appeared . . . to be the kind of an attorney that . . . practices within the rules and within the Rules of Professional Conduct;" and that he is "an honorable and conscientious lawyer."

Respondent submitted character letters from twenty-two individuals, including a long-term employee, an attorney, a rabbi, friends, clients, members of the business community, and two individuals associated with Kickin' It, one of whom is its founder.

The special master determined that, "[i]n light of the Stipulated Facts, Admission and all the evidence in this matter," the OAE had proven respondent's stipulated violation of RPC 1.5(b), RPC 1.7(a)(2) and (b)(1), RPC 1.8(a), and RPC 1.15(b). Thus, the special master's analysis focused on whether the OAE had established, by clear and convincing evidence, that respondent knowingly misappropriated the $690,000 in escrow funds, in violation of RPC

1.15(a), the principles set forth in Wilson and Hollendonner, and RPC 8.4(b) and (c).

The special master first determined that respondent owed a fiduciary duty to the investors, both as a managing member of Numba One, LLC and as an escrow agent. According to the special master, respondent breached his duty in two respects. First, he released the $690,000 from his attorney trust account "without competent knowledge of the transaction as it was governed by the FSA and . . . without the investors' agreement." Second, respondent "authorized the release of the funds from [FLG]'s Trust Account without any regard for the provisions of the FSA as they would jeopardize the investors' funds." According to the special master, respondent's conduct "resulted in the almost certainty of loss of the funds."

The special master found it perplexing that respondent transferred the trust account funds to FLG's trust account "without a complete understanding of the financial obligations and without consent of the investors." He considered "even more of a quandary [sic]" respondent's agreement to the February 2nd release of the funds from FLG's trust account, "still without known concern regarding the dangers of the FSA," which had removed respondent's and Numba One, LLC's control of the funds, and without the investors' consent. Based on the record,

the special master was unable to determine whether respondent understood the FSA and why he had abandoned "all sense of reason" when he signed it.

The special master accepted the testimony of Phillips and Scire, who claimed that they neither saw nor reviewed the FSA prior to respondent's action. In this regard, we note that the special master observed that, during respondent's testimony, he attempted "to undo certain stipulated facts and admissions."[11] According to the special master, respondent's testimony was not credible and, thus, it "has not been given weight in this Opinion."

According to the special master, the funds were lost due to "hasty stewardship of this transaction by Respondent," who did not have "full grasp of the FSA" and who had placed "irrational trust" in Hamilton Guaranty and Atlantic Gulf. The special master speculated that respondent's lack of diligence and caution may have been due to the fact that he stood to share in the profits if the movie were produced and succeeded.

The special master concluded, however, that the record lacked clear and convincing evidence that respondent knowingly misappropriated the investors' funds. In this regard, he first noted that the testimony of Phillips, Scire, Bade, Grad, and Abraskin was "all completely credible and reliable" and "100 percent

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[11] Although we will not belabor this decision with details of respondent's "attempts," in one such incident, he tried to introduce into evidence a different version of the operating agreement than the one he previously had stipulated to as the applicable document.

truthful." The special master also noted that Attardi and Van Roon may have been able to clarify the "complex issues," but had not testified.

The special master found that "the complexity of these convoluted business matters went far beyond the Respondent's abilities" and "his level of knowledge." Thus, respondent "never should have offered advice to the investors or counseled the people he was either representing or whose funds he was investing." Moreover, respondent's judgment was "clouded" by the conflicts of interest in which he was embroiled. The special master described respondent's "complete delegation of authority over the investment funds . . . reprehensible and grossly negligent."

Because the special master could not find cases directly on point, he looked to "willful blindness" knowing misappropriation cases involving attorneys who either intentionally designed disastrous recordkeeping systems, or had abdicated responsibility for their attorney trust accounts to nonlawyer employees whom the attorneys then failed to supervise. The special master concluded that the record lacked clear and convincing evidence that respondent "had to know" that, by his actions, the funds would be lost. The special master was greatly concerned that respondent had "practiced in such a manner; however, his gross negligence only by a thin margin [did] not rise to the level of knowing misappropriation."

The special master assessed the recommended discipline based on cases involving recordkeeping and negligent misappropriation, and those involving egregious conflicts of interest resulting in financial loss. He concluded that "a significant sanction" was warranted.

In aggravation, the special master noted respondent's disciplinary record and the investors' financial harm. In mitigation, the special master considered respondent's history of community service, Levy's testimony, and the twenty-two character letters. Given respondent's numerous RPC violations, especially the conflicts of interest, which resulted in financial loss, and his disciplinary history, the special master recommended a three-year suspension, plus attendance at continuing legal education classes, plus costs.

