SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 16-111
District Docket Nos. XIV-2012-0349E
and XIV-2012-0354E

IN THE MATTER OF	
THOMAS ANDREW CLARK	
AN ATTORNEY AT LAW	

Decision

Argued: September 15, 2016

Decided: January 11, 2017

Christina Blunda Kennedy appeared on behalf of the Office of Attorney Ethics.

John McGill, III 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 ethics master, based on his finding that respondent knowingly misappropriated funds belonging to both unspecified clients and to the beneficiaries of three trusts, a violation of RPC 1.15(a) and (b), and the principles set forth in In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J 21 (1985). The special master also found that respondent violated RPC

1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6) and RPC 8.1(b) (failure to cooperate with disciplinary authorities). For the reasons set forth below, we recommend that the Court disbar respondent for the knowing misappropriation of trust funds belonging to his nephew Thomas Bilgrav and to his client Anaya Grant.

Respondent was admitted to the New Jersey bar in 1986. At the relevant times, he maintained an office for the practice of law in Perth Amboy, known as Seaman and Clark (the firm).

On December 16, 2013, the Court temporarily suspended respondent from the practice of law for failure to cooperate with the Office of Attorney Ethics (OAE). In re Clark, 216 N.J. 338 (2013). On February 12, 2014, he was reinstated, albeit with certain conditions imposed on the use of his attorney trust, escrow, and fiduciary accounts. In re Clark, 216 N.J. 581 (2014). Respondent is currently ineligible to practice law due to nonpayment of the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection.

The firm maintained a trust, escrow, and business account at Wells Fargo Bank.[1] On May 2, 2012, the firm's trust account

[1] Respondent testified that the only purpose of the escrow account was to permit checks made payable to respondent's "escrow account" to be deposited in that account, rather than in his "trust account."

balance dipped to -$752.92, when Wells Fargo electronically transferred $1,639.22 from that account to Chase Home Finance, the mortgage company for respondent's secretary and bookkeeper, Nancy Kauffman. On June 14, 2012, the trust account was overdrawn again, by -$595.27, when the bank electronically transferred a $1,000 "web payment" to 214 Smith, LLC (214 Smith), the firm's landlord.

The overdrafts prompted a demand audit, which took place on September 19, 2012. The audit uncovered the following deficiencies in the firm's attorney records:

- An attorney trust account receipts journal was not maintained;
- An attorney trust account disbursements journal was not maintained;
- Individual client ledger cards either did not exist or were inaccurate and incomplete;
- Monthly attorney trust account three-way reconciliations were inadequate;
- Running balances for the attorney trust account checkbook were not maintained; and
- Respondent's personal funds were commingled in the trust account.

The above deficiencies formed the basis for the RPC 1.15(d) charge against respondent. Although not listed among the above deficiencies, the ethics complaint also alleged that

respondent had made cash withdrawals from the trust account, in addition to electronic online transfers, without proper written documentation.

Respondent admitted all recordkeeping infractions, except the cash withdrawals and the improperly-documented electronic transfers. He asserted two defenses, however.

First, as to the admitted violations, respondent claimed that, prior to the audit, he had no knowledge of the R. 1:21-6 recordkeeping requirements. Rather, respondent maintained his attorney books and records consistent with the longstanding system of poor recordkeeping practices that he had inherited from his father, Andrew V. Clark, Esq., who retired in approximately 2007. Further, respondent testified that it was Kauffman, his secretary and bookkeeper, who had failed to prepare monthly three-way reconciliations, failed to maintain the journals and a running balance in the trust account checkbook, and maintained either inaccurate and incomplete ledger cards or none at all.

Second, as to the cash withdrawals and electronic transfers, respondent claimed that they were carried out by Kauffman, without his knowledge or consent. Indeed, respondent blamed Kauffman for nearly every act of impropriety.

Respondent joined his father's law firm, as an associate, in 1986. At the time, the firm's bookkeeper was Mary Ann Dziba, who had been employed in that role since respondent was five years old. According to respondent, Dziba "ran the show" and told him what to do.

As an associate, respondent had no involvement with the firm's recordkeeping practices. Thus, he did not know whether Dziba maintained the firm's books in accordance with the requirements of R. 1:21-6. Indeed, OAE financial specialist Jasmin Razanica testified that, during the September 19, 2012 audit, respondent stated that he had never taken an accounting course and that he was unaware of the R. 1:21-6 recordkeeping requirements, including the performance of monthly three-way reconciliations.

In 2003, the firm hired Kauffman as a legal secretary. That same year, Dziba left the firm due to illness. She died two years later. When Dziba left the firm, Kauffman "was doing everything," including "all of the books." Prior to assuming Dziba's duties, Kauffman had had no bookkeeping experience. She learned how to carry out those tasks by observing Dziba and asking her questions.

At some point, respondent's father became ill, and, by 2007, respondent had informally assumed leadership of the firm.

When respondent assumed responsibility for the operation of the firm, he made no effort to learn the bookkeeping system that was in place. He neither met with his father to discuss his responsibilities nor consulted the New Jersey Court Rules. Further, he did not employ either a bookkeeper or an accountant during the audit period, that is, September 2011 through August 2012. Rather, Kauffman carried out the firm's bookkeeping responsibilities.

According to respondent, "the system was in place," and he believed that Dziba had performed the recordkeeping "properly." Given Dziba's fastidious nature and respondent's interactions with her since the time he was five years old, he assumed that, when Kauffman took over the bookkeeping responsibilities, she carried out those duties just as Dziba had done. Indeed, respondent considered Kauffman a "very valued employee" and had no reason to suspect that she was engaged in improper conduct.

Respondent allowed Kauffman almost total control over the clerical and financial operation of the firm. He testified that Kauffman opened "every piece of mail," including bank statements, and that he "never saw certain bank records." Respondent was, as he claimed during his September 2012 interview, "in the dark." Thus, the standard by which

respondent measured Kauffman's bookkeeping performance appeared to be whether a client ever accused the firm of not disbursing funds that were due. Respondent testified that, because no client ever made such a complaint, he had no notice of any problem with client funds in the trust account. Thus, he believed that Kauffman was doing a good job and was not handling the firm's accounts in an inappropriate manner. Razanica confirmed that, prior to the firm's receipt of the overdraft notices, the firm's accounting records would not have placed respondent on notice that the trust account was out of trust largely because those records were, in a word, abominable.

Certified public accountant G. Nicholas Hall testified that respondent retained him in March 2013 to "straighten out his attorney records," the condition of which Hall described as "[p]robably one of the worse [sic] I've seen." The records were so poorly kept that Hall had no "starting point."

Hall reviewed bank statements, check stubs, deposit tickets, and receipts journals that identified the client, amount received, and the date received, but contained no tallies. There was not enough information in the existing records to allow Hall to determine the running balances. Further, the deposit tickets, which Hall used to identify client

funds, either were illegible or contained mistakes, such as the identification of the wrong client. The receipts journals also were either difficult to read or incomplete. At times, Hall had to review the client file in order to identify checks written or deposits made. In addition, the trust account reconciliations, which Kauffman prepared, were not accurate. For example, they did not reflect any shortages in the trust account.

Given the absence of an orderly system of bookkeeping, it is important to understand how respondent and Kauffman handled the firm's finances. Thus, we summarize their procedures as follows. Despite respondent's professed ignorance of the recordkeeping rules, and the firm's own recordkeeping practices, he understood that fees were to be kept in the business account and that the trust account was for funds relating to real estate transactions and monies paid to the firm and its clients in negligence cases.

