SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 15-324
District Docket No. XIV-2012-0463

IN THE MATTER OF	:
MARVIN S. DAVIDSON	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 28, 2016

Decided: June 29, 2016

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Ronald M. Gutwirth 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 disbarment filed by a special master. The three-count complaint charged respondent with violations of RPC 1.15(a) (failure to safeguard client funds) and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985); RPC 1.15(d) (recordkeeping violations); RPC 8.1(b) (failure to reply to a lawful demand for information from a disciplinary authority); and R. 1:20-20, erroneously cited as RPC 1:20-20,

(following a suspension from the practice of law, failure to disburse trust funds or to arrange for the disbursement of such funds), presumably also a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice for failure to comply with a Court order). For the reasons expressed below, we recommend respondent's disbarment.

Respondent was admitted to the New Jersey bar in 1969. He has a significant ethics history and has been suspended from the practice of law since September 6, 2010.

In 1995, respondent was suspended for three months for improperly witnessing and acknowledging documents, preparing a power of attorney containing false representations, and advancing funds to a client in connection with litigation. In re Davidson, 139 N.J. 232 (1995). He was reinstated on July 28, 1995. In re Davidson, 141 N.J. 232 (1995). In 2005, he was reprimanded for recordkeeping violations and negligent misappropriation of more than $28,000 of client funds, which resulted from his failure to reconcile his trust account. In re Davidson, 182 N.J. 587 (2005).

Respondent was temporarily suspended, on May 20, 2009, for failure to satisfy a fee arbitration determination and to pay a sanction to the Disciplinary Oversight Committee. In re

Davidson, 199 N.J. 37 (2009). He was reinstated on July 7, 2009. In re Davidson, 199 N.J. 574 (2009).

In 2010, respondent was suspended for six months for misconduct in four client matters. He was guilty of engaging in gross neglect and lack of diligence by failing to take any action to prevent the dismissal of a case and then failing to have the case reinstated; failing to abide by a client's decision to release escrow funds; failing to communicate with a client; failing to provide a client with a written contingent fee agreement; failing to promptly deliver funds to a third person; failing to notify a client that he had received a settlement in one matter and, in another matter, disbursing escrow funds to his client that were earmarked for the satisfaction of tax liens; failing to segregate a settlement until resolving a dispute over its distribution; engaging in numerous recordkeeping improprieties, which the Office of Attorney Ethics (OAE) had previously directed him to correct and which he certified he had done; making a misrepresentation about receipt of a settlement; and failing to cooperate with the ethics investigation.

We found that respondent's resort to self-help remedies (failure to pay bills from the proceeds of a settlement), rather than seek recourse through the legal process, demonstrated that

he was either unfamiliar with the Rules of Professional Conduct or ignored them to suit his own needs, and that his testimony strained credibility and twisted the law. In the Matter of Marvin S. Davidson, DRB 09-280 (April 13, 2010) (slip op. at 42-43).

The Court ordered that, prior to reinstatement, respondent complete ten hours of professional responsibility courses; that he practice under the supervision of an OAE-approved proctor until the OAE deems him capable of practicing without such supervision; that he submit to the OAE monthly reconciliations of his attorney accounts on a quarterly basis, prepared by an OAE-approved accountant, until further order of the Court; and that he repay funds to the client. In re Davidson 202 N.J. 530 (2010).

Also in 2010, respondent received another six-month suspension in a default matter, effective March 7, 2011, and consecutive to his prior six-month suspension, for engaging in gross neglect, lack of diligence, and failure to expedite litigation in a personal injury matter by permitting the complaint to be twice dismissed, failing to engage in discovery, and failing to have the case reinstated; failing to keep the client reasonably informed about the status of the matter; and

failing to cooperate with disciplinary authorities. In re Davidson, 204 N.J. 175 (2010).

In 2012, respondent was suspended for one year, consecutive to his six-month suspension (effective March 7, 2011), for misconduct in two matters. In re Davidson, 212 N.J. (2012). In one matter, he practiced law while on the IOLTA list of ineligible attorneys. In the second matter, he failed to turn over a client's settlement proceeds for almost five and one-half years (the Sabrina Clyburn matter, DRB 12-052) and failed to cooperate with the district ethics committee's investigation into the matter. We found that it was not the first time that respondent had been disciplined for improprieties with client or escrow funds. He, therefore, failed to learn from prior mistakes and continued to disregard his ethics and professional obligations. We determined that the aggravating factors in the matter - respondent's ethics history and his resort to self-help measures by withholding Clyburn's settlement funds until there was a resolution of an issue between them - warranted the imposition of progressive discipline.

Finally, respondent was temporarily suspended, effective April 30, 2015, for failure to comply with a fee arbitration determination. In re Davidson, 221 N.J. 289 (2015). As noted earlier, he remains suspended to date.

The primary charges against respondent stem from our referral to the OAE of the Clyburn matter and from an Internal Revenue Service (IRS) tax levy on respondent's trust account for his personal tax obligations.

As to our referral, following our review of the Clyburn matter, by letter dated August 10, 2012, we asked the OAE to conduct an investigation and audit to determine whether respondent had kept Clyburn's settlement funds intact in his trust account, during the five and one-half-year period encompassing his dispute with her.

As to the IRS levy, respondent failed to promptly replenish his attorney trust account after the IRS imposed a levy against that account to satisfy his personal tax obligations. Respondent's attorney trust account was not properly designated as such by his bank. The IRS had levied against that account on two previous occasions. Although respondent took prompt steps to resolve those levies, he did not do so on the third occasion. He also failed to have the bank correct the designation of his bank account to reflect that it was an attorney trust account, which likely would have prevented the IRS levy.

