SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 05-248
District Docket No. XIV-04-0036E

IN THE MATTER OF :
:
ANTHONY J. SIMMONS :
:
AN ATTORNEY AT LAW :

Decision

Argued: October 20, 2005

Decided: December 8, 2005

Walton W. Kingsbery, III appeared on behalf of the District IIIA Ethics Committee.

Michael P. Ambrosio 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 discipline filed by Special Master Bernard A. Kuttner. The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(a) (failure to communicate with a client), RPC 1.15(a) (failure to safeguard client funds), RPC 1.15(b) (failure to promptly deliver property to a client), RPC 1.15(c) (failure to keep

separate client property), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was temporarily suspended from the practice of law by Order dated February 20, 2003, effective March 21, 2003, for failure to comply with a fee arbitration committee determination. He remains suspended to date.

In February 2005, respondent received an admonition for improper withdrawal from representation in two matters and failure to provide a written retainer agreement in one of the matters. The letter of admonition directed respondent to provide proof of his fitness to practice law, including proof that he was drug-free. He failed to comply with that directive.

Respondent entered into a stipulation of facts with the Office of Attorney Ethics ("OAE"), in which he admitted the majority of the allegations against him, but denied that he intentionally invaded client funds.

Respondent was admitted to the New Jersey bar in 1989. He was a partner in the firm of Winkler, Bevacqua & Simmons, P.C. until June 1999, at which time he left to become a sole practitioner.

Respondent represented a minor, Malik Thompson, in a personal injury matter against the Newark Housing Authority, which was settled, in November 1996, for $11,500. After

deducting fees and costs, Thompson was to receive $8,278. Because Thompson was a minor, respondent was obligated to deposit his funds in a Surrogate's account. He failed to do so. The funds remained in his law firm's trust account until 1999.

In June 1999, respondent left the law firm in which he had been a partner, and transferred the funds to his newly opened trust account at Summit Bank.[1] In July 1999, respondent advised Thompson's guardian, Donna Thompson, of the transfer; Thereafter, he lost contact with her.

In November 2000, respondent wrote a trust account check to an individual named Luis Reyes, in the amount of $4,775. Respondent did not recall who Reyes was, but thought that likely he was a former client who had asked for a refund of his retainer. Respondent stated that he moved his law practice a number of times and lost files in the process.

The above disbursement invaded the Thompson settlement funds, which were the only funds in respondent's trust account at the time.[2] Respondent did not have the authorization of Malik

---

[1] Beginning in June 1999, Summit Bank charged monthly fees to the account. The money was deducted from the Thompson funds.

[2] On November 4, 1999, respondent deposited $15,000 in his trust account. Those funds were depleted eight days later and are not relevant to this matter.

Thompson or Donna Thompson to use the funds in any way.[3]

At some point, Donna Thompson attempted to contact respondent regarding Malik Thompson's funds. Respondent was unaware that she was trying to contact him because he had relocated his office. As detailed below, in June 2001, respondent left the practice of law and moved to Minnesota to seek treatment for drug addiction. According to respondent, he had contacted the Lawyer's Assistance Program ("LAP") for help and thought that his clients would be able to reach him through that organization. He stipulated that he also had sent letters to clients who he was able to locate to advise them that he was leaving New Jersey to enter a drug-treatment program. He claimed, however, that he had been unable to advise Donna Thompson that he was leaving the practice of law because he had lost the Thompson file.

As to his failure to deposit the funds with the Surrogate, respondent stated that he was unfamiliar with the procedure. He initially contended that he had appeared twice in court to deposit the funds, and that it was his belief that the matter was adjourned because no one appeared on behalf of the defendant

[3] In April 2003, after respondent learned of the shortage in his account, he deposited $8,300 of his own funds. In November 2004, respondent paid Malik Thompson $8,278.

in the underlying proceeding.[4] It seems, however, from respondent's brief to us that he realized, at the hearing before the special master, that he was in error and that what he recalled as a proceeding before the court was actually a friendly settlement proceeding. The brief does not state if that applies to one appearance before the court or both.

As noted above, at some point respondent lost the Thompson file. According to respondent, he did not recall that he had Thompson's funds in his trust account.

Respondent admitted all of the allegations against him, except knowing misappropriation and dishonesty. He contended that his invasion of Thompson's funds was unintentional. According to respondent, he thought that the check to Reyes had been written against his business account.

Respondent blamed his actions on his depression and addiction to oxycontin. He testified that he had been injured in an automobile accident and, consequently, needed the pain-reliever, which friends in the medical industry provided to him.[5] Respondent dated the beginning of his depression to June 1999.