Further, notwithstanding respondent's claim that he relied on Kauffman's compliance with the firm's longstanding recordkeeping practices, he had his own system of "keeping track of funds," based on the amount of fees that were paid to the firm. Yet, his testimony regarding the handling of the fees was inconsistent. On the one hand, respondent "assumed" the fees

were deposited in the business account. On the other hand, he claimed that fees were retained in the trust account.

Kauffman testified that, when she took over the bookkeeping duties, she continued to follow the firm's practice of retaining fees in the trust account, which were transferred to the business account only "when they needed it." To pay a bill or cover payroll, Kauffman wrote a check from either the trust or the business account.

According to respondent, when payments were made from the wrong accounts, it was Kauffman's fault. He testified: "Nancy Kauffman made the payments. I assumed they would come from the right source."

Both respondent and Kauffman had signatory authority for the business account, which was used to pay bills and salaries, using two differently designated checks.[2] Kauffman prepared the payroll checks, which respondent signed if he was in the office. Her net weekly salary was $541.40. Respondent's was approximately $803.

In addition to respondent's method of tracking fees, he knew that there were "always cash flow problems." When the business account balance was low, Kauffman would tell

[2] Although there was one linked account, one set of checks was designated "payroll," and the other "business account."

respondent, who would then deposit personal funds in the account.

Kauffman also lent money to the firm when its accounts were low. On February 19, 2009, for example, Kauffman deposited a $235 personal check with the notation "Discover," representing a payment for respondent's personal credit card, which he used for the payment of firm expenses. On May 8, 2009, she deposited $200 into the account via a personal check with the notation "loan repayment." On May 22, 2009, she contributed another $200 to the business account.

According to respondent, he and Kauffman tracked their loans, which were in even dollar amounts, on a "casual basis." When money "came in," they were repaid.

In addition to Kauffman's deposit of personal funds in the business account, she made payments directly to the firm's and respondent's creditors. For example, she paid the firm's rent on occasion and once took out a cash advance against a personal credit card to do so.

Kauffman also used a personal credit card to pay some homeowners insurance premiums for a home owned by respondent's mother. Although Kauffman had no interest in the property, she paid the premiums because they "had to be

paid," respondent "wasn't around," and she did not want the policy to lapse.

Kauffman testified that, although she did not tell respondent about every payment she had made on the firm's behalf, she did "mention" it to him when she paid the rent "or some other kind of bill or something like that." Kauffman repaid herself with monies taken from firm accounts and informed respondent that she had taken "some of it back." She maintained that he never told her to use client monies for either her or his personal purposes.

In addition to the business account, Kauffman regularly deposited personal funds into the firm's trust account. For example, in 2009 and 2010, she made eleven individual deposits of $50. She also made a $100 trust account deposit in November 2009, and three deposits, totaling $700, in 2010.

In 2011, Kauffman made three trust account deposits, totaling $2,150.[3] One of Kauffman's checks, dated July 6, 2011, in the amount of $2,000, contained the notation "Loan/Zalek payment." "Zalek" referred to the settlement of a legal malpractice case instituted against respondent and the firm by William Zalek and Jean Psolka-Zalek (the Zaleks),

[3] On February 19, 2010, Kauffman deposited $30 into the escrow account.

which respondent had settled for $225,000. Kauffman explained that she lent the money to the firm so that it could make the required monthly payment to the Zaleks. When the special master asked Kauffman why she did that, she answered:

> Because at the time we didn't have money and I felt I was with Tom for such a long time and I just felt to help the company to get it paid so that there wouldn't be any problems or anything like that. Never did I think of anything that I was doing -- I'm not even going to say I did it wrong. I did it because I thought it was the right thing to do to get the people paid.
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> [1T31-16 to 24.][4]

Kauffman stated, on the one hand, that respondent knew that she was infusing the trust account with personal funds. On the other hand, she claimed that she had merely "mentioned it to him," "probably after the fact," but that she did not know whether he would remember. Respondent denied any knowledge that Kauffman had deposited funds into the trust account.

Kauffman testified that, when she reimbursed herself for loans to the firm, she removed funds from whichever account had sufficient monies available.

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[4] "1T" refers to the transcript of the April 20, 2015 hearing before the special master.

In addition to lending money to the firm, Kauffman took funds in the trust and business accounts for her personal use. She testified, inconsistently, both that she did and did not borrow money from the firm's accounts. Although she specifically mentioned a loan, her testimony, taken as a whole, suggests that her common practice was to use funds in firm accounts to pay her bills on those occasions when she was not paid her salary.

In respect of the loan or loans that she claimed she took from the firm, Kauffman could not say whether respondent knew of the specific loans at the time they were made. In this regard, her testimony was vague:

> Q And the loan that you were repaying, was Mr. Clark aware of that?
>
> A I'm not sure. You know, I had mentioned it to him, but whether or not did I specifically say I'm paying 50 bucks. You know, I can't say that he was aware.
>
> Q So, you were repaying certain funds. Was he aware that there was a loan that you needed to repay? Was he aware that there had been a loan taken?
>
> A No. I told him. You know, I had mentioned it to him. Whether or not he remembered, I can't say.
>
> SPECIAL MASTER: Did he authorize you to make the loan from the business from any account to yourself or did you just

write the check to yourself to repay the loan?

THE WITNESS: No, I had told him, you know, when I had taken money. You know, and I said I'm going to take this back for part of the loan. Is that what you mean? I'm confused.

SPECIAL MASTER: Well, did he know that you were loaning yourself money from the business?

THE WITNESS: For the mortgage?

SPECIAL MASTER: For any reason.

THE WITNESS: I had mentioned it to him. Whether or not it was remembered, I can't say.

[1T32-24 to 1T34-3.]

Despite the above exchange, Kauffman later testified that she had not taken personal loans from the firm. Rather, she "took the money" to pay debts, such as her monthly mortgage payment. Kauffman paid her mortgage with firm funds "[q]uite a few" times, though she could not recall how many. She was not sure whether she took the loans before or after she had deposited her personal funds in the firm's "accounts." Kauffman did not have a complete record of the money she had deposited and withdrawn from the firm's accounts.

According to Razanica, respondent acknowledged that Kauffman was not paid every week. Respondent claimed that

Kauffman paid herself for the missed weeks when funds became available and that he was aware of this practice. Kauffman's testimony on this issue, however, was inconsistent.

Kauffman claimed that she would inform respondent when she could not be paid, and "he would, you know, get the money so we could get paid I guess from his personal funds, you know, to make sure we got paid." Yet, she testified that, in lieu of payment, she would use trust and other funds to pay her bills. For example, Kauffman sometimes paid her mortgage using funds held in the trust and business accounts. She explained:

> I mentioned it. I don't know whether [respondent] knew, but probably this is going to be wrong too. If I didn't get paid, my mortgage had to get paid. So, if I didn't get paid for the month I paid the mortgage.
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> [1T56-22 to 1T57-1.]

Kauffman did not keep track of the number of paychecks that she did not receive because, she stated, the payroll book would reflect that those checks had not been issued. Her W-2 statements reflected only the amount she was paid. Although Kauffman maintained a list of how much money she had reimbursed herself for payments made on the firm's behalf, she testified that she did not know whether she had been repaid in full. She did not believe so, however.

As to the improper cash withdrawals from the trust account, Razanica testified that three trust account checks, representing respondent's $803 weekly salary, were cashed in March 2012. Respondent denied that he had cashed those checks, declaring, "I never made any cash withdrawals from my trust account at any time knowingly period, ever." According to respondent, Kauffman cashed the checks and handed the money to him, although he never authorized or told her "to do it that way," and he did not "know that she was doing it that way."

Respondent further denied that he had issued a trust or escrow account check to cash; authorized Kauffman to make such withdrawals from either the trust or escrow accounts; consented to those transactions; or had knowledge of her doing so. In short, respondent insisted that he knew nothing about checks payable to cash. Yet, he did admit that, on February 6, 2009, he personally signed a $1,500 trust account check, payable to cash, which was then endorsed by Kauffman.