The complaint charged that respondent's failure to promptly replenish the trust account after clients' funds had been removed pursuant to the third levy constituted the knowing

misappropriation of client funds. As of the date of the ethics complaint, November 25, 2013, respondent had not replenished those monies. It was not until January 23, 2015, about one week before the disciplinary hearing, that respondent finally replenished his trust account.

Respondent was also charged with recordkeeping violations that resulted from the OAE audit. He admitted that (1) the trust account was not properly designated as an attorney trust account or an IOLTA attorney trust account; (2) he did not maintain trust receipts or disbursements journals; (3) client ledger cards were not properly descriptive; (4) he did not maintain a ledger card identifying attorney funds for bank charges; (5) he did not maintain individual ledger cards for each client; (6) he did not perform monthly trust account bank reconciliations with client ledgers, journals, and checkbook; (7) deposit slips lacked sufficient detail; (8) attorney funds for bank charges exceeded $250; (8) he commingled personal and client funds; and (9) checks lacked client identification. Respondent, thus, admitted violating RPC 1.15(d) by failing to comply with R. 1:21(6)(a), (c), and (d), and RPC 1.15 (a) (commingling). He contended, however, that they were the identical charges for which he had been disciplined in prior matters (2005 and 2010), that he had made a good faith effort to correct the deficiencies

during his suspension, and that the OAE impermissibly sought to impose "a double jeopardy sanction" against him.[1]

At the relevant times, respondent maintained trust and business accounts at Sovereign Bank (the last digits of the accounts are trust account #3524, trust account #9931, and business account #0030).[2] Respondent's answer to the ethics complaint stated that, in early February 2009, he opened trust account #9931 at the OAE's request, so that newly deposited transaction funds would not be impacted by the recordkeeping problems that had plagued his other trust account. OAE Disciplinary Auditor Arthur Garibaldi confirmed that, because neither respondent nor the OAE could accurately identify to whom an unidentified balance in trust account #3524 belonged, in February 2009, respondent opened a new trust account #9931 in "an effort to start off with a clean slate."[3]

Account #9931, however, was not properly designated as an attorney trust account. Instead, the designation on the account

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[1] At the ethics hearing, the OAE stated that it was not seeking additional discipline based on respondent's recordkeeping violations.

[2] At some point not specified in the record, Santander Bank acquired Sovereign Bank, resulting in the name change.

[3] Trust account #3524 was the account into which the Clyburn funds had been deposited.

was "Marvin S. Davidson, Esq. DBA." Respondent accused the bank of making the error, about which he learned only when the IRS levied on the account. Account #9931 and respondent's business account have since been closed.

The Clyburn Funds; Recordkeeping; Failure to Cooperate

On October 5, 2012, the OAE requested a written response to our concerns regarding the Clyburn funds, and a copy of the Clyburn file, the Clyburn client ledger, and all attendant Clyburn trust account documentation. Respondent did not produce the information, prompting a second OAE request, on January 8, 2013, for the same information from respondent's counsel.

On January 17, 2013, respondent's counsel provided the OAE with the Clyburn file and two pages of accounting records prepared by respondent's accountant, Charles Kandel, but not a monthly three-way reconciliation. On February 21, 2013, counsel provided additional information. Thereafter, by letter dated February 26, 2013, the OAE provided respondent's counsel with a copy of the OAE's reconstruction of respondent's trust account records from December 1, 2005 through November 30, 2012, and asked respondent to ensure its accuracy and to supply missing information for the entries marked "unidentified." Respondent, thereafter, provided the OAE with a chart, describing only some

of the items that had been listed as unidentified. Although some of the items were marked as being researched, Garibaldi did not receive any further information on those items. On March 22, 2013, respondent's counsel submitted a chart "describing" only some of the items the OAE had previously listed as unidentified. Garibaldi attempted to reconcile both trust accounts by piecing together the records respondent had provided, with the help of respondent's accountant, and the available subpoenaed bank records.[4]

At the DEC hearing, Kandel testified that he had obtained bank records for the years 2005 through 2011 and part of 2012. Although he tried to reconstruct respondent's records, he was unable to perform a three-way reconciliation, even with the information provided by the OAE, because there were only a few books and records available. He added that, to conduct a three-way reconciliation, client ledgers, bank statements, and receipts and disbursements journals were required. He did not have the journals and ledgers, requiring him to recreate them forensically from bank records. Kandel prepared a list of monies held in trust account #3524 from August 2009 through March 31,

[4] Garibaldi noted that Sovereign Bank produced records for the period beginning November 30, 2005 through November 30, 2012. The records prior to November 30, 2005 were no longer available, however.

2013. He determined that, at the time he reviewed respondent's records, there were clients that were owed money. According to Kandel, trust account #9931 had been closed in January 2012.

On April 23, 2013, the OAE conducted a demand audit at respondent's office. Thereafter, by letter dated May 7, 2013, the OAE requested (1) proof that respondent had contacted Sovereign Bank to request that trust account #9931 contain the proper designation of "Attorney Trust Account" on bank statements and checks; (2) copies of respondent's bank statements and three-way reconciliations for that trust account from February 1, 2011 to the present; (3) a written explanation for all overdrafts occurring in that trust account; and (4) a written explanation for all tax levies executed by the IRS.

According to Garibaldi, respondent did not produce all of the financial records at the demand audit that related to the Clyburn funds and the OAE was not able to subpoena the necessary bank records because of the age of the matter. Although the OAE detected numerous other disbursements from trust account #3524 that were unrelated to the Clyburn matter, without the necessary records, the OAE could not establish whether Clyburn's funds remained intact throughout the period that respondent should have been holding them or what other client money he should have been holding in that trust account.