---

[4] In fact, there was no need for the defendant to have appeared to have Thompson's funds deposited with the Surrogate.

[5] The special master noted that respondent was not charged with a violation of RPC 8.4(b) (commission of a criminal act), even though his possession of oxycontin without a prescription was illegal.

He stated that, when he wrote the check to Reyes, in November 2000, he was in the midst of his addiction and depression. He presented no medical evidence as to the existence of his addiction, its extent, or its effect on him. According to the stipulation, respondent had no financial difficulties stemming from his addiction. Presumably, this stipulated fact was intended to negate respondent's need for the Malik funds.

Respondent admitted that he violated RPC 1.1(a), RPC 1.4, RPC 1.15(b), and RPC 1.15(c).[6] He denied that he violated RPC 1.15(a) and RPC 8.4(c).

The special master found clear and convincing evidence that respondent was guilty of knowing misappropriation of client funds. As to respondent's claim of depression and addiction, the special master noted that respondent submitted no medical evidence on the level of his addiction. Nevertheless, the special master accepted that portion of the stipulation that stated that respondent was depressed and was addicted to oxycontin.

The special master found incredible respondent's contention that he thought that he was writing the check to Reyes against his business account. The special master concluded that either

[6] As noted above, respondent was charged with having violated RPC 1.3 as well. The omission in the stipulation was probably an oversight.

respondent had no business account or the account had insufficient funds to cover the check to Reyes. Similarly, the special master deemed respondent's explanation about his attempts to deposit Thompson's funds with the Surrogate "beyond belief," and found that his failure to turn over the funds to the court "constituted dishonesty and misrepresentation."

As noted above, respondent admitted having violated RPC 1.1(a), RPC 1.4, RPC 1.15(b), and RPC 1.15(c). The special master found knowing misappropriation and, therefore, additional violations of RPC 1.15(a) and RPC 8.4(c).[7] In recommending respondent's disbarment, the special master stated:

> Our Supreme Court set the standard in the *Wilson* case. We do not serve the public who has been victimized, nor the Bar by inconsistent application of our mandate to honor the trust placed in us by the public.
>
> There is generally some explanation given for the theft or misappropriation of client funds, i.e., inexperience, mental disease, alcohol or drugs. Some simply ignore the theft of client funds and term it 'misunderstanding.' A chipping away at the high standards required of the legal profession continues the slow, but steady, decline in confidence in lawyers and the Courts.
>
> [SMR6-SMR7.][8]

---

[7] In his summary, the special master omitted the violation of RPC 1.3. This was likely an oversight stemming from the similar error in the stipulation.

[8] SMR refers to the special master's report, dated August 5, 2005.

Upon 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 finding that respondent knowingly misappropriated trust funds, and with respondent's admission that he violated RPC 1.15(c). That rule, which refers to an attorney's failure to keep separate client property in which both have an interest, is inapplicable to the facts of this matter.

It is undisputed that respondent invaded his client's funds. We cannot find, however, that this invasion was intentional. Respondent claimed that he was so mentally impaired when he wrote the check to Reyes that he drew it against the wrong account — his trust account, instead of his business account. Although R. 1:20-6(c)(2)(C) places the burden of going forward with regard to defenses or mitigating factors on respondent, and although he submitted no medical evidence that he was mentally impaired at the time that he wrote the check to Reyes, he did submit evidence, in a prior disciplinary matter, that he was suffering from polysubstance dependency, for which he had sought treatment in Minnesota.[9] Here, too, respondent testified that he had taken steps to notify his

[9] The earlier matter resulted in the above-referenced admonition.

clients, the courts, and the LAP that he was unable to continue to practice law because of his impairment. In the previous matter before us, respondent provided copies of the letters sent in that regard. We have, thus, taken judicial notice of the fact that respondent had a substance-abuse problem, for which he sought treatment, and have given credit to respondent's claims of depression and substance abuse.

In a long line of attorney disciplinary cases, many of which involved knowing misappropriation of trust funds, the Supreme Court has held that an attorney is not responsible for his or her actions if the attorney demonstrates "by competent medical proofs that [he or she] suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In re Jacob, 95 N.J. 132, 137 (1984). We need not reach the issue of respondent's illness and whether it met the "Jacob standard" because we do not find respondent guilty of knowing misappropriation. In In re Cavuto, 160 N.J. 185, 196 (1999), the Court observed:

> The line between knowing misappropriation and negligent misappropriation is a thin one. "Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission." In re Johnson, 105 N.J. 249, 258, 520 A.2d 3 (1987). However, this Court had noted that "an inculpatory statement is not an indispensable ingredient of proof of knowledge, and that

> circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded." Ibid. In this case, that circumstantial evidence includes repeated invasions of client funds that were required to be held inviolate. The testimony adduced convincingly suggests that respondent "knew," or "had to know" that he was invading client funds.