In addition to the cash withdrawals, Razanica testified that funds were transferred from the trust account to pay personal credit card bills. For example, on March 15, 2012, a $2,100 payment was transferred to 214 Smith. On March 20, 2012, a $1,639.22 electronic payment was made to Chase Home Finance, and, two days later, $200 was electronically

transferred to Discover. Razanica assumed that respondent had made the electronic transfers because he had told the OAE that he maintained full control of the account and, further, that he was "the only one that was handling the trust account issuing checks."

Respondent, however, denied having made electronic transfers from the trust account, claiming that they were made by Kauffman. Further, he did not know whether the transfers had been made without proper written documentation because he did not know what documentation was required.

On September 27, 2012, the OAE informed respondent of the deficiencies that it had uncovered at the September 19 demand audit. The OAE requested that, within forty-five days, respondent submit the following documents:

1. A monthly reconciliation of all trust account funds from September 2011 through September 2012, including a copy of the bank statements and a list of names and amounts held for all clients at the end of each month.

2. Client ledger sheets for all clients and beneficiaries for whom funds were held at the end of the month stated.

3. Receipts and disbursement journals for the one year period preceding the audit.

According to Razanica, forty-five days was the standard amount of time for an attorney's compliance with such a demand.

On October 25, 2012, before the forty-five-day period had expired, the OAE scheduled a second demand audit for November 9, 2012. In the October 25 notification letter, the OAE asked respondent to produce, and be prepared to discuss, files for the following client matters: Estate of Nellie Smith; William Zalek and Jean Psolka-Zalek; Nancy J. Kauffman; and Channel 46 Associates.

The complaint alleged that, at the November 9, 2012 audit, respondent failed to identify the exact amount of funds that he had borrowed from Thomas Bilgrav; failed to produce evidence that he had issued a $1,801.23 trust account check to Andrew Bilgrav; and failed to provide an explanation for the $12,293 in trust account checks issued to Kauffman, the monthly trust account payments to Chase Home Finance on behalf of her husband, Richard Kauffman, and the numerous unidentified wire transfers to and from the trust account.

Respondent admitted that he failed to provide this information, but claimed that none of it had been identified in the OAE's letters of September 27 or October 25, 2012. He could not recall whether the OAE had made an oral request for these documents and information at the September 19, 2012 audit.

Although the OAE gave respondent an additional ten days to comply, he did not meet that deadline, complaining that ten days was not enough time.

Respondent testified that his efforts to comply with the OAE's demands were hampered by Kauffman, who was not forthcoming when she and respondent were reconstructing the records. He claimed that the reconstructed reconciliations and other information requested were within the sole knowledge and possession of Kauffman, who did not cooperate and provide him with "full disclosure of facts to which only she was privy." Respondent did not know where Kauffman kept the reconciliations and client trust ledgers, and he "couldn't access" them.

Respondent eventually produced all of the client files requested by the OAE, except for the Kauffman file because she was not a client and, thus, there was no client file for her.

By November 19, 2012, respondent had produced only some of the requested documents and, even then, "most of them were partial or inaccurate." On December 19, 2012, after placing four unanswered calls to respondent's office, the OAE faxed a letter informing respondent that, unless he produced the documents within two days, the OAE would seek his immediate

temporary suspension. Still, respondent did not comply. Instead, on that date, he obtained an extension to December 27, 2012.

On December 27, 2012, respondent hand-delivered documents to the OAE, but they were "inaccurate, partial, previously provided, and/or . . . not requested." As of that date, respondent still had not provided the OAE with

- a client ledger card for Thomas A. Bilgrav;
- the date(s) of unauthorized withdrawal(s) of Thomas's funds;
- an accounting of the funds he withdrew from Thomas's monies;
- an accurate list of all disbursements made to Ayana Grant; and
- copies of records reflecting all deposits and disbursements made in reference to Kauffman.

Respondent admitted the above infractions, but asserted that they did not amount to a failure to cooperate, because he had "attempted in good faith to fully comply with the OAE's requests for information," by either providing numerous original documents and files in his possession or compiling and providing "numerous reconstructed documentary information," as R. 1:21-6 requires. Further, he asserted that the delay was caused by the scope of the requests and

the magnitude of the undertaking required to bring the records into compliance. Thus, he argued, "the OAE's standard guidelines for timely compliance do not provide a fair measure of Respondent's cooperation, under the circumstances."

On January 9, 2013, the OAE filed a motion for respondent's temporary suspension, based on his continuing failure to provide records. On February 27, 2013, the Court denied the motion, but ordered respondent to provide "all records and information demanded [by the OAE] to date," within sixty days. In the Matter of Thomas A. Clark, M-649 September Term 2012 No. 072036 (February 27, 2013). Hall testified that respondent retained him on March 8, 2013. Hall completed his reconstruction of respondent's records within forty-five days, with perhaps a one-week extension.

As seen below, the evidence demonstrated that, although respondent had failed to comply with the OAE's demands, he was operating under a clear disadvantage, caused not only by his apparent disinterest in understanding the firm's recordkeeping obligations and ensuring compliance with them, but also by the conduct of Kauffman, who, given respondent's lax supervision, was able to actively deceive him about the OAE's investigation.

Due to Kauffman's conduct, respondent did not know about the May and June 2012 trust account overdrafts until the September 19, 2012 demand audit. He never saw the letters that had been exchanged between the OAE and his office prior to the audit because Kauffman had intercepted them.

Kauffman testified that, on May 21, 2012, the OAE notified respondent's firm of the $752.72 overdraft in the trust account. On June 1, 2012, unbeknownst to respondent, she wrote a letter of explanation to the OAE and signed his name. Kauffman did not tell respondent about either letter until months later.

On July 2, 2012, the OAE requested copies of trust account bank statements, three-way reconciliations, and client ledger cards for the period covering April, May, and June 2012. Respondent denied Kauffman's claim that, at this point, she had informed him about the overdraft letter and the reply that she had submitted. Subsequent events suggested this to be accurate.

By the following month, the OAE had not received a reply to its July 2, 2012 letter and, thus, followed up on its request. On August 2, 2012, Kauffman drafted a letter, under respondent's signature, apologizing for the delay and assuring the OAE of the following:

> I have told my office to verify the account balance before any checks are to be written out of the accounts. Due to clerical error and employee error, this was not done and the account became negative and was immediately rectified by my office. I have since made [sic] change of staff in my office to rectify this situation in hopes to not have this problem occur again. In no way am I trying to make excuses for this error occurring.
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> [Ex.R14.]

Kauffman stamped respondent's signature to the letter.[5]

Kauffman did not tell respondent about the August 2, 2012 letter. Respondent knew nothing of the communications between the OAE and his office until just before the September 2012 audit. He explained:

> Kauffman had opened, had taken and had not shown me and had actually written I think two letters back to Mr. Rakowski [sic] in my name and I think one she squiggled and one she stamped as if they were from me and I knew nothing about that and I knew nothing about that at the first meeting when they came to me, when ethics came to me and I knew nothing about it in November when they came to me is my recollection.
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> [4T127-5 to 20.][6]

Respondent believed that Kauffman's deceptive actions were undertaken by her, with his best interests in mind, as she

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[5] The signature stamp is discussed in detail, infra at 25-26.

[6] "4T" refers to the transcript of the May 4, 2015 hearing.

perceived them. Thus, respondent, who believed that an overdraft was not "a big deal," comforted a distraught Kauffman prior to the September 2012 audit, emphasizing that the OAE was coming to talk to him, not her.