The OAE determined that, in addition to the Clyburn funds, respondent held other clients' funds in trust account #3524. The OAE's demand audit revealed that, on November 19, 2005, respondent deposited $8,000 on Clyburn's behalf into that trust account. He made subsequent disbursements over several years for fees he claimed were earned in other matters that he handled prior to the Clyburn matter. Garibaldi remarked that, as of the date of the ethics hearing, respondent had failed to provide sufficient documentation to substantiate this claim. Garibaldi could find no evidence, however, that respondent's trust account balance had fallen below the amount he owed Clyburn because he could not determine the total amount of funds respondent was holding and for whom he was holding the funds.

As examples of respondent's lack of documentation, Garibaldi testified about three checks respondent had issued to himself after his 2010 suspension. On February 5, 2012, respondent issued a $5,000 check to himself, that contained the notation "check to remove money toward untaken fees and costs." Respondent informed Garibaldi that he had earned the fee prior to his suspension, but had no documentation to support that claim or to identify the client matter. Garibaldi found two additional checks for fees that could not be attributed to any particular client.

Following the audit, the OAE requested additional information from respondent. He provided only a portion of it - some of it after Garibaldi had completed his investigative report, some of it only after the OAE filed the ethics complaint. As of the date of the ethics hearing, respondent had not provided the OAE with three-way reconciliations.

As to trust account #9931, Garibaldi testified that, "literally," from the day respondent opened it, there was a problem with bank fees because the bank was not aware that it was a trust account. In February 2009, respondent had opened the account with an initial $100 deposit. The bank fees created a $90.65 overdraft. Moreover, because the account had not been properly designated as an attorney trust account, the bank did not report the overdraft to the OAE, as required by court rule.[5]

By March 24, 2009, the bank fees created a negative balance of $185.65 as a result of a $5 per diem "sustained overdraft fee." Respondent did not replenish the funds but, at some point, the bank reversed the charges against the account. Thereafter, on April 28, 2009, the bank charged a $32 checkbook fee to the trust account, thereby creating a $17 overdraft. The bank did

[5] According to Garibaldi, respondent should have been aware of the improper designation on his trust account after the first February 23, 2010 IRS levy.

not report this overdraft to the OAE either. The OAE did not find that respondent had any client funds in that account at that time. The bank continued to charge the account with a $5 per diem overdraft fee through May 22, 2009, resulting in a negative $87 balance. Respondent did not replenish the funds.

On May 26, 2009, respondent received $50,000 for client Eve Merkel and deposited those funds into trust account #9931. The Merkel funds immediately were impacted by the shortage in that trust account. On June 15, 2009, respondent had a negative $142 balance but, on June 22, 2009, he replenished that amount.

On July 13, 2009, respondent received a $15,000 check for George and Teresa Garas, which he deposited into trust account #9931. He disbursed $14,000 from the trust funds to an attorney. At the time, the Garas funds were the only funds in trust account #9931. On September 8, 2012, respondent disbursed a $1,000 fee to himself in connection with the Garas matter; however, he took the funds from trust account #3524. Respondent provided no proof that he had deposited any money from the Garas matter into that account. The OAE was unable to fully reconcile either trust account because respondent had failed to produce the necessary documentation.

Garibaldi's audit of trust account #9931 and the bank statements for October and November 2009 further showed that, on

October 8, 2009, respondent deposited $28,204 on behalf of Tunis. However, he subsequently disbursed $28,729.12 from the Tunis funds, resulting in a negative $525.12 balance for this client. The negative balance resulted when, on November 17, 2009, respondent disbursed a $525 fee to himself. Respondent did not replenish the $525.12, which impacted other client funds. The OAE was unable to determine precisely whose funds had been impacted.

Garibaldi determined that, as of November 30, 2009, the balance in trust account #9931 should have been $3,700 for the Colon, DeJean and Garas matters, but the balance was only $633.16, reflecting a $3,066.84 shortage. According to the stipulation,[6] bank fees and other negative client balances had impacted these clients' funds.

Specifically, respondent's reconstructed records prepared by his accountant and subpoenaed bank records, showed that, on November 17, 2009, respondent took a $100 fee in the Claudia Pisanti matter. However, he had not received any funds in Pisanti's behalf until December 3, 2009. Thus, the negative balance for that client impacted other client funds.

[6] The OAE and respondent entered into a joint factual stipulation at some point prior to the hearing.

Garibaldi also found a $2,321.72 negative client balance in the Science of Being matter that occurred when, on October 2, 2009, respondent issued a $2,321.72 check in connection with the matter before receiving any funds for that client. Approximately four months later, on January 20, 2010, respondent deposited $2,321.72 of personal funds into the account to correct the shortage.

The OAE's review of respondent's records also revealed that, at the time of the third IRS levy, on December 15, 2010, respondent was holding the following funds in trust account #9931: 1) Melody Cleveland - $500; 2) George Garas - $1,000; and 3) Santos - $2,749.98. On July 8, 2013, the OAE requested that respondent produce the files for those matters by July 15, 2013, and that he provide a written explanation as to why he was holding the funds after his temporary suspension. Garibaldi did not receive the Garas file until after he filed his investigative report.

The Santos matter was improperly identified under Santos' attorney's name, Michael Prestia. Respondent claimed that he did not make the connection between the two names "for a period of time." When he did, he claimed that, sometime in 2012, he contacted Santos, met him at a restaurant "on Route 10," and gave Santos a check "minus . . . some sort of fee" to which they

had originally agreed. Respondent did not keep a copy of the check, however.

Respondent asserted that he had paid all of the money that he owed his clients in the "George divorce," the Colon matter, and the DeJean matter; and further, that he had paid all but two of his clients. He had no documentation to prove that he had made any of those payments, however.

With regard to the Garas matter, respondent explained that he had received $15,000 for a closing, which later fell through. When the seller's attorney threatened him with an ethics grievance, respondent gave the attorney $14,000. Respondent asserted further that he had "prepared a complaint" against the seller and his attorney.