Following a de novo review of the record, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

RPC 1.5(b) provides that, when a lawyer has not regularly represented the client, the lawyer must communicate to the client, in writing, the basis or rate of the fee before or within a reasonable time after commencing the representation. In this case, respondent failed to provide Dream Balloon, an entity that he had not previously represented, with a writing setting forth the basis or rate of his fee, a violation of RPC 1.5(b). He violated the Rule once again when he

undertook the representation of Numba One, LLC, another entity that he had not previously represented.

RPC 1.7(a) defines and prohibits two types of concurrent conflicts of interest. One such conflict involves a representation in which "there is a significant risk that the representation of one or more clients will be materially limited by the . . . personal interest of the lawyer." Under RPC 1.7(b)(1), however, an attorney may proceed with the representation, despite the conflict, if "each affected client gives informed consent, confirmed in writing, after full disclosure and consultation. . . ."

Respondent's representation of both Dream Balloon and Numba One, LLC constituted two concurrent conflicts of interest, under RPC 1.7(a)(2), because, in addition to serving as counsel to the entities, he was a managing member with financial stakes in the entities. Respondent's dual status created a significant risk that his representation of Dream Balloon and Numba One, LLC would be materially limited by his financial interest in the success of their enterprises. In particular, if *Numba One* had been produced and generated a net profit, respondent, as a managing member, would have shared in that profit. His representation of the entities, without obtaining written, informed consent from the managing members, pursuant to RPC 1.7(b)(1), constituted separate violations of RPC 1.7(a)(2).

Respondent engaged in an additional conflict of interest in respect of his representations of Dream Balloon. RPC 1.8(a) prohibits a lawyer from entering into certain business transactions with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client unless

> (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

The parties stipulated that, in exchange for respondent's legal representation of Dream Balloon, he received a one-percent ownership interest in the company, and, therefore, entered into a business transaction with Dream Balloon. Yet, respondent admittedly failed to comply with any of the disclosure and consent provisions and, thus, he violated RPC 1.8(a).

Respondent's violation of RPC 1.8(a) in connection with his representation of Numba One, LLC is less clear. There was no fee arrangement,

but, as a managing member, respondent received a share of the net profits of the film. Thus, as detailed above, a conflict of interest clearly existed. In our view, however, in the absence of a specific fee arrangement, as with Dream Balloon, the record lacks clear and convincing evidence that respondent violated RPC 1.8(a) as to Numba One, LLC.

The crux of this case, however, is respondent's violation of Hollendonner. Contrary to the special master's finding that respondent did not fully grasp the FSA, the clear and convincing evidence demonstrates that respondent knew exactly what he was doing when he capitulated to the demands that he execute DA6 and the loan agreement and, thus, he knowingly misappropriated the $690,000 in escrowed investors' funds. Presumably, he breached his fiduciary duties in a desperate effort to save the deal that he had worked so long to bring to fruition, and in which he had an improper pecuniary interest.

We conclude that respondent's release of the investors' $690,000, prior to the fulfillment of the preconditions of the escrow, and without the investors' authorization, clearly violated his admitted fiduciary duty to the investors. That fiduciary duty was rooted in the escrow provision of Numba One, LLC's operating agreement, to which respondent was bound, both as a manager of the entity, and as a New Jersey attorney who had expressly agreed to serve as the escrow agent for those investor funds.

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.
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> [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).]

This principle also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985). Specifically, 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 . . . ." In re Hollendonner, 102 N.J. at 28-29.

In this case, the record clearly establishes that the investors' funds constituted escrow funds. Both Numba One, LLC and the investors held an interest in the monies, subject to both the preconditions and the "Termination Date." As we recently opined in In the Matter of Robert H. Leiner, DRB 16-410 (June 27, 2017) (slip op. at 21), "[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." The Court agreed. In re Leiner, 232 N.J. 35 (2018).

Here, respondent repeatedly admitted that he owed a fiduciary obligation to the investors, and consistently acted in accordance with that fiduciary obligation – up until the point that he failed to do so. The investors placed $690,000 in respondent's attorney trust account, which, under the terms of the operating agreement, functioned as the "dedicated escrow bank account." The terms of the operating agreement clearly stated that the funds were not to be released to Numba One, LLC unless and until the total budget for the film had been "achieved" by the September 2, 2011 "Termination Date." By addendum, the "Termination Date" was moved forward to January 31, 2011 and required that principal photography commence by that date. Thus, if additional funding had not been achieved and principal photography had not commenced by January 31, 2011, the funds would be returned to the investors, without interest. Respondent and all investors were clear in this understanding.

Further, any argument that there was no formal escrow agreement governing the distribution of the investor funds fails, as the operating agreement clearly filled that role. See In the Matter of Lyn P. Aaroe, DRB 19-219 (February 6, 2020) (slip op. at 46) (finding that, collectively, the documents underlying the transaction functioned as an escrow agreement, as they bound the attorney to disburse the funds in a particular manner; the attorney was disbarred for his

knowing misappropriation of the escrow funds); In re Aaroe, 241 N.J. 532 (2020).