Kauffman's deception continued even after the September 19 audit. Kauffman drafted a reply to the OAE's October 24, 2012 letter, notifying respondent of the second trust account overdraft, and stamped respondent's signature on it. The letter explained the cause of the overdraft and the actions that respondent was taking to address the issue. As before, respondent knew nothing of these additional communications prior to the November 2012 audit.

Despite Kauffman's role in the bookkeeping and in the OAE's investigation, Razanica maintained that the non-cooperation charge against respondent was justified.

In addition to the recordkeeping and failure-to-cooperate charges, the complaint alleged that respondent knowingly misappropriated funds held in trust for his nephews, Thomas and Andrew Bilgrav, and for Anaya Grant. Further, the complaint charged respondent with knowingly misappropriating other trust account funds in order to make settlement payments to the Zaleks and to fund disbursements made to or on Kauffman's behalf.

Before detailing the facts underlying the alleged acts of knowing misappropriation, we explain first the history and use of "the stamp." The stamp reproduced respondent's signature, and Kauffman used it frequently when she issued checks against the firm's accounts.

Kauffman testified that, when respondent's father was in charge of the firm, the firm maintained a signature stamp for respondent, his father, and another partner, which "the secretary" kept in the drawer. The stamp was used for letters and checks, "if he wasn't around." Kauffman testified that respondent was aware of the stamp, although she did not know whether he had personally used it.

Respondent testified that, prior to the OAE's investigation, he was not aware of the signature stamp's existence. Kauffman disputed his claim, stating that he signed letters enclosing checks that he did not sign. Alternatively, when respondent was told that a check had been stamped with his signature, he would say "ok."

In respondent's answer to the complaint, he stated that he did not learn of Kauffman's use of the signature stamp until January 2013. When he asked her to return it to him, she claimed that she had destroyed it. However, respondent learned that Kauffman's claim was untrue, as many of the

checks that were the subject of the OAE's complaint had been stamped with respondent's signature by Kauffman, without his knowledge or consent. Thus, respondent claimed, he was a victim of his misplaced trust in Kauffman, as well as her poor recordkeeping practices and improper conduct.

Razanica disputed respondent's claim that he did not learn of Kauffman's use of his signature stamp until January 2013. For example, Razanica testified that, on May 25, 2012, an $803.05 trust account check (no. 6264), was issued to respondent. Although respondent's signature was stamped on the front of the check, the endorsement on the back was respondent's actual signature. Moreover, Razanica believed that respondent was well aware of the use of the signature stamp on trust account checks because, as shown below, "maybe 70 percent" of all trust account checks were stamped.

THE BILGRAV TRUSTS

In 2011, respondent's nephews, Thomas and Andrew Bilgrav, each inherited $10,342 from their grandmother. The grandmother's will named respondent trustee and charged him with investing the nephews' monies, which were to be used for their maintenance, education, and support.

Neither Thomas nor Andrew was to receive his bequest until age thirty. At the time of the inheritance, Thomas was twenty-one years old, and Andrew was twenty-six.

On September 29, 2011, Thomas's funds were deposited in the trust account, and Andrew's were deposited in the escrow account. Respondent denied that he deposited the funds into the accounts. Rather, Kauffman made that decision. Respondent did not instruct her to do that, and he did not know that she had done that. Respondent did not maintain ledger cards for the Bilgravs.

Thomas Bilgrav

The complaint alleged that, on September 30, 2011, respondent authorized Kauffman to remove $4,000 of Thomas's monies and place them in the business account, at which point they were used to pay various expenses.

As stated above, Thomas's $10,342 was deposited in the trust account on September 29, 2011. The next day, September 30, 2011, trust account check no. 6174, in the amount of $4,000, was issued to the firm. The memo line contained the notation "Loan from Bilgrav." Respondent's signature was stamped on the check. Kauffman did not know whether she or respondent had stamped the check. The trust account balance was now $5,864.62.

The $4,000 trust account check was deposited in the business account on the same day. Prior to the deposit, the business account balance was $1,558.53. The deposit raised the balance to $4,658.53.[7]

In respondent's answer to count three of the complaint, he denied that he had authorized Kauffman to disburse Thomas's funds. Instead, respondent asserted that

> Kauffman's actual disbursements of Thomas' funds were made without Respondent's knowledge or consent and were the product of her poor recordkeeping practices inherited prior to Respondent taking over the law firm, her lack of candor, cooperation and full disclosure with Respondent regarding the true state of her handling of his attorney books and records, as well as her improper conduct.
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> [A,C3¶6.][8]

Respondent emphasized to the special master that the disbursements were made without his knowledge or consent. Moreover, he could not "imagine" that he would have withdrawn the funds the day after they were deposited because "they wouldn't even have time to clear."

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[7] The new balance was $900 less than $5,558.53 because two checks, totaling $900, were posted on that same date.

[8] "C" refers to the formal ethics complaint, dated October 24, 2013. "A" refers to respondent's verified answer, dated January 28, 2014.

Although respondent denied that he had taken $4,000 of Thomas's funds in September 2011, he made it plain that he did "borrow" $7,500 of Thomas's monies, in March 2012. In respondent's answer to the ethics complaint, he asserted that he "held a good faith belief that he had been previously authorized by Thomas' family to borrow Thomas' trust funds for whatever purpose [he] deemed appropriate in his sole discretion, including his own personal use." Razanica, however, testified that, prior to the filing of the complaint, respondent, who was interviewed three times, never stated that anyone in the Bilgrav family had given him permission to use the money.

Respondent testified that, in addition to his good faith belief that he had been authorized by Thomas's family to borrow the monies, he had sufficient funds of his own in another account to cover the $7,500. Thus, he testified, in March 2012, he authorized Kauffman to "access" $7,500 of Thomas's monies.

Nonetheless, respondent claimed that, at the time of the "loan," the business account balance was low, but Kauffman told him too late in the day for him to get funds from his personal account. Thus, he directed Kauffman to "take it from Tommy's money" and deposit the funds in the business account. He

maintained that the money was withdrawn from the account with the intention to "replace it immediately."

Respondent stated at the interview that he took the funds in March 2012, but acknowledged that he "could be wrong." In fact, $7,500 was not removed from the trust account and deposited in the business account in March 2012, but rather six months earlier under the circumstances he had described. The OAE never found a $7,500 check. It found only a $4,000 check.

Several disbursements followed the deposit of Thomas's $4,000, in September 2011. On October 3, 2011, a $1,500 "web" payment was made to 214 Smith. The next day, a $270 "Epay" payment was made to Chase, with the reference "Nancy Kauffman." Kauffman testified that, although she "sometimes" told respondent that she had paid her Chase account with business account funds, she did not tell him "all the time."

On October 5, 2011, a $530 check was posted to the account. On October 6, 2011, a $321 online payment was made to Capital One, and a $15 business account check was posted. At this point, the business account balance was $2,022.53. Razanica testified that these payments could not have been made without the $4,000 infusion of Thomas's funds.

In terms of the trust account balance in March 2012, when respondent first thought he had taken Thomas's funds,

Razanica testified that, even during that month, the balance was as low as $5,307.05. Although the balance fluctuated from April through July 2012, in each of those months it fell below the $10,000 he should have been holding in Thomas' behalf alone. At one point, all of Thomas's funds in the trust account had been "impacted."

In determining that Thomas's $10,000 did not remain intact in the trust account, Razanica did not consider other clients' funds because he did not have ledger cards, which would have reflected whether other clients' monies were in the trust account.

Respondent's sister, Dorothy Bilgrav, Thomas, and Andrew testified on respondent's behalf.[9] Dorothy described her relationship with respondent as "pretty amazing." They had been "very close" since childhood. Indeed, Dorothy stated that all the Clark siblings were "very close" and that members of the family had routinely borrowed money from each other and paid it back.