According to Garibaldi, on September 8, 2012, respondent issued a $1,000 check to himself in the Garas matter from his client's deposit. Respondent claimed that, when he realized how much work he had completed for Garas, over a long period of time, he told Garas, after the fact, that he had taken the $1,000 as a fee and that Garas "didn't disagree with it" or object to it. He justified the fee to Garas by telling him that, if he had itemized all the work he had done, Garas would have owed him more money. Later, respondent testified that he could not recall whether he told Garas about the fee before or after

he had taken it. Respondent, however, had no writing setting forth the basis or rate of the fee or memorializing the time spent on the Garas matter.

At the ethics hearing, respondent admitted that he still owed his client, Science of Being, $100. He claimed that the client lost the check he had issued in 2009. By the time the client located the check, it was stale. Respondent offered to meet the client to turn over the money, but maintained that the client never returned his call. Respondent further admitted that he owed clients Barns and Mallory $4,200. He was unable to locate Barnes to return the funds. Immediately before the hearing, however, his attorney found an address for Mallory.

Kandel, respondent's accountant, testified that he could find no evidence in the documents indicating that respondent made any disbursements to Santos, Colon, or DeJean from trust account #3524. Respondent had testified, however, that he had paid Colon and DeJean before 2012 and Santos after 2012.

According to respondent, as to the $9,614.64 that remained in trust account #3524, after deducting amounts owed to Mallory, the Science of Being, and Ambrosio, he wrote a check payable to the Superior Court Trust Fund for the remainder, $5,321.24, but, apparently, never deposited it with the Fund. Respondent admitted that Cleveland, Garas, George, and Santos had not given

him permission to use their money for taxes or for any other purposes not related to their cases.

Respondent asserted that he did not have access to the records to prove that he had made payments to those clients because he lost his office building, presumably where the pertinent records were maintained, through a foreclosure proceeding as a result of his "very bad divorce." The divorce left him "so disgusted" that the let the building go and "didn't pay taxes." Nor did he contact the new owners to try to obtain his client and account records.

As to his failure to conduct three-way reconciliations, respondent admitted that he knew the reconciliations were required but claimed that he did not know what they were, despite being previously disciplined for the same deficiency. He asserted that he did not recall receiving information from the OAE, during a prior audit that explained the process. He admitted, however, that he did not comply with the Court's July 14, 2010 Order requiring him to submit monthly reconciliations to the OAE. Later, he testified that he did not recall that his prior discipline was for recordkeeping violations, but believed that the matter arose from someone complaining that he "left money in the account" or that he "left fees in the file." He added that he thought that the "decision was wrong period."

The IRS Levies

As previously mentioned, the IRS levied on respondent's account #9931 on three occasions to satisfy his personal tax obligations because it was not properly designated as a trust account. Garibaldi testified that the IRS will levy on an attorney trust account only if it has proof that the attorney has personal funds in the account. Garibaldi first learned about the levies when he received subpoenaed bank records.

Garibaldi noted that, at the demand audit and subsequently, in a May 7, 2013 letter to respondent's counsel, he requested proof that respondent had made some attempt to change the designation on the trust account after each of the levies. However, he received no documentation from respondent showing that he had asked the bank to remedy the problem to prevent further levies on the account.

The first IRS levy, executed on February 23, 2010, in the amount of $20,507.50, left a zero balance in trust account #9931. The clients whose funds were impacted by the levy were Cleveland, Garas, the Estate of Noel, Santos, and Vega, for whom respondent should have been holding a total of $21,032.62. On March 4, 2010, the IRS reversed the levy.

Five months later, on July 27, 2010, the IRS executed a second levy on the account in the amount of $108,513.13. Thereafter, the

bank assessed a $100 legal processing fee, which left a zero balance in respondent's trust account. The levy impacted the funds of Cleveland, Garas, Santos and another client, DeGeorge. Respondent claimed that, as with the first levy, he contacted the bank and the IRS, and the levy was reversed "right away" on August 9, 2010.

There was no documentation from either respondent or the bank showing that respondent had asked the bank to change the designation of the account after either of the levies.

On December 15, 2010, the IRS executed the third levy on the same trust account in the amount of $3,441.81. The bank assessed another $100 processing fee, which left a zero balance in respondent's account. As of December 31, 2010, the balance in respondent's trust account was -$105. At the time of the third levy, respondent was holding funds for clients Cleveland, Garas, and Santos. Respondent should have been holding $4,249.98 in the trust account. Respondent's personal tax obligation, therefore, was paid with trust account funds belonging to those clients.

The IRS did not reverse the third levy. Despite respondent's knowledge of the deficit in the account caused by the levy, he did not replenish the funds until January 23, 2015, more than four years later, long after the November 25, 2013 ethics complaint was filed, and only six days before the ethics hearing. Respondent

informed the OAE, during its investigation, that he was working with the bank and the IRS to replenish the funds, but provided no corroborating documentation to that effect. Thus, the above referenced clients' funds were used to pay respondent's personal tax obligation. Although the third levy had taken place in 2010, at the 2013 demand audit, respondent insisted that he was still attempting to get the third levy reversed. At the ethics hearing, however, he stated that he believed that an IRS levy has to be contested within thirty days. In somewhat confusing testimony, he stated:

> [I] went to the IRS this past December and I did that because . . . it was the third levy. She told me that money could not be returned. That was the first I heard that it could not be returned. I still think that's wrong and I intend to dispute that. In the mean time I issued a check to reimburse that. The reason I mentioned that is because when Mr. Garibaldi indicated that the client funds were impacted, as soon as the levy came I don't believe it was impacted because there was no money transferred as far as I knew. Although the money was technically taken out of the account because it was supposed to go to the IRS, if they didn't reverse it, but they did reverse it.
>
> [T128-20 to 129-8.][7]

Respondent explained further that, after he received the first notice of levy, he contacted Santander Bank employee Ann

[7] T refers to the January 29, 2015 hearing transcript.