We are not persuaded that, in this case, circumstantial evidence points in the direction of knowledge. The record indicates that respondent did not lack personal funds that he could have used for the Reyes disbursement. Indeed, when the shortage in the account was brought to respondent's attention, he immediately deposited more than was required to cure the deficiency. Moreover, the money remained inviolate in his account for years prior to his disbursing it to Reyes, a further indication that he did not need to use the funds for an unauthorized purpose.

We do not believe, however, respondent's contention that he was so impaired that he wrote the checks to Reyes against the wrong bank account. In fact, respondent has failed to produce sufficient evidence that he even maintained a business account. Instead, we find that it is possible that respondent forgot that the funds in his trust account belonged to a client.

Respondent received the Thompson funds in November 1996. He wrote the check to Reyes in November 2000, four years later.

Donna Thompson was unable to contact respondent because he had relocated his practice and then moved to Minnesota. Therefore, no one was reminding him of the existence of the funds. Thus, when Reyes asked for a refund of his retainer, respondent used the funds on hand – Thompson's funds. The record indicates that respondent was not at a loss for money, despite his drug-dependency problems, thereby allowing for the possibility that he thought that the funds in his account were no one's but his.

On the other hand, respondent's conduct was nothing short of reckless. He made no effort to identify the owner of the funds before he used them. He lost track of the funds that he was holding for his client and might even have lost track of what bank accounts he had. We find, thus, that his invasion of Thompson's funds was caused by reckless disregard of his trust account responsibilities.

We find also – and respondent admitted – that he was guilty of gross neglect, lack of diligence, failure to communicate with Thompson's guardian, and failure to promptly turn over client property.

Generally, an admonition or a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation, even if the attorney also commingled personal and client funds. See, e.g., In the Matter of Bette R. Grayson, Docket No. DRB 97-338

(May 27, 1998) (admonition imposed where the attorney had deficient recordkeeping practices and failed to prepare quarterly reconciliations of client ledger accounts, resulting in the negligent misappropriation of client trust funds in eleven instances); In the Matter of Joseph S. Caruso, Docket No. DRB 96-0076 (May 21, 1996) (admonition imposed where the misrecording of a deposit led to a trust account shortage and the attorney committed a number of violations in the maintenance of his trust account); In re Blazsek, 154 N.J. 137 (1998) (reprimand where the attorney negligently misappropriated client funds and failed to comply with recordkeeping requirements); In re Goldstein, 147 N.J. 286 (1997) (reprimand where the attorney negligently misappropriated client funds as a result of recordkeeping deficiencies); and In re Liotta-Neff, 147 N.J. 283 (1997) (reprimand where the attorney negligently misappropriated client funds after commingling personal and client funds).

This is not, however, a case of poor recordkeeping. Nothing in the record indicates that respondent failed to properly maintain the required attorney books and records. It was his cavalier attitude – worse yet, recklessness – toward his trust account duties that caused him to disburse funds held in his trust account before verifying their ownership.

In a case that led to a three-month suspension, In re Gallo, 117 N.J. 365 (1989), the Court found no clear and convincing evidence of knowing misappropriation or of willful blindness, despite the attorney's poor accounting procedures. There, the attorney took over another lawyer's practice, which included over 200 files in a state of complete disarray. The attorney's recordkeeping practices mirrored those of a prior employer, who paid all of his operating expenses from his trust account. The attorney assumed that his employer's bookkeeping methodology was an appropriate way to keep attorney records. The attorney left his fees in his trust account, never kept a running balance of the account, and never used client ledger cards. The attorney, thus, never knew exactly how much money was in the trust account or to whom the funds belonged. If the attorney believed that the trust account balance was too low to pay for his office expenses, he occasionally deposited his own funds in the trust account. As a result of his inadequate bookkeeping practices, the attorney invaded clients' funds on numerous occasions. In addition, two checks drawn on his trust account were returned for insufficient funds.

The OAE asserted that the return of those checks signaled to Gallo that his clients' funds were being spent improperly and that an invasion of clients' funds was a likely result of his

conduct. The Court disagreed. The Court found that, unlike the attorney in In re Fleischer, 102 N.J. 440 (1986), who designed a bookkeeping system that prevented him from knowing whether he was using clients' trust funds, Gallo followed the practices of his former employer, was unfamiliar with basic principles concerning the management of trust accounts, and apparently had no knowledge of the current balance in his trust account. Although the Court found no evidence of knowing misappropriation, it concluded that Gallo's misconduct was inexcusable and deserving of a three-month suspension.