Dorothy claimed that she had given respondent permission to use Thomas's funds. About six months after the grandmother's death in 2010, Dorothy asked respondent if Andrew could receive

[9] Because the witnesses share a surname, we refer to them by their first names.

his money prior to age thirty, as he had approximately $9,000 in student loans that were due to be paid. She explained:

> Sometime after the will was probated and we knew what money the boys were going to receive, I spoke with my brother to find out if we could get Andrew's money before he turned 30 because he needed that to repay student loans. At the same time I said to him that I knew that Tommy wasn't going to be getting his money until he was 30 and that if it needed to be used in any way, because I knew that the office was going through some difficulties and that if he needed to borrow that for a time that that was all right as long as he put it back.
>
> I don't know that I used the word borrowed, but I knew that it wasn't going to be used for something like eight years between the time that the will was probated and the time that Tommy would receive it.
>
> [4T20-19 to 4T21-10.]

Although Dorothy was not aware, at the time, that the firm was having money problems, she did know that there were "highs and lows." Thus, even though respondent neither asked to borrow the money nor indicated that he needed to borrow money, "[i]t was something [she] threw out to him if he ever needed it." She cautioned respondent, however, to "make sure you put it back because it's going to be there for like eight years." She asserted that it was always understood that the money would be returned.

Dorothy never considered the issue of respondent's paying interest on any monies that he might borrow. It also never occurred to her whether she even had the right to authorize respondent to borrow Thomas's money, given that he was an adult. Respondent never told her that Thomas's money was neither hers to give nor his to take or that she did not have the right to authorize him to use Thomas's money.

Respondent gave no indication to Dorothy that he might borrow the funds. She emphasized that their conversation was not taken seriously by either of them, as it was "just a comment" that she had made.

Dorothy learned that respondent had used Thomas's funds on July 25, 2013, when an OAE representative called Thomas to schedule an interview and asked if she knew that Thomas's funds had been used. The OAE representative also questioned whether respondent had ever asked Dorothy if he could borrow money from the trust, to which she answered "no." She then volunteered to the representative that, "if he had asked . . . me it would have been fine with me" because family members had "always borrowed money from each other and paid it back."

When asked why she told the OAE that, if he had asked permission to use the funds, she would have granted it when she

was now testifying that he had had permission all along, Dorothy answered:

> Because [respondent] didn't ask. We had a discussion. I offered that information to him, but he never – you know, he never outright directly said, hey, I need money, can I borrow the money.
>
> [4T44-3 to 6.]

Dorothy clarified that, during this first conversation with the OAE, she had intended to convey that respondent had permission to use the funds, even though she told the OAE the opposite, that is, that he did not seek her permission. She claimed that her omission was due to her discomfort during the conversation, which she described as abrupt.

Dorothy agreed, therefore, that, during the first conversation with the OAE, she had not disclosed that she had given respondent the authority to use Thomas's money.

Although Dorothy was in the room with Thomas during his August 1, 2013 OAE telephone interview, she was not questioned. Further, she did not ask to speak with either of the two OAE representatives to tell them respondent had permission to borrow Thomas's funds because, again, she felt "very uncomfortable" with the "very sharp and abrupt" way they were speaking to her and Thomas.

Thomas testified that he could not recall having given respondent permission to use his funds. Nevertheless, as of the date of his testimony, Thomas approved respondent's use of his monies, as if respondent had asked him for permission at the time the funds were used.

Andrew Bilgrav

As stated above, Andrew's $10,342 was deposited in the escrow account on September 29, 2011. On October 5, 2011, $8,540.77 of Andrew's money was used to pay a student loan, reducing the amount of available funds to $1,801.23. The monies did not remain intact, however.

On November 1, 2011, the escrow account balance was $2,228.60. On November 4, the bank posted a $500 escrow account check, issued to Kauffman, reducing the balance to $1,728.60. This was $72.63 less than the amount that respondent should have been maintaining for Andrew. In fact, in addition to the deficiency in the escrow account, on November 4, 2011, the account also held insufficient funds for Andrew for almost one year — from January 10, 2012 to July 11, 2012, and from July 23, 2012 to December 12, 2012.

The testimony established that, during the above periods, many escrow account checks were issued for the payment of expenses that were not properly paid from an escrow account. For

example, on November 14, 2011, a $1,639.22 escrow account check was issued to Chase. On December 16, 2011, a $100 escrow account check was issued to Kauffman. Both checks were stamped with respondent's signature. Neither was attributable to a client obligation with corresponding funds on deposit.

During respondent's three interviews with the OAE, he never claimed that he had permission to use Andrew's funds other than for Andrew's benefit. Respondent admitted that, on January 10, 2012, escrow account check number 1060, in the amount of $1,425.90, issued to the company that provided homeowners insurance for his mother's property, had invaded Andrew's funds. He claimed, however, that it was Kauffman who had issued the check.

Andrew's funds were further misappropriated when the following escrow account checks were issued and paid:

Date	Payee	Amount	Trust Account Balance	Andrew Deficit
01-13-12	Kauffman	$540.00	$582.05	$1,219.18
01-24-12	Kauffman	$200.00	$382.05	$1,419.18
04-18-12	The Firm	$200.00	$149.05	$1,652.18
07-06-12	Cash	$803.00	$804.08	$997.15
07-09-12	Kauffman	$250.00	$554.08	$1,247.15

All of the checks were issued by Kauffman and stamped with respondent's signature.

Respondent testified that he did not authorize Kauffman to make these disbursements, he did not consent to the disbursements, and he did not know about them. Rather, he recalled having issued a check to Andrew for the balance of his inheritance, but could find no documentation to support his recollection:

> In other words, you understand there was the ten thousand and change that was left to him by the grandmother. 8,900 or so, whatever the amount was, was paid for his educational trust and the balance was $1,801.23 and I swore, and Christina -- Miss Kennedy knows I swore we sent that out and I wanted proof of it. I couldn't find the check. I couldn't come up with the check and yet I swore we did and now again, is it paranoia on my part to I believe that she came to me with a letter and check, I signed the check and she took it and threw it out or ripped it up because she had already used the money and it wasn't there? I mean why was I so certain?
>
> [4T117-17 to 4T118-5.]

Respondent answered his own question, stating that he was "positive" that Andrew had been paid. He had a "very clear recollection" of Kauffman preparing the letter and the check and bringing them to him for his signature, after which "it would have gone out."

When Andrew told respondent that he had not received the funds, respondent sent the monies to him, after deducting

$475 in fees incurred in representing Andrew in connection with some traffic violations.

Like Thomas, Andrew also testified that he wished to grant respondent "after-the-fact" permission to use his monies.

Both Thomas and Andrew understood that, if respondent had used their funds without permission, they could sue him, report him to the police, seek his disbarment, and file a claim with the New Jersey Lawyers' Fund for Client Protection. Neither wished to do so, however.

Respondent admitted, at an OAE interview, that his nephews neither gave permission nor knew that he had taken the funds. He also admitted that Dorothy did not authorize him to borrow the money.

THE ANAYA GRANT TRUST

Upon his father's death, respondent became the alternate trustee for Anaya Grant under the terms of the will of her grandmother, Nellie M. Smith. Grant's trust funds were invested with Sun Life Financial. Grant received monthly payments, which were to be used for her education, rent, "whatever she needed it for." Respondent did not have a ledger card for the Anaya Grant trust.

When a payment was due to Grant, the firm requested the funds from Sun Life, deposited the monies into its different accounts, and sent a check to Grant.[10] Kauffman prepared the checks, which were signed by respondent or, if he was not in the office, stamped by her. Kauffman did not know whether respondent ever used a signature stamp on trust account checks issued to Grant. She admitted to Razanica, however, that she had stamped respondent's signature on the Grant trust account checks, albeit with either respondent's authorization or awareness.