Marquis and the IRS, but could not recall the name of the IRS employee with whom he had spoken. Respondent claimed that the bank was aware that account #9931 was a trust account, because that was what he had "asked for when [he] originally opened that account." When he explained to Marquis that the IRS could not levy on a trust account because the funds in it were not his, she told him to contact the IRS, which he did, "and it was reversed." He did not recall, however, if he specifically requested the bank to change the account to a trust account, but conceded that somewhere there was a "slip-up."

Respondent produced a March 11, 2014 letter that he sent to IRS employee Carol Ann Hefferman that enclosed a January 17, 2014 letter from Santander Bank employee Marquis to respondent. Respondent's letter indicated to Hefferman that (1) account #9931 was a trustee account; (2) on two prior occasions the IRS executed against the account and each time returned the money; (3) the last levy was for more than $3,000 and had not been returned; and (4) the account held other "persons" moneys and, therefore, should not have been subject to levy. Therefore, he requested the return of the funds. Marquis' January 17, 2014 letter stated that the bank's records indicated that the primary purpose of account #9931 "was to serve as an attorney trust account." The bank exhibit attached to Marquis' letter confirmed

this. The letter to Hefferman was stamped received by the IRS on December 22, 2014. Respondent conceded that the letter was dated almost four years after the third IRS levy. Respondent further admitted that he did not write to the bank asking it to designate the account as an attorney trust account, but claimed that he went to the bank and personally spoke to someone about it. He had no documentation to support his contention.

In respect of his efforts to address the third levy, respondent testified that he "went to the IRS" this past December (presumably 2014) and was informed that the levy could not be reversed. Respondent asserted that he had gone to the IRS "more than once" and spoke with one of the employees about six times. He informed the IRS that the account was his trust account, "[i]t's not my money and it should be reversed and I think I also told her at the time, one time that -- I think I told her I paid all the time and some of the money [left] over maybe my money, but anyway it shouldn't be subject to a levy."

Respondent later testified, however, that he thought that the only money in the account had been his. He did not know whether he owed money to any client. He, nevertheless, stipulated that there were client funds in account #9931 at the time of the third levy, which the IRS used to satisfy his personal tax obligations. Specifically, respondent's counsel

stipulated that money in the account belonged to clients Cleveland, Garas, and Santos. Any payments respondent made to those clients occurred well after the levy. Still, respondent produced no proof that he paid them, asserting that he did not know that he needed such proof.

Respondent submitted a January 25, 2015 letter to the special master and the OAE, stating that, on January 23, 2015, he had deposited $3,441.81 of personal funds into his trust account. He had borrowed the funds from a friend, Anthony Ambrosio, to replenish the levied funds. He claimed that he had waited so long to replenish the funds because, "in part," he was disgusted with the whole thing, but was still contesting the levy and thought that the IRS would return the money. According to a notation on respondent's letter, after the January 23, 2015 deposit, he had $9,614.65 in the trust account. The OAE pointed out that, despite respondent's earlier claims that he believed that only his funds remained in the account at the time of the third IRS levy, clearly, client funds had been affected by the levy; otherwise, the OAE maintained, respondent would have had no reason to replenish the account.

As to the unidentified funds in the trust account, respondent asserted that "when you have a trust account and you do as much work as I do, there's extra money that goes to you

that you don't always take. I didn't take the money because I knew something like this could happen. I wanted to protect my clients in case there was ever an overdraft." He, nevertheless, stipulated that the money in the trust account was "unclaimed funds" that he was required to deposit with the court. He did not deposit the funds earlier because he believed they were his. As an example, he claimed that the funds represented attorney's fees (from matters he could not identify) and fees obtained at closings - such as mortgage cancellation fees. Although the mortgage cancellation fee was only $2, he charged the clients $20, $25, or sometimes nothing. Respondent testified that he believed that "most of the money" in the account was his but "I've now given up on that thought." Thus, he stipulated that the funds were not his and that he would have to deposit them with the court.

* * *

The special master noted, as to the Clyburn matter, that without sufficient documentation, the OAE auditor could not verify whether Clyburn's funds remained intact while in respondent's possession. However, the OAE auditor conceded that respondent's trust account balance never fell below $5,013, the amount he was required to hold in Clyburn's behalf. The special master, therefore, found no clear and convincing evidence that

respondent did not maintain the Clyburn funds intact from the time of deposit until the ultimate disbursement.

As to the IRS levies, the special master found that respondent's Sovereign (Santander) Bank trust account #9931 was improperly designated as "Marvin S. Davidson, Esq. DBA" even though the checks for the account indicated that it was a trust account. As a result, the IRS levied on this trust account, three times. The December 15, 2010, $3,444.81 IRS levy (the third levy) on respondent's trust account, plus a bank-imposed $100 processing fee, depleted the full balance of the account. Unlike the prior two levies, the third IRS levy was never reversed.

At the time of the third levy, respondent should have been holding $4,249.98 in account #9931 on behalf of three clients. Following the hearing, respondent produced documents showing that he had paid the three clients from account #3524, without explaining how the clients were paid from that account, when their funds were originally deposited in account #9931.

The special master found a knowing misappropriation, at least as to the third levy, by the unauthorized temporary use of client funds without the clients' knowledge or permission. That respondent eventually restored the funds, or that he intended to argue for the IRS' restoration of the funds, did not change the

fact that the funds were misappropriated. Rather, the special master found, when the IRS seized client funds to satisfy respondent's personal debt, the funds were converted for respondent's personal use. Respondent's failure to promptly return the funds to the clients for two to three and one-half years, after they were seized, made respondent "complicit in the use, converting it to a misappropriation." Moreover, respondent did not inform the affected parties of the levy or make arrangements to make the clients whole, once he accepted the benefits of the misused funds.

