SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 06-348
District Docket No. XIV-03-738E
(formerly IIA-01-005E)

IN THE MATTER OF

JOSEPH O. SULLIVAN

AN ATTORNEY AT LAW

Decision

Argued: February 15, 2007

Decided: April 26, 2007

Lee Gronikowski appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter originally came before us in October 2003, as a recommendation for an admonition filed by the District IIA Ethics Committee, following the committee's finding that respondent had violated RPC 1.15(a), (c), and (d). We remanded the matter to the Office of Attorney Ethics ("OAE") for an audit of respondent's trust and business accounts. A four-count

complaint, which is the subject matter of this disciplinary proceeding, resulted from that audit.[1]

The matter is now before us on a recommendation for discipline filed by special master Bernard A. Kuttner. The case stems from respondent's misappropriation of client trust funds. The OAE argued that respondent's conduct was knowing, and recommended that he be disbarred. The special master found that respondent's misappropriation was negligent, and recommended a one-year suspension. Because we conclude that respondent's misappropriation was knowing, we recommend his disbarment.

Respondent was admitted to the New Jersey bar in 1983. He has no history of discipline.

In January 1996, respondent, in the name of Joseph O. Sullivan and Associates, borrowed $50,000 from The Midland Bank and Trust Company ("Midland"). In March 1997, Midland merged with Valley National Bank ("Valley National"). Valley National became the successor-in-interest to Midland.

During the latter part of 2000, the business loan became delinquent. By letter dated January 2, 2001, Valley National

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[1] The second count of the complaint charged respondent with violating RPC 8.1(a) (knowingly making false statements of material fact in connection with a disciplinary matter) and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The OAE moved to dismiss count two, following the hearing below.

advised respondent that the loan was in default and demanded payment in full. The letter went on to state that $45,391.87 was due, and that failure to repay Valley National by January 12, 2001, would result in the referral of the matter to Valley National's attorney for further action.

On February 21, 2001, Valley National's attorney, Michael S. Blustein, advised respondent that, if he did not hear from respondent within one week of receipt of the letter or if payment was not made, he was authorized to initiate suit. On February 28, 2001, respondent wrote to Blustein, acknowledging receipt of the letter and requesting that no action be taken for thirty days to allow him to refinance the loan. Respondent stated:

> I plan to attempt to either refinance my first mortgage loan together with this business loan or to refinance the business loan by itself . . . .
>
> If I am unable to refinance the obligation, I will sell my residence, which I believe has $100,000 to $125,000 of equity in it, and pay the obligation.
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> [Ex.C-4.][2]

On March 3, 2001, respondent executed an affidavit of confession of judgment in favor of Valley National for

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[2] C refers to the formal ethics complaint, dated March 6, 2006.

$46,167.76. The affidavit required respondent to pay Valley National in full on or before May 1, 2001, or suffer entry of a judgment against him. Also on March 3, 2001, respondent forwarded a check for $1,724 to Blustein to cure the arrearage on the account and to pay Blustein's legal fee.

On April 25, 2001, respondent and his wife refinanced the mortgage loan on their residence. The refinancing netted them $35,170.37.

On April 26, 2001, respondent sent a fax to attorney Suzanne T. Whalen, of Whalen & Whalen, who had represented him during the refinancing. Respondent asked her to "[p]lease forward Valley Nat'l Bk. Check to [him] at [his] NJ office."[3] The next day, via Federal Express, respondent advised Whalen that it was "important that [he] receive the Valley National check by Tuesday, May 1, 2001."

On April 30, 2001, Whalen sent the check to respondent, along with a letter stating: "As directed at the closing and pursuant to your fax dated April 26, 2001 enclosed please find a check made payable to Valley National Bank in the amount of $35,170.37 representing the balance of disbursements in connection with the above referenced refinance."

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[3] Refinancing proceeds are distributed no earlier than three days after the closing, to allow the mortgagor to exercise its right to rescind the transaction.