Razanica testified that, between March 25, 2009 and June 14, 2013, respondent received from Sun Life, on Grant's behalf, a total of $90,471.87. The disbursements made by respondent on Grant's behalf totaled $66,927.90. Thus, $23,543.97 should have remained available to Grant.

The OAE prepared a chart reflecting the payments from Sun Life, the accounts into which they were deposited, the amount of each deposit, the total funds held by respondent in all accounts, and whether the balance in those accounts was enough to cover the amounts he should have been holding for Grant at the time. To determine the balance in all three firm

[10] On July 1 and August 26, 2013, the firm deposited two Sun Life checks, totaling $3,400.72, directly into Grant's personal Wells Fargo account.

accounts, on the date of either a deposit or a disbursement pertaining to Grant, Razanica totaled the balance in each account on the corresponding date, as reflected on the actual bank statements. For example, the first deposit, on March 25, 2009, was $8,138.57. At that time, the total balance for all firm accounts was $15,851.06. Thus, there was an "overage" of $7,712.49, on that date.

Respondent's total balance in all three firm accounts was short, for the first time, on January 12, 2010. On that date, he should have been holding $10,960.07 for Grant, but the total balance in all accounts was only $6,439.47, leaving a $4,520.60 shortage in Grant's funds.

By February 11, 2010, respondent should have been holding $15,973.07 for Grant, but the balance in all accounts was only $7,728.55, resulting in a $8,244.52 shortage. There followed many more shortages, but the greatest shortage — $48,992.50 — occurred on March 1, 2011, when respondent should have been holding $52,906.04 for Grant, but his account balances totaled only $3,913.54.

Razanica identified every check issued to Grant over the years. Of the fifty-four checks issued to her, respondent signed only four (trust account check nos. 5788, 5802, and 6302, and business account check no. 15037). The rest were stamped or, in

the case of some of the business account checks, signed by Kauffman.

Razanica prepared a second chart, reflecting the dates on which the total balance for all accounts was below the amounts respondent should have been holding for Grant. On December 1, 2011, for example, respondent should have been holding $41,136.04, but the total balance for all accounts was only $39,769.72, representing a shortage of $1,366.32 for Grant alone. On September 29, 2011, $10,342 had been deposited in the trust account for the benefit of Thomas Bilgrav. Thus, on December 1, 2011, the trust account was short of Thomas's funds as well. Indeed, respondent did not hold sufficient funds for either Grant or Bilgrav from December 1, 2011 through October 2, 2012. Razanica's chart did not identify the transactions that caused the invasions.

On October 1, 2012, respondent issued a $1,000 trust account check (no. 6310) to the firm, in the Grant matter, which was then deposited in the business account. Razanica testified that the $1,000 represented the payment of a fee, although there was no such indication on the check. During one of respondent's OAE interviews, he stated that his father had taken a fee when the trust was established. Thus, according to Razanica, respondent was not entitled to the $1,000.

Respondent agreed that he was not entitled to a fee for his handling of Grant's trust funds. He was unaware of the $1,000 check, which was issued by Kauffman.

Respondent admitted that he did not have Grant's permission to use any of her funds, but asserted that he did not know that Kauffman was taking Grant's monies.

THE ZALEK SETTLEMENT PAYMENTS

The OAE claimed that respondent used trust monies to fund the settlement payments that he was required to make to the Zaleks. The settlement terms required the payment of $25,000 on September 1, 2009 and $15,000 on November 11, 2009, followed by monthly payments of $2,000 until the settlement was paid in full. Respondent claimed that he disbursed the first payment of $25,000, in September 2009, but that Kauffman disbursed the second payment, in November. Respondent signed the $25,000 check, but his signature was stamped on the November 2009 check. Both payments were made from the trust account.

Respondent did not maintain a ledger card for the Zalek matter. He claimed that there was no need to track the settlement payments because "they weren't ending soon."

Of the thirty-nine trust account checks issued in the Zalek matter, only six were signed by respondent. All other trust account checks were stamped with his signature.

According to Razanica, respondent stated that the Zalek settlement payments were issued from the trust account and were funded by earned legal fees that were retained in the trust account for that purpose, in addition to personal funds, which he would deposit into the trust account on occasion. Razanica testified that the trust account bank statements did not reflect corresponding deposits, made on behalf of the Zaleks, prior to the issuance of trust account checks to them. Respondent claimed that he issued trust account checks for the payments to the Zaleks to demonstrate good faith on his part.

Razanica identified the client ledger prepared by Hall. He also identified a list of client balances on certain dates, which he had prepared based on information received from Hall. The daily balances reflected negative balances for specific clients. Further, the chart did not list either the Zaleks or the Bilgravs as clients because the information provided by Hall did not include their names.

Respondent invaded other client funds in order to make the settlement payments to the Zaleks. For example, when the

$15,000 trust account check, issued on November 11, 2009, was cashed six days later, the total shortage, for all client matters, was $41,662.79. As of that date, respondent should have held money for one of the Bilgrav brothers; thus, the accounts were actually short an additional $10,452 on that date.

On November 27, 2009, respondent issued a $2,000 trust account check to the Zaleks. On that date, the chart reflected a $50,533.12 shortage for all bank accounts. Thereafter, between January 30, 2010 and July 1, 2011, respondent issued seventeen trust account checks to the Zaleks and their attorney, each in the amount of $2,000. Of those seventeen checks, fourteen increased the amount of an already-existing shortage in respondent's total account balances, ranging from $41,662.79 to $99,314.39, at the time the checks were issued.[11]

A specific example of respondent's invasion of client funds in order to make a settlement payment to the Zaleks occurred on June 4, 2012, when a $1,000 trust account check

[11] Neither the chart nor Razanica's testimony identified the $2,000 trust account checks issued on March 14, May 1, and June 1, 2011 as affecting the shortage. It is not known whether that was by omission or because there was no shortage either before or after the checks were written.

(number 6271) was issued to them and their attorney. That check was cashed on June 13, 2012. Meanwhile, on that same date, the bank paid a $1,000 trust account check that was issued to 214 Smith. The payment of those two checks resulted in a trust account balance of -$595.27, on that date. Yet, according to the "balance sheet detail," created and provided by Hall, as of June 13, 2012, the trust account should have been holding a total of $32,849.78.[12]

On January 4, 2010, a $2,000 escrow account check was issued to the Zaleks and their attorney and signed by respondent. On January 30, 2010, he issued a $2,000 trust account check to the Zaleks and their attorney, followed by ten more trust account checks, in the same amounts, to the same payees. The record does not include a trust account check for February 2010, although respondent made two payments in July. All but the March 1, 2010 check were stamped with respondent's signature.

In 2011, respondent issued twelve $2,000 trust account checks to the Zaleks. With the exception of December, respondent issued the required monthly trust account checks in 2012. Kauffman did not know why some of the payments in

[12] The transcript erroneously reads $72,849.78.

the Zalek matter were made from the trust account and others from the escrow account.

Funds Disbursed to or on Behalf of Nancy Kauffman

From January 1, 2009 through August 1, 2011, Kauffman made seventeen deposits to respondent's trust account, totaling $3,450; seventeen deposits to the business account, totaling $7,282.06; and one $30 deposit to the escrow account. These "loans" totaled $10,762.06. Between August 1, 2011 and January 7, 2013, Kauffman made one $800 deposit to the trust account and three business account deposits totaling $140.