Because respondent acted immediately to have the first two levies reversed, the special master did not find a knowing misappropriation in that regard, but stated that respondent was grossly negligent. However, she found that respondent had acquiesced to the IRS' use of the client funds by failing to take prompt action on the third levy, further reasoning that the passage of time converted respondent's conduct to a knowing misappropriation. Respondent admitted that he waited to contact the IRS because "in part [he] was disgusted with the whole thing. [He] didn't want to go back [to the IRS]." The special master equated respondent's delay in seeking a reversal of the third levy or his failure to timely replenish the funds to "willful blindness." Respondent knew the seized funds were used

for his benefit and acquiesced in their use until returning the funds to his clients in 2013 and 2014. In addition, respondent did not produce evidentiary support of payments to his clients until after the hearing: (1) a copy of an April 22, 2014 letter to Santos transmitting $2,349.98 from trust account #3524, noting that he deducted $400 as his fee; and (2) a Santander Bank record showing a $500 check from the same account, dated September 13, 2013, to Cleveland.

The special master remarked that respondent's problems resulted from his sloppy bookkeeping practices and the disregard of his bookkeeping obligations, notwithstanding that they were highlighted in his prior disciplinary actions.

The special master also found that respondent failed to comply with R. 1:20-20, requiring a suspended attorney to cease using checks or bank accounts designated as attorney accounts and that he failed to transfer the remaining funds from his accounts to an attorney in good standing (R. 1:21-6(j)), thereby violating R. 1:20-20, RPC 8.1(b) and RPC 8.4(d).

The special master recommended respondent's disbarment, or in the alternative, if respondent's misappropriation of client funds was not found to be knowing, then an indefinite suspension.

* * *

The OAE maintains that, for almost three years, respondent personally benefitted from the IRS' use of his clients' funds, which were used to satisfy his personal tax obligations. For respondent's knowing misappropriation of those funds and his other ethics improprieties, the OAE recommended respondent's disbarment. The OAE underscored the fact that respondent could have immediately replenished the levied funds with his own money so that his client funds were no longer impacted, but instead waited until after the conclusion of the OAE investigation to do so.

Respondent's counsel argues that respondent deserves discipline no greater than time served. According to counsel, there was no proof that respondent intentionally misappropriated trust funds based on the IRS levies. Counsel contended that the IRS levy was the antithesis of an intentional misappropriation because "it prevents the attorney from misusing the funds for improper personal obligations." Moreover, a levy lacks all of the legal elements of a required intentional misappropriation of funds. Counsel pointed out that it was "uncontested that the funds subject to the IRS levy were not respondent's funds but

were client funds." Therefore, the levy was a wrongful levy as defined by 28 U.S.C.A. §7426(a)(1).[8]

Counsel argues further that respondent immediately advised the IRS that the levy on the account was an error and contacted the IRS approximately six times about his objection. However, the IRS did not advise him until December 2014 that the levy would not be reversed. Within approximately two weeks of learning that information, respondent borrowed the funds and deposited them into his trust account.

Citing In re Moras, 131 N.J. 164 (1993), counsel argues that an attorney's mere benefit from the use of funds is insufficient to establish an intent to misappropriate funds. In addition, an attorney's failure to immediately replenish negligently misappropriated funds is not a basis to find that an attorney intentionally misappropriated funds.

Counsel considered this case most analogous to In re Noonan, 102 N.J. 157 (1986), where the attorney's temporary suspension, which extended to more than four years, was sufficient discipline because none of the ethics charges against the attorney involved dishonesty, venality, or immorality and

[8] This section permits an individual, who claims an interest in property that was sold as a result of a wrongful levy, to bring a civil action against the United States in a district court of the United States.

the attorney's character and fitness were not irretrievably lost. Counsel added that the inability to identify the owner of unclaimed amounts in a trust account has never been a basis for disbarment.

* * *

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

Despite having been disciplined twice previously for recordkeeping violations, in 2005 and again in 2010, respondent had not resolved his recordkeeping deficiencies as of the OAE's April 23, 2013 demand audit or thereafter. His records were so deficient that the OAE auditor was unable to determine, even from reconstructed records, whether Sabrina Clyburn's funds had remained intact in the trust account for the five and one-half years during which respondent controlled the funds. The OAE, therefore, was unable to establish by clear and convincing evidence that respondent misappropriated those funds. In addition, respondent failed to provide the information that the OAE requested. In part, respondent was unable to comply because of the abysmal condition of his records. However, he also failed to turn over files to the OAE and produced one of the files only

after the ethics complaint was filed. He further failed to submit monthly three-way reconciliations of his trust accounts, despite the OAE's requests and the Court's mandate. Thus, respondent is guilty of having violated RPC 1.15(d) (recordkeeping violations) and RPC 8.1(b) (failure to cooperate with disciplinary authorities).

Count one mistakenly charged respondent with having violated "RPC" 1:20-20, rather than R. 1:20-20, which requires a suspended attorney to disburse all trust funds or to arrange for the disbursement of such funds by a lawfully admitted attorney. Although the complaint should have charged respondent with violating RPC 8.4(d) (conduct prejudicial to the administration of justice) or RPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) for failing to comply with the Court's orders requiring him to comply with R. 1:20-20, specifically R. 1:20-20(b)(5), we do not view this apparently inadvertent omission to preclude a finding that respondent also violated RPC 8.4(d) by his failure in this respect. Rule 1:20-20(c) specifically provides that the "failure to comply fully . . . with the obligations of this rule . . . shall also constitute a violation of . . . RPC 8.4(d) . . . ." Thus, respondent is guilty of a violation of RPC 8.4(d) by operation of law, based on his admitted payment to clients from his trust

account well after his 2010 suspension, but, more importantly, on his admitted withdrawal of fees, even though he could not identify from which client matters those fees were generated.