In another case, In re James, supra, 112 N.J. 580, the Court also declined to find knowing misappropriation, as urged by the OAE. Instead of disbarment, the Court imposed a three-month suspension. In that case, the attorney was out of trust on numerous occasions, at times for as long as four years. The attorney had a practice of leaving substantial fees in his trust account. He used his trust account to pay employee payroll taxes, at times making disbursements in excess of funds deposited in the trust account for that purpose. The attorney did not maintain separate ledger cards for each client, failed to maintain receipts and disbursements journals, and failed to reconcile the trust account bank statements with the trust account ledger. For twenty-four years – and without incident –

the attorney followed the same business practices and accounting procedures learned from his legal mentors.

In essence, attorney James used his trust account as a second business account, paying client expenses and employee payroll taxes out of that account. Whenever the trust account balance approached an insufficient level to satisfy outstanding obligations, the attorney's secretary transferred funds from his business account to his trust account. On several occasions, the secretary informed the attorney that the trust account balance was insufficient to satisfy client obligations. Instead of reviewing his books to discover the reason for the deficiency, the attorney simply cured the shortage with funds from his business account. Because no checks ever bounced, the attorney assumed that the trust account contained sufficient funds to cover the checks written. The attorney's personal solvency and successful law practice were never at issue. He simply did not know how to manage his attorney records (his bookkeeping improprieties were discovered through the OAE's Random Audit Program). The Court found that the attorney had "in good faith perpetuated an inadequate system that led to negative balances in his trust account," Id. at 591, and that any misappropriation of clients' funds was negligent, rather than knowing. Balancing the length of time spanned by the

attorney's conduct and the serious level of his negligence against the strong mitigating factors presented, the Court found that a three-month suspension was the appropriate measure of discipline for the attorney's ethics offenses.

In yet another instance, In re Konopka, supra, 126 N.J. 225 (1991), the Court refused to disbar an attorney who, according to the OAE, was guilty of knowing misappropriation of clients' funds. There, for a period of three weeks, the attorney failed to keep a client's funds intact. In addition, another client's ledger (the client was the Konopka family) showed a balance of $153.81 and then, two lines down, two $500 disbursements. The attorney had handwritten the entries for the balance and for the disbursements. Yet, no deposits were made to cover these excessive disbursements until sixty days later. As a result of the disbursements, trust funds were invaded on twenty-six instances, over three years. The Court found that "[t]here [was] simply no proof of when Konopka made the 'balance forward' entry in relation to the issuance of the checks." Id. at 230. Concluding that the invasion of clients' funds was the product of the attorney's serious inattention to his recordkeeping responsibilities, the Court imposed a six-month suspension.

We find that respondent's misconduct was worse than that in Gallo, James, and Konopka. Respondent saw funds lying dormant

and unclaimed in his trust account, and used them at his own convenience. That he was able to replace the funds when needed is of little moment. He should have investigated to whom they belonged. Over $8,000 was undisbursed to its rightful owner, nearly half that sum sitting in respondent's trust account for four years, the other half having been given to Reyes. Respondent's failure to turn over Thompson's funds was a horrific breach of his trust account responsibilities that cannot be tolerated.

We find no mitigating factors here, only aggravating circumstances. Addiction to a controlled dangerous substance at the time of an attorney's misconduct is not to be considered as a mitigating factor because the attorney commits a crime by the illegal acquisition of the drug. In re Skevin, 97 N.J. 550, 565-66 (1984). Furthermore, as noted above, respondent failed to comply with our directive, following his admonition, to provide proof of fitness to practice law. His cavalier attitude toward the disciplinary system, too, cannot be countenanced.

Taking all of the above into account, we determine that severe discipline – a two-year suspension – is required in this matter. In addition, prior to reinstatement, respondent must comply with our prior directive to submit proof of his fitness

to practice law, as attested by a mental health professional approved by the Office of Attorney Ethics.

Members Lolla and Wissinger found knowing misappropriation and voted to recommend respondent's disbarment. Members Boylan and Neuwirth did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony J. Simmons
Docket No. DRB 05-248

Argued: October 20, 2005

Decided: December 8, 2005

Disposition: Two-year suspension

Members	Two-year Suspension	Reprimand	Disbar	Disqualified	Did not participate
Maudsley	X				
O'Shaughnessy	X				
Boylan					X
Holmes	X				
Lolla			X		
Neuwirth					X
Pashman	X				
Stanton	X				
Wissinger			X		
Total:	5		2		2

Julianne K. DeCore
Chief Counsel