Based on the above, between January 1, 2009 and January 7, 2013, Kauffman lent a total of $11,702.06 to the firm. Yet, between August 1, 2011 and December 24, 2012, a total of $66,324 was disbursed from respondent's trust, business, and escrow accounts to, or on behalf of, Kauffman. Razanica could not recall whether Kauffman was receiving her full salary between 2009 and 2010. Between August 2011 and December 2012, Kauffman should have received $42,198 in net salary payments.

The $66,324.50 paid for Kauffman's benefit consisted of $31,152.75 from the trust account, comprising thirty checks totaling $24,595.87 and four online transfers to Chase totaling $6,556.88; $5,149.34 from the escrow account,

comprising eight checks totaling $4,959.65 and two online payments totaling $219.33; and $29,992.71 from the business account comprising at least fifty checks totaling $19,388.67 and thirty-three online payments totaling $10,604.04. These payments included $23,260.40 in payments to Chase. Prior to those payments, $24,831.28 in payments already had been made to Chase. Thus, disbursements, made on behalf of Kauffman from all accounts, between October 19, 2009 and December 24, 2012, totaled $91,155.78.

On May 1, 2012, a $1,639.22 online transfer from the trust account to Chase caused the $752.72 overdraft. In addition, as of that date, respondent should have been safeguarding $41,907.62 in funds belonging to seven clients, which already had been depleted.

Respondent denied that he made any of these disbursements. He claimed that Kauffman made the disbursements without his knowledge or consent.

Razanica did not undertake an analysis of how much money Kauffman had removed from firm accounts to which she was not entitled. The OAE's investigation included the October 19, 2009 transaction whereby Kauffman used $1,593.46 in trust account funds to pay her mortgage. All of her transactions

from the firm accounts were included in his investigation report.

Razanica testified that, despite respondent's claim to the contrary, he had authorized the payments to Chase because he gave Kauffman online access to his trust account.

Although Kauffman's weekly net salary was $541.40, she was not paid on a regular basis. Respondent told Razanica that, when the business account lacked sufficient funds, Kauffman was not paid. Once the account had sufficient monies, she "would take it." According to Razanica, if Kauffman had been paid every week, over a three-year period, she would have received $84,458.40 net. Between June 29, 2011 and December 24, 2012, she received from the firm, including salary payments, a total of $66,324.50. Of this amount, $17,380.25 represented online payments to her personal creditors.

Razanica testified that, when the time period of Kauffman's disbursements was expanded to begin on October 19, 2009, instead of June 29, 2011, the funds disbursed to or on behalf of Kauffman increased to $89,509.23, which represented her $66,324 salary, plus $23,184.73.

Razanica testified that he did not analyze whether the trust account would have been out of trust if Kauffman had

not been using trust account funds to pay her mortgage or if the monies that she had taken in excess of her payroll were refunded. The OAE was never able to establish "all the money in and all the money out and where it was at any particular time." Moreover, the OAE did not conduct a more thorough analysis of how much money Kauffman had received because she was not under investigation. Razanica stated that, because respondent admitted to being aware of the payments made on her behalf, there was no reason to investigate her.

* * *

The special master concluded that the OAE had proven, by clear and convincing evidence, that respondent violated RPC 1.15(d) and RPC 8.1(b), and that he knowingly misappropriated funds belonging to Thomas and Andrew Bilgrav, Anaya Grant, and other unidentified clients whose monies were used for purposes unrelated to their matters, including the funding of respondent's settlement payments to the Zaleks.

The special master found that respondent's trust account reflected a shortage in funds held on behalf of Grant; that respondent had invaded other clients' monies to fund his payments to the Zaleks; and that the payments made to Kauffman "created situations where respondent's trust and escrow accounts . . . had less money than they should have

been holding on behalf of clients." After having concluded that the record established, clearly and convincingly, all knowing misappropriation counts of the complaint, the special master later wrote:

> The Special Master concludes that at least one of the counts constitutes knowing misappropriation. While some could argue about [sic] certain other counts were only negligent misappropriation, though the Special Master does not find that to be the case, nevertheless, the facts related to Thomas Bilgrav sadly lead to a finding of knowing misappropriation.
>
> [SMR¶70.][13]

The special master recommended respondent's disbarment.

* * *

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

We agree with the special master's conclusion that respondent violated RPC 1.15(d) and RPC 8.1(b) as well as his conclusion that respondent knowingly misappropriated funds belonging to Thomas Bilgrav, Anaya Grant, and other unidentified clients. We specifically find that, based on his willful blindness, and despite his proclaimed lack of

[13] "SMR" refers to the special master's hearing report, dated January 20, 2016.

knowledge of Kauffman's actions, respondent is guilty of knowing misappropriation of funds belonging to Anaya Grant, Thomas Bilgrav, and other unidentified clients. In our view, however, the record falls short of demonstrating, clearly and convincingly, that respondent knowingly misused the funds held in trust for Andrew Bilgrav.

As stated earlier, respondent admitted that he had failed to maintain trust account receipts and disbursements journals, that individual client ledger cards either did not exist or were inaccurate and partial, that the monthly trust account three-way reconciliations were inadequate, that running balances for the trust account checkbook were not maintained, and that he had commingled personal funds in the trust account. These omissions violated, respectively, R. 1:21-6(a)(1) and R. 1:21-6(c)(1)(A), (B), (G), and (H).

Despite respondent's denial, the evidence also established, clearly and convincingly, that he made at least one cash withdrawal from the trust account, a violation of R. 1:21-6(c)(1)(H)(3). He admitted to signing a $1,500 trust account check, payable to cash, and negotiated by Kauffman. Moreover, regardless of respondent's knowledge, the record established that the firm carried out electronic online transfers from the trust account, without proper written

documentation, a violation of R. 1:21-6(c)(1)(A). Thus, by his failure to comply with the recordkeeping requirements of R. 1:21-6, respondent is guilty of violating RPC 1.15(d).

RPC 8.1(b) prohibits an attorney from knowingly failing to respond to a lawful demand for information from a disciplinary authority. The clear and convincing evidence sustains the failure-to-cooperate charge in this case.

Respondent knew which documents and information the OAE had requested from him, and he admittedly failed to comply with those requests for many months, to the point where the OAE was required to obtain a court order. Although respondent was certainly hampered by the condition of his records, and by Kauffman's deceptions, he was still required to comply with the OAE's demands. By his failure to do so, respondent violated RPC 8.1(b).

As to the more serious charges in this matter, in In re Wilson, supra, 81 N.J. 451, the Court described knowing misappropriation as follows:

> Unless the context indicates otherwise, "misappropriation" as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.
>
> [81 N.J. at 455 n1.]

Six years later, the Court elaborated:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is "almost invariable," *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. To the extent that the language of the DRB or the District Ethics Committee suggests that some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" – all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be "almost invariable," the fact is that since *Wilson*, it has been invariable.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, there must be clear and convincing evidence that the attorney took client funds, knowing that the client had not authorized him or her to do so, and used them. This same principle applies to other funds that an attorney is to hold inviolate, such as escrow funds. Hollendonner, supra, 102 N.J. 21.

We now turn to the individual claims of knowing misappropriation.

Thomas Bilgrav

One day after Thomas's $10,342 was deposited in respondent's trust account, in September 2011, respondent instructed Kauffman to move $4,000 to the business account because the balance was low. He maintained that she had not alerted him early enough in the day for him to infuse the account with his own funds. Respondent claimed that, at the time, he had a good faith belief that he previously had been authorized to borrow the funds and that, in any event, he had sufficient funds of his own to cover the loan.

We do not accept respondent's claim that, because it was not until March 2012 that he decided to borrow $7,500 of Thomas's funds, he cannot be held responsible for Kauffman's removal of $4,000 six months earlier. Respondent provided a clear recollection of needing to infuse the business account

with funds and directing Kauffman to do it. That he was incorrect about the date and the amount of monies is irrelevant.