Moreover, the Numba One, LLC documents, including the operating agreement and all promotional materials, mirrored and leveraged that escrow arrangement, expressly stating that the investors' funds could not be released unless and until the "total budget amount . . . has been achieved," and inducing the investors to deposit their monies, with respondent, in his attorney trust account. All parties, including respondent, understood this condition precedent, which the investors never modified or waived. Indeed, until the very end, respondent staunchly defended this condition precedent, as he was required to do.

Ultimately, despite respondent's intimate knowledge of the condition precedent, which he had repeatedly built into other failed transactions, he improperly violated the escrow agreement by executing DA6 and the loan agreement, and exposing the investor funds to third parties. He did so despite knowing that he was duty-bound to safeguard the $690,000 until receipt of the balance of the funding required for *Numba One* was received and accepted. Instead, in the days preceding the "Termination Date," perhaps due to a desperate, unrealistically hopeful view that this financing might actually be obtained, respondent unilaterally signed documents that permitted third parties

to walk away with the investors' $690,000, in a deal that could not possibly be – and indeed was not – consummated prior to January 31, 2011.

Respondent conceded that he did not have written authorization to turn the terms of the operating agreement upside down. Further, he testified that "no investor said, yes, you are authorized to do this." Instead, respondent took the hollow position that Phillips and Scire "appeared" to be onboard, based on a telephone conference that predated the existence of both DA6 and the loan agreement that respondent ultimately executed. Simply put, respondent lacked any reasonable belief that the investors suddenly were willing to risk their investments at the same time they had been pressing him to return their funds. Also problematic is the lack of any authorization from the Grads, Abaskins, and Bade. Although the witnesses testified that Phillips and Scire spoke for them, there was no testimony that Phillips and Scire were authorized to make decisions in their behalf or that they even knew about DA6, the FSA, and the loan agreement.

In short, respondent permitted the use of the $690,000 for a purpose other than the investors had authorized. He, thus, knowingly misappropriated the funds. Lest there be any doubt, we note that an attorney's knowing misappropriation of escrow funds does not require an attorney-client relationship. See, e.g., In re Meenen, 156 N.J. 401 (1998) (attorney disbarred

for knowing misappropriation of funds stolen from an estate in respect of which he was the administrator, not the attorney) and In re McCue, 153 N.J. 365 (1998) (despite the absence of an attorney-client relationship between the attorney and the beneficiaries of a trust for which he was the trustee, the attorney was disbarred for his knowing misappropriation of trust assets).

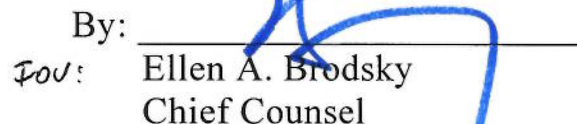
Respondent's knowing misappropriation of the investors' funds aside, his failure to return the monies to the investors violated RPC 1.15(b), which requires an attorney to promptly deliver to a third person any funds that the third person is entitled to receive.

Respondent also violated N.J.S.A. 2C:21-15, which criminalizes a fiduciary's application or disposal of property "that has been entrusted to him as a fiduciary . . . in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted whether or not the actor has derived a pecuniary benefit." The record clearly and convincingly establishes that respondent was well aware that he was placing the monies at risk. He resisted all attempts on the part of Richmond and Castenir to do so until the eleventh hour, when he made a half-hearted attempt to secure the investors' consent during the January 31, 2011 conference call and determined to throw caution to the wind. Respondent knew what he was doing, and he risked the funds of others.

In sum, we find that respondent violated RPC 1.5(b), RPC 1.7(a)(2), RPC 1.8(a), and RPC 1.15(b). The record also contains clear and convincing evidence that respondent knowingly misappropriated $690,000 in investors' escrow funds, a violation of Hollendonner, RPC 1.15(a), and RPC 8.4(b) and (c). Accordingly, disbarment is the only appropriate sanction, pursuant to the principles of Wilson and Hollendonner. Therefore, we need not address the appropriate quantum of discipline for his additional ethics violations.

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
Bruce W. Clark, Chair



By: ______________________
FOU: Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

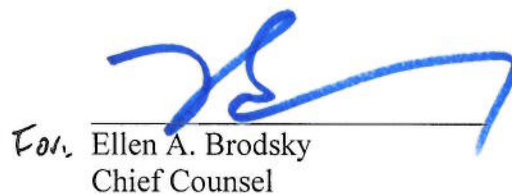
In the Matter of Gary L. Mason
Docket No. DRB 19-448

Argued: June 18, 2020

Decided: October 20, 2020

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Clark	X		
Gallipoli	X		
Boyer	X		
Hoberman	X		
Joseph	X		
Petrou	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0



For, Ellen A. Brodsky
Chief Counsel