Respondent's recordkeeping problems were so pervasive that, in February 2009, he opened a second trust account to start off with a "clean slate." Garibaldi explained, however, that, from the outset, the new account was plagued with problems. Because the account was not properly designated as a trust account, the bank assessed various fees against it that caused overdrafts and created shortages in client balances immediately on deposit of their funds. Again, because the account was not properly designated, the bank did not notify the OAE of the various overdrafts.

Respondent's disregard of his recordkeeping responsibilities caused him to invade other clients' funds. For example, on May 26, 2009, respondent deposited $50,000 on behalf of client Eve Merkel, but the funds immediately were impacted by the existing shortage in the account, because he had failed to maintain all of those funds intact in his trust account; he took a fee in the Tunis matter before receiving funds on Tunis' behalf; and he disbursed funds against the Science of Being matter prior to receiving funds in connection with that matter.

Respondent's abdication of his recordkeeping responsibilities was no more evident than when he failed to formally rectify the improper designation on account #9931, thus allowing the IRS to levy on the account three times to satisfy his personal tax obligations. Although respondent took prompt action to have the first two levies reversed, he failed to do so after the third levy. Notwithstanding respondent's claim to the contrary, it appears that it was not until after the ethics proceedings were instituted that he took any action at all. The OAE demand audit, which uncovered the levies, took place on April 23, 2013. Respondent obtained a letter dated January 17, 2014, from a Santander Bank employee, stating that the bank's records showed that the "primary" purpose of account #9931 was to serve as an attorney trust account. However, nowhere in that letter is a reference to any request by respondent that the bank correct the problem with the designation on the account, the exact information that the OAE had requested on several occasions. Also, the letter to the IRS, to which the Santander Bank letter was attached, was dated March 11, 2014, but stamped received by the IRS on December 22, 2014. Respondent failed to produce these letters until after the ethics hearing. The letters, nevertheless, fell short of the proof requested by the OAE.

Moreover, respondent's testimony lacked credibility in respect of the owner of the funds in the trust account at the time of the third IRS levy. He both (1) argued that the funds in the account were his attorney's fees and excess mortgage cancellation fees and the like, and that, therefore, client funds were not impacted by the levy; and (2) informed the IRS that the levy had to be reversed because the funds belonged to his clients, and not to him. Respondent's accountant, however, testified that, at the time he reviewed respondent's records, respondent still owed his clients money from the trust account. Furthermore, respondent's counsel conceded that the money in the account belonged to clients.

Notwithstanding respondent's testimony that he was aware that he had to act within thirty days to have the levy reversed, he professed that, four years later, he was still trying to do so. The fact remains that the IRS levied on $3,441.81 in respondent's account, funds that belonged to respondent's clients Cleveland, Garas, and Santos. Respondent did not have permission from those clients to use their funds. Yet, he did not replenish the levied funds, presumably to account #3524,[9] until the week before the January 29, 2015 ethics hearing. He,

[9] According to respondent's accountant, account #9931 had been closed by the end of January 2012.

therefore, enjoyed the benefit of the use of those clients' funds to satisfy his personal tax obligation, without the clients' knowledge or consent.

Respondent also claimed that he repaid the clients whose funds were impacted by the levy. However, he did not do so until almost three years after the fact. It was not until after the ethics hearing, on March 15, 2015, that respondent submitted a copy of an April 22, 2014 letter to Santos, transmitting $2,349.98 from trust account #3524, and a Santander Bank record showing a $500 check, dated September 13, 2013, to Cleveland from the same account. He presented no proof that he repaid Garas because, he asserted, he was unaware that he had to maintain such proof. If respondent previously had repaid those clients, he would have had no reason to replenish the funds in his trust account one week before the ethics hearing took place.

Clearly, respondent failed to safeguard these clients' funds as well as other clients' funds when he made disbursements on behalf of clients and took his own fees before receiving funds on those clients' behalf.

The question remains whether there is clear and convincing evidence that respondent knowingly misappropriated client funds.

In a somewhat comparable case, In re Brown, 102 N.J. 512 (1986), an attorney deposited a client's $20,000 check and,

rather than wait for the check to clear, began disbursing funds against it in accordance with the client's instructions. The bank dishonored the check and the client was unable to make good on the check. The attorney, therefore, resorted to "lapping," using one client's designated funds for another client's needs. Id. at 514-515.

The attorney's lapping continued for more than four years. His difficulties were compounded when the IRS seized $8,098 from an escrow account that was not properly designated as a trust account and bore the attorney's social security number, rather than the client's. The IRS used the client's funds to pay the attorney's outstanding liens on taxes he owed. The attorney again resorted to lapping to pay that client. It was not until an ethics complaint was filed against the attorney that he refinanced his house to restore the funds missing from the account. Id. at 516.

The Court found that the attorney could not avoid the impact of Wilson by relying on having been victimized by a client who gave him a bad check. For more than four years, the attorney misused trust monies – knowingly so. The attorney's motivation for using the money was unavailing. Ibid.

Citing Wilson the Court stated

> [M]isappropriation . . . 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.
>
> [81 N.J. at 455 n.1.]

As the Court further explained in In re Noonan, 102 N.J. 157, 160-161 (1986)

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is "almost invariable," *id.* at 453, 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.

In this case, unlike Brown, respondent did not knowingly resort to lapping to adjust for a shortage in his trust account.

A knowing misappropriation requires proof that the attorney is guilty of (1) "taking a client's money entrusted to him;" (2)

"knowing that it is the client's money;" and (3) "knowing that the client has not authorized the taking." In re Noonan, supra, 102 N.J. at 160. Each and every element must be proved by clear and convincing evidence. See R. 1:20-6(c)(2)(B). We find that it is the first indispensable element that is missing from the record here. Respondent did not take the money. The IRS took it. The record is far too equivocal to conclude by clear and convincing evidence that respondent knowingly intended for the IRS to levy on client funds as part of a plan to benefit himself. The evidence can equally be construed as showing that respondent failed to act with the diligence and foresight that might have prevented the problem. We find that conduct to be negligence, not knowing misappropriation.