Prior to respondent's removal of Thomas's $4,000 from the trust account, he did not have Thomas's permission to use the $4,000 for purposes unrelated to Thomas and the terms of the trust. Thus, under Wilson and Hollendonner, respondent knowingly misappropriated Thomas's funds. That Thomas gave respondent permission to use his monies after the fact does not alter that conclusion.

It also makes no difference that respondent had sufficient monies to "cover" the $4,000, or even the $7,500 that he claimed to have taken in March 2012. Time and again, the Court has stated that restitution or availability of other funds is irrelevant to a finding of knowing misappropriation. See, e.g., In re Cozzarelli, 225 N.J. 16 (2016) (attorney disbarred for knowing misappropriation of trust funds; we rejected his claim that he had sufficient monies to cover the funds he had used); In re Blumenstyk, 152 N.J. 158, 161 (1997) (attorney disbarred for using trust funds to pay for personal expenses, such as a family vacation and his son's Bar Mitzvah, and to avoid overdrafts in his business account; although the attorney replenished the trust account with personal monies in order to make restitution, the Court noted that

"restitution does not alter the character of knowing misappropriation and misuse of clients' funds"); In re Barlow, 140 N.J. 191, 198-99 (1995) (intent to repay funds or otherwise make restitution is not a defense to knowing misappropriation); and In re Noonan, supra, 102 N.J. at 160 (noting that, under Wilson, it makes no difference that the lawyer "intended to return the money when he took it").

Andrew Bilgrav

The record lacks clear and convincing evidence that respondent knowingly misappropriated Andrew's $1,801.23. Respondent testified, quite emphatically, that he believed that a check had been issued to Andrew. Respondent was confounded by the evidence to the contrary. Certainly, Andrew's funds were invaded, as the escrow account balance dipped below $1,800 on several occasions, in November 2011 and throughout 2012. Moreover, Andrew testified that the funds were not paid to him until after he inquired about their whereabouts. Yet, these facts, on their own, do not establish that the misappropriation was knowing.

The evidence must clearly and convincingly demonstrate that respondent knew that Andrew's funds had been invaded. It did not. The OAE established nothing more than a shortage. As the Court stated in In re Konopka, 126 N.J. 225 (1991),

> [w]e insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or

> she was misappropriating. . . . If all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
>
> [Id. at 234.]

ANAYA GRANT, ZALEK PAYMENTS, AND KAUFFMAN DISBURSEMENTS

Without doubt, Grant's funds were plundered,[14] as were the trust account funds that were used to fund the Zalek settlement payments, and the multitude of disbursements made on Kauffman's behalf. In this regard, we are of the view that respondent's so-called lack of knowledge of these transactions did not stem from his inheritance of an abominable recordkeeping system. In such a case, respondent could be found guilty only of negligent misappropriation. See, e.g., In re Kim, 222 N.J. 3 (2015) (six-month suspension imposed on attorney whose accounting system and recordkeeping practices were horrendously reckless and whose knowledge of his recordkeeping responsibilities was so lacking that he did not even understand what the documents that the OAE had requested were, and willfully disregarded his recordkeeping

[14] In this regard, we find no evidence to support the proposition that the $1,000 trust account check issued on October 1, 2012, from the Grant trust account and deposited in the business account, represented the payment of a fee.

obligations, placing his clients' funds at great risk; we considered astonishing his arrogance in believing that his "mental juggling" of his trust funds was sufficient), and In re Gallo, 117 N.J. 365 (1989) (three-month suspension imposed on attorney who took over a law practice and implemented the only recordkeeping system he knew, which he had learned from his previous employer; the Court could not find clear and convincing evidence that the trust account misappropriations were knowing because the attorney did not design the deficient bookkeeping system, but rather, followed the practices of his prior employer, and because the attorney was not familiar with basic principles governing lawyer trust accounts).

Here, we determine that the funds were misappropriated because respondent had given carte blanche to Kauffman, who violated his trust and used the trust account as an equity line. Under such circumstances, we find that, in so doing, respondent acted with willful blindness to Kauffman's improper conduct. Accordingly, we find him guilty of knowing misappropriation, on that basis. See, e.g., In re Skevin, 104 N.J. 476, 486 (1986), cert. denied, 481 U.S. 1028 (1987). In Skevin, the Court defined willful blindness as "a situation where the party is aware of the highly probable existence of a

material fact but does not satisfy himself that it does not in fact exist." Ibid. Willful blindness satisfies the knowing requirement in knowing misappropriation cases. Ibid.

Although abominable recordkeeping practices may remove a case from the realm of knowing misappropriation, the Court has rejected the notion that an attorney "who just walks away from his fiduciary obligation as safekeeper of client funds can expect . . . an indulgent view of any misappropriation." In re Johnson, 105 N.J. 249, 260 (1987). Rather, the Court "will view 'defensive ignorance' with a jaundiced eye." Ibid. Consequently, "[t]he intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation'." Ibid. In so ruling, the Court was confident that, "within our ethics system, there is sufficient sophistication to detect the difference between intentional ignorance and legitimate lack of knowledge." Ibid.

In determining whether respondent was a hapless victim or was intentionally ignorant, we considered the following. First, respondent accepted no responsibility for the firm's financial operation. He not only assumed that the bookkeeping system in place was proper and functioning as it should, but also took no interest in monitoring the books or the

activities of Kauffman to ensure that to be the case. We note that an attorney's recordkeeping responsibilities are non-delegable. See In re Barker, 115 N.J. 30, 35-36 (1989).

Moreover, respondent permitted a situation to develop whereby he and Kauffman would lend money to the business account, "casually" monitor the amounts they were owed, and then re-pay themselves when funds became available. Yet, respondent did nothing to determine when funds became available, instead leaving that crucial determination to Kauffman, who decided into which accounts funds should be deposited and out of which accounts funds were to be disbursed. Respondent created the perfect opportunity for Kauffman, if she chose, to use the firm's accounts as an equity line.

Second, most of the offending checks were stamped with respondent's signature. Although respondent claimed to know nothing of the stamp or Kauffman's use of it, the sheer number of checks that were stamped with respondent's signature demonstrates clearly and convincingly that he knew that the stamp was being used and that he considered its existence another reason to simply look the other way. In particular, we note the number of checks issued in payment of the Zalek settlement. Clearly, respondent, whose firm was

responsible for the monthly payments to his former clients, would have ensured that the payments were being made and, thus, would have known that, if he was not signing the trust account checks, then his signature was being affixed with the stamp.

Third, respondent said it best when he remarked that he was "in the dark" when it came to the firm's books and records. He was so blind to the firm's financial matters that he never even saw the overdraft notices and was unaware of the OAE's investigation until just before the September 2012 demand audit. In our view, respondent adopted a strategy that would put him "in the dark" about his firm's finances to avoid responsibility. His blindness was, in every respect, willful – and the consequences that flowed from that strategy were both material and predictable. To allow respondent to benefit from his own self-imposed blindness would be tantamount to putting blinders on ourselves.

In sum, we find that respondent knowingly misappropriated Thomas Bilgrav's funds and that he exhibited willful blindless in the cases of Anaya Grant and the unnamed clients whose monies were invaded in respect of the Zalek payments and the Kauffman disbursements.

We, therefore, recommend respondent's disbarment for the knowing misappropriation of trust and client funds. In re Wilson, supra, 81 N.J. 451; Hollendonner, supra, 102 N.J. 21. Accordingly, we need not reach the appropriate quantum of discipline for respondent's recordkeeping violations and for his failure to cooperate with the OAE.

Member Clark 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
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 Thomas A. Clark
Docket No. DRB 16-111

Argued: September 15, 2016

Decided: January 11, 2017

Disposition: Disbar

Members	Disbar	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