According to respondent, either on April 25, 2001, the day of the refinancing, or shortly thereafter, he had written and signed checks to pay off the loan. Those checks had been left with his file, pending the three-day right of rescission period. He claimed that, unbeknownst to him, on May 1, 2001, following his receipt of the closing proceeds, someone in his office had sent to Blustein two checks payable to Valley National, in satisfaction of the $44,585 balance of the loan. Respondent signed the cover letter. One of the checks was drawn on Whalen & Whalen's trust account, in the amount of $35,170.37, representing the proceeds from the refinancing; the other check was drawn on respondent's trust account, in the amount of $9,414.63. As seen below, the issue of the mailing of the checks becomes relevant to respondent's defense to a charge of knowing misappropriation.

Respondent's withdrawal of $9,414.63 from his trust account resulted in a shortage of $8,420.89 and the invasion of clients' funds. As of April 30, 2001, the day before respondent issued the $9,414.63 trust account check to Valley National, he had $993.74 of personal funds in his trust account. At no time during these proceedings did respondent claim that he had, or thought he had, $9,414.63 of personal funds in his trust account to cover that disbursement. The record is silent as to how

respondent intended to fund the $9,414.63 withdrawal from his trust account.

On May 2, 2001, respondent's wife was involved in an accident that "totaled" her car. Ten days later, respondent issued a $6,000 trust account check to Sunrise Toyota ("Toyota") for a down payment on an automobile. At that time, he was out of trust by $8,420.89 because of the $9,414.63 check to Valley National.

On May 14, 2001, two days after respondent wrote the check to Toyota, he deposited two checks totaling $7,580.44 into his trust account. That amount represented the insurance settlement for his wife's accident. That deposit reduced the $8,420.89 trust account shortage to $840.45. On May 15, 2001, respondent's $6,000 check to Toyota cleared his trust account, increasing the shortage to $6,840.45. Between that date and June 28, 2001, the trust account shortage ranged from a high of $6,840.45 to a low of $1,345.45. During that period, respondent deposited approximately $6,130 in his trust account to cover the shortage, but remained out of trust nevertheless.

It seems that respondent intended to use a portion of the $35,170.37 from the refinancing to purchase his wife's car, instead of applying those funds to the Valley National loan. According to respondent, he believed that, at the end of the

three-day rescission period, either the $35,170.37 from the refinancing would be wired into his trust account or a check "[would go] into" the trust account. As seen above, neither of those events took place. Instead, the Whalen & Whalen trust account check was sent directly to Valley National, under respondent's cover letter. Respondent explained that, although there had been discussions about a check being sent from Whalen & Whalen, as the date drew closer for the funds to be paid, he had spoken with John W. West, an attorney in his office, and possibly also with his wife, about having the funds wired into his trust account. Instead, respondent claimed, either his wife or West had sent the checks to Valley National without his knowledge, with a previously prepared and signed cover letter.

In support of his alleged belief that the $35,170.37 was still in his trust account, respondent testified that, in the aftermath of his wife's accident, he "didn't address that refinance problem probably for about 10 days, and in [his] mind [he] thought that the monies were in the account . . . ." He conceded, however, that the checks had been mailed to Valley National before his wife's accident.

The complaint charged respondent with knowing misappropriation, a violation of RPC 1.15(a), RPC 8.4(c), and

the principles of In re Wilson, 81 N.J. 451 (1979), for having written a $9,000 and a $6,000 check against clients' funds.

In February 2005, respondent was the subject of an OAE audit of his attorney trust and business accounts. During the audit, respondent stated to the OAE that he had been "taught" that he could take fees in real estate matters prior to closing of title. Respondent acknowledged that he had followed this practice on occasion.

Based on respondent's statements, the OAE reviewed all of respondent's real estate matters that had closed between November 1, 1999 and October 31, 2000. The OAE also subpoenaed respondent's bank records for the same time period.

The OAE's review showed two instances in which respondent had prematurely taken a fee. In the first instance, respondent represented Kristina Ganski in connection with a real estate closing that took place in February 2001. In November 2000, respondent deposited $29,000 in his trust account, to be held in trust until the closing. In mid-December 2000, respondent deposited an additional $1,000 in his trust account to be held in trust for the closing. From December 5, 2000 through January 8, 2001, respondent invaded the trust funds by removing $1,200 of his $1,335 fee, before the closing.

In the second instance, respondent represented Steven Baker in connection with a real estate closing that took place in June 2000. In April 2000, respondent deposited $28,900 in his trust account, to be held in trust for the closing. Between April 28, 2000 and June 28, 2000, respondent advanced himself $800 from the funds to be held for the Baker closing.