Clearly, respondent was tremendously lax in several respects. He failed to ensure that the bank account was properly designated as an attorney trust account when he opened it. Moreover, he failed to discover that error for a full year before the first IRS levy. Finally, it is true that the record indicates that respondent took some action after the levies to notify the IRS that the money belonged to clients, to have the levies reversed, and to have the bank correct the account designation. However, it is equally evident that his efforts to prevent the levies in the first instance were deficient – and it

is certainly evident that his efforts to prevent the second and third levies were woefully deficient. We can reach no other conclusion but that respondent was neglectful.

In contrast, however, there is no evidence in the record that respondent directed the IRS to take the trust money. There is no evidence that respondent planned to have the IRS take the money. There is no evidence that respondent even had prior knowledge that the IRS was about to serve any of the levies. All that can be said is that respondent should have known the risk of additional levies. Again, that is negligence. Here,

> the evidence about respondent's state of mind is no more compelling in the direction of knowledge than it is in the direction of unhealthy ignorance; and before we will disbar on the basis of a lawyer's knowing misappropriation, the evidence of that knowledge must be clear and convincing.
>
> [In re Johnson, 105 N.J. 249, 258 (1987).]

In addition, the record casts serious doubt on the availability of personal funds that respondent could have used to reimburse the clients any sooner. If an attorney negligently misappropriates funds, his subsequent financial inability to replenish them promptly does not then somehow convert that negligent misappropriation into a knowing misappropriation. See, e.g., In re Colby, 172 N.J. 37 (2002), DRB 01-030 (August 6, 2001) (Slip op. at 14) and In re Prado, 159 N.J. 528 (1999).

Likewise, that respondent may have benefited from the IRS levy does not transform the event into a knowing misappropriation. It is hardly unusual that an attorney found to have negligently misappropriated client funds personally benefited to some degree from the misappropriation. However, a knowing misappropriation cannot be sustained merely on the fact that the attorney has derived a personal benefit from the invaded funds. Indeed, the presence or absence of personal benefit is not relevant to that determination. See, e.g., In re Iulo, 115 N.J. 498, 501 (1989) and In re Brown, supra, 102 N.J. 512.

Disbarment for knowing misappropriation under In re Wilson, 81 N.J. 451 (1979), or In re Hollendonner, 102 N.J. 21 (1985), is — and should be — a bright-line test. An attorney is reasonably held responsible for a purposeful, volitional act in taking funds that belong to someone else. Here, however, respondent did not do the taking. We cannot conflate acts of negligence or evidence of harm to clients into a substitute for this pivotal element. Of course, acts such as respondent's could subject an attorney to discipline for violating any number of other RPCs, for example, negligent misappropriation, failure to safeguard funds, recordkeeping violations, conflict of interest, gross neglect. They just do not fit within the narrow definition

of knowing misappropriation. Thus, we do not find that the evidence here establishes that respondent was guilty of knowing misappropriation.

That said, respondent's recordkeeping practices were shoddy and precluded him from knowing the balance in his trust account at any given time. Thus, it is no surprise that, each time respondent made withdrawals for himself and for or on behalf of clients before he received the corresponding settlement funds, he invaded client funds.

Respondent is no newcomer to the attorney disciplinary system and is well-aware of the recordkeeping requirements. Respondent has been disciplined twice before for his deficient recordkeeping practices – once in 2005, when he negligently misappropriated $28,000 and, again, in 2010. Yet, respondent failed to alter his problematic practices and continued to place his clients' funds in jeopardy.

We are perplexed by respondent's refusal to comply with the recordkeeping rules and troubled by his apparent willingness to treat client funds in any way he sees fit, resulting in repeated negligent misappropriations of those funds. Respondent's refusal to comply with the recordkeeping rules, his failure to comply with both R. 1:20-20 and numerous Court orders, his failure to cooperate with ethics authorities, and his woefully lax

compliance with and awareness of the Rules of Professional Conduct give us no confidence that he will ever conform his behavior to acceptable standards. He has five times before been the subject of discipline, including four term suspensions, and has had every opportunity to learn from his prior mistakes. He has not availed himself of those opportunities and we see no hope that he will in the future.

The primary purpose of discipline is to protect the public from unfit lawyers and to promote public confidence in the legal system. In re Gallo, 178 N.J. 115, 122 (2003). In In re Harris, 182 N.J. 594, 609 (2005), the Court detailed the factors to consider in determining the quantum of discipline to impose on an errant attorney, including: the nature and number of professional transgressions, the harm caused by the transgressions, the attorney's ethics history, and whether the attorney is capable of meeting the standards that must guide all members of the profession. In our view, respondent has no regard for his clients or the disciplinary system and we see no beacon of hope for any change. He is a danger to his clients and to the public-at-large. We, therefore, recommend that he be disbarred.

Members Gallipoli and Rivera join in the recommendation for respondent's disbarment, basing their determination also on a finding that respondent's failure to promptly replenish the

levied funds to his trust account and the attendant benefit he derived from the IRS' use of his clients' funds, constituted an implicit approval of the unauthorized use of client funds, amounting to knowing misappropriation of those funds.

Member Boyer abstained.

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
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Marvin S. Davidson
Docket No. DRB 15-324

Argued: January 28, 2016

Decided: June 29, 2016

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Abstained	Disqualified	Did not participate
Frost	X					
Baugh	X					
Boyer				X		
Clark	X					
Gallipoli	X					
Hoberman	X					
Rivera	X					
Singer	X					
Zmirich	X					
Total:	8			1		

Ellen A. Brodsky
Chief Counsel