At the ethics hearing, respondent reiterated that he thought that it was proper to withdraw fees from real estate deposits after work had been completed in connection with the transaction. Respondent added that he now understands that this practice is wrong.

Here, too, the complaint charged respondent with knowing misappropriation, a violation of RPC 1.15(a), RPC 8.4(c), and the principles of In re Wilson, supra, 81 N.J. 451.

In a certification to the special master, respondent stated that he had instituted procedures in his law office "to guard against any negligent disbursements from the trust account." Specifically, he now has other parties to the transactions hold escrow funds, receives prior written consent from his clients before releasing trust funds, monitors his trust account activity several times a week online, and is the only individual in his office permitted to handle trust account deposits and checks.

By way of mitigation, respondent pointed to the lack of harm to his clients, his prior unblemished record, his remorse, and his willingness to have a proctor assist him with his trust account activities.

The special master found no clear and convincing evidence that respondent had knowingly misappropriated trust funds. The core of the special master's findings was as follows:

> In the case before me, the Respondent took real estate fees out of funds deposited for the real estate clients.
>
> An early release of escrow funds to a party to the escrow agreement does not invariably result in disbarment when the attorney has reasonable grounds to believe that the purposes of the escrow have been completed and the circumstances do not otherwise demonstrate that the attorney has 'made a knowing misappropriation' of the funds within the meaning of In re Wilson Id et 38 [sic].
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> Here the Respondent has an otherwise unblemished record, no financial injury to the clients, extenuating circumstances and the attorney took immediate corrective measures.
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> Respondent testified that he did not know the checks to Valley National Bank were written and sent on May 1, 2001. His wife had an accident on May 2, 2002 [sic].
>
> He testified he believed the $35,717 [sic] was still in his account when he issued the check to purchase a car on May 12, 2001.

> He only withdrew Real Estate fees in small amounts as he did the work. No funds were taken which were not earned.
>
> . . . .
>
> Respondent's explanations as to the trust checks going to Valley National and the totality of circumstances surrounding this case, i.e. the call of his Loan because of two months tardy payments, his wife's accident and his drawing down of real estate fees as earned, before the closing cause questions which in my view defeat a 'clear and convincing' holding.
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> [SMR5-SMR7.][4]

The special master determined that respondent failed to safeguard client funds, a violation of RPC 1.15(a). He recommended a one-year suspension.

Following a de novo review of the record, we are satisfied that the conclusion of the special master that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence. We are unable to agree, however, with the special master's conclusion that respondent's misappropriation was negligent.

As to the $9,414.63 check to Valley National, nothing in the record explains or justifies that disbursement from respondent's trust account. Respondent never contended below

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[4] SMR refers to the special master's report, dated December 14, 2006.

that he believed that he had sufficient personal funds in the account to cover that withdrawal. At oral argument before us, that issue was raised by one of our members:

> MR. PASHMAN: The amount that you owed was about $9,000 more than the refinance proceeds, and when you paid off the amount that you owed, you wrote a separate check for that amount?
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> MR. SULLIVAN: Yes.
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> MR. PASHMAN: What did -- did you believe that you had personal funds in that amount in your trust account?
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> MR. SULLIVAN: I don't recollect why I did it, or if my wife did, or I did it. I would have –
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> MR. PASHMAN: Well, one of the two checks you signed?
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> MR. SULLIVAN: I signed both of them, sir. I signed the checks.
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> MR. PASHMAN: So you -- you did it in that sense? I realize --
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> MR. SULLIVAN: Yes, I did, sir.
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> MR. PASHMAN: -- somebody else mailed them out.
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> MR. SULLIVAN: Yes, sir.
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> MR. PASHMAN: So when you signed it, did you believe that you had personal funds in your trust account?
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> MR. SULLIVAN: I wasn't certain, sir.
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> [BT14-22 to 15-20.][5]

[5] BT refers to the transcript of oral argument before us.

The record makes clear that, faced with the entry of a confessed judgment against him on May 1, 2001, respondent knowingly availed himself of clients' funds to the extent of $9,000, the shortfall between the $35,000 refinance proceeds and the balance of the loan. The two checks were mailed to Valley National on the deadline stipulated in the confession of judgment. Then, eleven days later, on May 12, 2001, respondent again invaded clients' funds for a $6,000 down payment on a car for his wife. He did so two days before he received the $7,500 insurance check for his wife's accident. He then deposited the insurance proceeds to cover the $6,000 withdrawal against clients' funds.

"The burden of proof in proceedings seeking discipline . . . is on the presenter. The burden of going forward regarding defenses . . . relevant to the charges of unethical conduct shall be on the respondent." R. 1:20-6(c)(2)(C). Respondent did not meet his burden. The record does not support his position that he thought that the source of the $6,000 check was the $35,000 refinance proceeds. Conversely, the evidence establishes that he knew or should have known that those funds were never deposited in his trust account. He was desperately trying to avoid the entry of the confessed judgment against him. Twice he asked Whalen & Whalen that the check payable to Valley National

be mailed to him by May 1, 2001, the deadline contemplated in the confession of judgment that he executed in favor of Valley National. He received the check on April 30, 2001. The next day, he mailed to Valley National's attorney the Whalen & Whalen trust account check, along with the $9,000 drawn on his trust account. He signed the $9,000 check, as well as the letter enclosing the two checks. Nothing in the record allows an inference that he did not intend to mail the checks to Valley National's attorney on the deadline for the payment of the loan. To the contrary, the evidence is overwhelming that the purpose of his urgent pleas to Whalen & Whalen was to enable him to comply with the critical May 1, 2001 deadline.

We find, thus, that respondent's misappropriation of $9,000 in clients' funds was the product of deliberation on his part, to avoid entry of a judgment against him for non-payment of the Valley National loan. The same finding obtains with respect to respondent's misappropriation of $6,000 in clients' funds, i.e., in light of his demonstrated urgency in satisfying the loan by May 1, 2001, his explanation that he thought that the $35,000 meant for Valley National was still in his trust account when he wrote the $6,000 check is simply not credible. At a minimum, respondent's conduct in connection with the $6,000 check amounted to willfull blindness, in that he failed to ensure that

the $35,000 had been deposited in his trust account and was still there when he issued the $6,000 check. Attorneys guilty of willful blindness are disbarred. See, e.g., In re Pomerantz, 155 N.J. 122 (1998) (attorney's disbursements from her trust account without assuring herself that she had sufficient funds on deposit constituted willful blindness).

Respondent's misuse of the real estate funds in escrow, too, amounts to knowing misappropriation. Taking a legal fee from funds that must remain intact until the closing of title constitutes knowing misappropriation, unless both parties to the transaction consent to the withdrawal. In re Hollendonner, 102 N.J. 21 (1985). The special master's statement that the early withdrawal of escrow funds by parties entitled to them does not amount to knowing misappropriation applies only to situations where the attorney releases the funds prematurely to a party to the escrow agreement, reasonably believing that the purpose of the agreement has been satisfied. In re Susser, 152 N.J. 37 (1997). These situations are in sharp contrast with instances when an attorney takes a legal fee from funds that must remain inviolate until the closing of title. Respondent was not a party to the agreements between the sellers and the buyers. Since at least 1985, the law has been that attorneys who invade escrow funds for their benefit face disbarment for knowing

misappropriation. In re Hollendonner, supra, 102 N.J. 21. See also In re Warhaftig, 106 N.J. 529 (1987) (attorney disbarred for taking advance fees in real estate matters). As sympathetic as we may be toward respondent's mistaken belief that his conduct was permissible, we are reminded that ignorance of the law is no excuse. In re Gifis, 156 N.J. 323, 355 (1998).

We conclude that respondent's conduct described in all three counts of the complaint constituted knowing misappropriation of trust funds. Under In re Wilson, supra, 81 N.J. 451, and In re Hollendonner, supra, 102 N.J. 21, he must be disbarred. We so recommend to the Court.

Members Boylan and Lolla did not participate.

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
William J. O'Shaughnessy, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Joseph O. Sullivan
Docket No. DRB 06-348

Argued: February 15, 2007

Decided: April 26, 2007

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not participate
O'Shaughnessy	X						
Pashman	X						
Baugh	X						
Boylan							X
Frost	X						
Lolla							X
Pashman	X						
Stanton	X						
Wissinger	X						
Total:	7						2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel