SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-411
District Docket No. XIV-2013-0690E
and XIV-2014-0119E

IN THE MATTER OF	:
THOMAS A. BLUMENTHAL	:
AN ATTORNEY AT LAW	:

Decision

Argued: February 16, 2017

Decided: June 23, 2017

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

Respondent appeared pro se.

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

This matter was before us on a recommendation for disbarment filed by Special Master Charles F. Kenny. A two-count complaint charged respondent with knowing misappropriation of trust and escrow funds (RPC 1.15(a) and In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1984)); improper business transaction with the client (RPC 1.8(a)); recordkeeping violations (RPC 1.15(d)); conduct involving dishonesty, fraud,

deceit or misrepresentation (RPC 8.4(c)); and conduct prejudicial to the administration of justice (RPC 8.4(d)).

We recommend respondent's disbarment.

Respondent was admitted to the New Jersey bar in 1988. He was admitted to practice law in New York in 1968.

On July 15, 2015, respondent received a censure for engaging in a conflict of interest, unlawfully obstructing another party's access to evidence, and knowingly disobeying an obligation under the rules of a tribunal. In re Blumenthal, 222 N.J. 25 (2015).

I. The Knowing Misappropriation Charges

At all relevant times, respondent operated a law office at 143 Main Street, Ridgefield Park, New Jersey and maintained attorney trust and business accounts at TD Bank.

On February 18, 2016, respondent and the OAE entered into a stipulation of facts (S) in which respondent admitted the salient facts supporting the charges against him, as follows.

A. The Willowbrook Court/Holquin Transaction

In December 2011, respondent represented New World Home and Framing Corporation (NWH) in its sale of 120 Willowbrook

Court, Paramus, New Jersey, to Rafael and Nilda M. Holguin. Paul Dykstra, Esq. represented the Holguins.

On December 8, 2011, NWH and the Holguins entered into a $780,000 contract of sale requiring a $50,000 deposit, which respondent was to hold in his attorney trust account pending settlement of title.

On December 12, 2011, Dykstra sent respondent a fully executed contract and the Holguins' check for $50,000. The transmittal letter directed respondent to deposit the funds into his trust account, which respondent accomplished the next day.

Construction delays prevented the closing of title for almost two years, until August 21, 2013. Respondent stipulated that he did not maintain the Holguin deposit inviolate in the trust account, as required, during that delay.

At no time during the delay did the Holguins or their attorney authorize respondent to use any of the $50,000 in escrow funds. Yet, from December 2011 through January 24, 2014, respondent made numerous disbursements from the escrow funds that were for the benefit of clients unrelated to the transaction or for respondent's own benefit.

Specifically, between September 2012 and January 2014, respondent made forty-nine disbursements from the Holguin deposit in varying amounts. Although respondent asserted that only half of the disbursements were for personal expenses, with the remainder for the benefit of respondent's clients, the OAE maintained its position that respondent had knowingly misappropriated client and escrow funds, citing In re Noonan, 102 N.J. 157, 160 (1986), where the Supreme Court found that it makes no difference whether the misappropriated funds were used for good or bad, or for the benefit of the lawyer or another, or whether the lawyer intended to return the money when he took it, or he did in fact return it.

On August 21, 2013, the closing date, respondent disbursed trust account check Nos. 1228 ($20,000) and 1230 ($30,000)[1] to NWH.

OAE disciplinary auditor, Nicole Figgs, testified at the DEC hearing that, during the fifteen-month delay, the balance in respondent's trust account fell below the $50,000 that he was required to maintain intact for the Holguins' matter on eighteen occasions in varying amounts ranging from $17,222.40

[1] Respondent later claimed that another client, Adel Michael, had loaned him the $30,000 to satisfy respondent's obligations in the Holguin transaction.

to $45,514.80. On August 20, 2013, the day before the Holguins' closing on the Willowbrook Court property, respondent's trust account was short by $45,514.80.

B. The Florence Avenue/Fasullo Transaction

In August 2013, respondent represented the Estate of August Fasullo in the sale of property located in Hillside, New Jersey, to Damian Estrella.

On August 20, 2013, respondent deposited his $20,000 legal fee for the transaction into his trust account, instead of his business account. That deposit increased the trust account balance to $24,485.30, and provided funds sufficient for the $20,000 check (No.1228) to NWH in the Holguin matter to clear respondent's trust account on August 22, 2013.

C. The Stelfox Street/Michael Transaction

In August 2013, respondent represented Adel Michael and his entity, NJ North Developers, LLC, in the purchase of property located on Stelfox Street, Demarest, New Jersey.

On August 28, 2013, respondent deposited Michael's $30,000 check (not a contract deposit) for the transaction into his

trust account, pending the closing.[2] That deposit increased the balance in respondent's trust account to $31,985.30, sufficient for the outstanding $30,000 check (No.1230) to NWH in the Holguin matter to clear respondent's bank on August 29, 2013. Once that check cleared, the balance in respondent's trust account decreased to $1,985.30.

D. The Ross Avenue/Katz Transaction

In September 2013, respondent represented Michael in the sale of property located on Ross Avenue, Demarest, New Jersey, to Russell Katz for $1,300,000. Justin DeCrescente, Esq. represented Katz.

On September 20, 2013, DeCrescente forwarded Katz' $130,000 deposit check for the purchase, which respondent deposited into his trust account a few days later. After the check cleared respondent's bank on September 24, 2013, the balance in his trust account was $136,392.99.

Two days later, on September 26, 2013, respondent wire-transferred $30,000 from the trust account to Vested Land, LLC,

[2] These are the funds that Michael loaned to respondent to address the shortfall in funds in the Holguin transaction.

on behalf of Michael for the Stelfox Street property. After the wire transfer, the balance in the trust account dropped to $103,999.47, some $26,000.53 short of the $130,000 respondent was required to hold for the Katz matter alone.

Katz' purchase of the Ross Avenue property did not materialize. Thus, in October 2013, Katz requested the return of his $130,000 deposit. On October 22, 2013, respondent's trust account contained only $100,059.32 – $29,940.68 less than the amount of the deposit respondent was required to hold for Katz' matter. Therefore, that same day, respondent sent to DeCrescente a $100,000 trust account check, along with a letter explaining that he would send the remainder after "straightening out" his accounting.

Respondent did not have Katz' permission to use any portion of the $130,000 deposit other than for the purchase price of the Ross Avenue property.

Respondent's trust account was virtually depleted after the $100,000 check to Katz cleared his bank on October 22, 2013. The remaining balance of $59.32 represented a shortage of $29,940.68 for the Katz matter alone.

Because respondent had returned only a portion of the deposit, on November 8, 2013, Katz filed a civil complaint in

Bergen County against respondent, Michael, and others, seeking the return of the deficient funds.

On November 22, 2013, respondent sent to DeCrescente a $1,000 trust account check, along with a letter explaining that he had legal matters nearing completion that would enable him to resolve the escrow fund shortage "as soon as possible."

Still owing Katz $29,000, on February 12, 2014, respondent sent to Katz' attorney a $10,000 check. On February 21, 2014, Michael arranged for his litigation attorneys to send to Katz a cashier's check for $19,000, as payment in full for the remaining balance that respondent owed on account of the missing deposit monies. That $19,000 check also represented a loan from Michael to respondent to resolve the Katz matter.

Respondent stipulated that he had not, in writing, (1) informed Michael of the advisability of seeking the advice of counsel regarding the loan, (2) disclosed the terms of the loan to his client, or (3) obtained Michael's written consent to the essential terms of the loan.

The OAE argued at the hearing before the special master that respondent had engaged in "lapping," a form of knowing misappropriation, by repeatedly using funds designated for one real estate transaction to pay for the disbursements in a subsequent transaction.

At the hearing, respondent sought to explain his actions. He testified about "lapping" as follows:

> So the amount of money basically had remained the same that I owed. It did carry over through what, as you've said, was basically three deals. I forget if that's what the definition of lapping is, but it carried over for three deals and it didn't get fully resolved until February of 2014.
>
> I never took any other escrow money out of the account. Since I guess I started practicing, I have probably had at least several million dollars in my trust account, which has basically been paid out in the way that it should be.
>
> [T113-18 to T114-3.][3]

Respondent had a "lean" year in 2011, at the same time that his wife was suffering from cryoglobulinemia and hepatitis C. At the time, medical coverage for respondent and his wife cost between $2,500 and $3,000 per month. He sought, above all else, to maintain that coverage:

> I had a bad year, I borrowed money that I should not have borrowed at that point. I did it. I know it's easy to say that I did it with the intent of repaying. It was repaid. I think that that should be a consideration. There was nothing that -- there was never in my mind not to repay this money.
>
> [T122-9 to 14.]

[3] "T" refers to the transcript of the March 2, 2016 DEC hearing.

Although respondent did not provide documentation to support his claims about his wife's health issues, we have no reason to doubt his truthfulness. Nonetheless, beyond respondent's statement that he had "a bad year" in 2011, no evidence in the record established that he was unable to borrow funds or take other measures to meet their monthly medical coverage obligations. In any event, such an inability would not excuse an unauthorized use of client trust or escrow funds.

In respect of the charge that respondent failed to comply with the written disclosure and consent requirements of RPC 1.8(a) in conjunction with the $30,000 and $19,000 loans, Michael testified that respondent had asked to borrow the $30,000 he was holding for the Stelfox matter to rectify a shortage that existed in his trust account for another client's [the Holguins'] transaction. He agreed to lend respondent those funds, which were not in the nature of a deposit, as had been alleged in the complaint. Rather, Michael had provided those funds to be used toward his purchase of the Stelfox property.

Respondent testified that the deposit for Michael's purchase of the Stelfox property had actually been $51,500 and that Michael had given him a separate check in that amount. Respondent turned over the check to the seller's attorney, Donna J. Vellekamp, Esq., who held the $51,500 in escrow, pending

settlement. Respondent never held the deposit for the Stelfox transaction.

Although respondent borrowed $49,000 from Michael ($30,000 from the Stelfox funds and a $19,000 cashier's check) to settle the Katz litigation, Michael testified, and respondent stipulated, that respondent never provided his client with a writing that set forth the terms of, and Michael's informed consent to, those loans. Respondent, however, did not admit that his actions were unethical.

The complaint also charged respondent with recordkeeping violations (RPC 1.15(d) and R. 1:21-6). Although he did not admit an ethics violation, respondent stipulated that, on March 27, 2014, the OAE conducted a demand audit of his attorney books and records. The audit revealed that he had failed to perform three-way reconciliations of his attorney trust account, as required by the Rule.

Finally, the complaint charged respondent with violations of RPC 1.15(d), RPC 8.4(c), and RPC 8.4(d), as the result of other audit findings. Respondent stipulated that, after the Internal Revenue Service (IRS) placed a lien on his attorney business account, he had placed personal funds in the trust account to avoid that lien, thereby commingling them with client and escrow funds held in the trust account.

The special master found respondent guilty of knowing misappropriation, specifically lapping, a violation of RPC 1.15(a) and In re Wilson, supra, 81 N.J. 451, as follows.

In the Willowbrook Court/Holquin matter, respondent was required to hold the Holguins' $50,000 deposit inviolate in his trust account, pending settlement, but invaded those funds to pay personal and business expenses. Respondent then used a $20,000 fee and the $30,000 loan from Michael to replenish shortages in the trust account.

Thereafter, respondent was required to hold a $130,000 deposit in escrow for the Ross Avenue matter, for Katz' purchase of that property from respondent's client, Michael. Instead, respondent misappropriated $30,000 of those funds to repay the $30,000 he had borrowed from Michael's Stelfox purchase monies. Respondent was unable to return the $130,000 deposit to Katz when the Ross Avenue matter fell apart.

The special master did not find knowing misappropriation for respondent's use of the $30,000 earmarked for Michael's Stelfox purchase, concluding that those funds were in the nature

of a loan, and commenting that the OAE had abandoned that charge following the hearing.[4]

The special master also found that respondent failed to comply with the recordkeeping requirements of R. 1:21-6 and RPC 1.15(d) inasmuch as he commingled personal funds in the trust account and failed to perform three-way reconciliations of his attorney trust account, as required. In addition, respondent's use of his trust account to hide personal funds from the IRS' lien violated both RPC 8.4(c) and RPC 8.4(d).

The special master declined to find a conflict-of-interest violation of RPC 1.8(a) for either of the Michael loans. In respect of the $19,000 loan to settle the Katz litigation, the special master concluded that no violation existed because "both [respondent and Michael] felt that there was no need for formalities since they were close friends and had an ongoing business relationship." Regarding the $30,000 loan of Stelfox funds, the special master declined to find a violation because

[4] The special master's reference to an OAE abandonment of the charge may be contained in the OAE's April 19, 2016 post-hearing brief to the special master. There, OAE counsel stated, [a]lthough the [Stelfox] funds were not required to be held in trust pursuant to a contract, the funds are relevant to this matter." Additionally, there is the absence of any mention of Michael's name when OAE counsel named the individuals (Holguin and Katz), whose funds were allegedly misappropriated.

the OAE did not amend the complaint to include an RPC 1.8(a) charge for that loan.

In aggravation, the special master considered respondent's prior censure. In mitigation, he considered that: (1) numerous individuals provided character letters attesting to respondent's good character; (2) respondent took responsibility for his actions, made the aggrieved parties whole, and promised to not repeat the behavior; (3) respondent had medical coverage expenses that were a priority because of his wife's poor health; and (4) respondent cooperated with the OAE and acted professionally throughout the proceedings.

The special master, nevertheless, concluded that "none of the mitigating factors enables any conclusion other than a recommendation of disbarment under the mandate of In re Wilson."

* * *

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.

Respondent essentially admitted to "lapping," an improper use of one client's funds to pay trust obligations owed to another client. The attorney thereby replenishes earlier

shortages in the attorney trust account with a later client's funds. In re Brown, 102 N.J. 512, 515 (1986).

In this case, respondent engaged in lapping to cure shortages created by his improper prior use of client and escrow funds for his own personal and business expenses, without permission from the parties to do so.

In December 2011, respondent deposited the Holguins' $50,000 deposit for their purchase of the Willowbrook Court property from respondent's client, NWH. During two years of construction delays, respondent used essentially all of those funds to pay personal and business expenses and for client matters unrelated to the Willowbrook transaction. In fact, on August 20, 2013, the day before the closing, respondent's trust account shortage for the Willowbrook Court transaction alone was $45,514.80.

That same day, August 20, 2013, and with a trust account balance of just $4,485.20, respondent deposited his $20,000 legal fee in the (unrelated) Florence Avenue/Fasullo matter into his trust account to cover that shortage.

In respect of the August 21, 2013 Holguin closing, respondent disbursed two checks to NWH, his client in the transaction. One check was for $20,000 and the other for $30,000. Respondent disbursed the checks without sufficient

funds on deposit in the trust account that day to cover either check. The $20,000 Fasullo legal fee, however, enabled the $20,000 check to NWH to clear the trust account the next day, August 22, 2013.

Respondent's $30,000 check to NWH cleared his trust account on August 28, 2013, but only after respondent borrowed $30,000 of Michael's Stelfox funds, monies that were already in the trust account. At the time, respondent was out of trust $25,514.70 for the Holguins' transaction.

Thereafter, in September 2013, respondent accepted a $130,000 escrow deposit check from Katz, for his $1,300,000 purchase of the Ross Avenue property. Respondent deposited the funds into his trust account and, on September 26, 2013, just two days after the check cleared, wire-transferred $30,000 of those funds to the seller in Michael's purchase of the Stelfox property. He did so without Katz' knowledge or permission. When he did so, the trust account balance dropped to $103,999.47, a shortage of $26,000.53 for Katz' matter alone.

Respondent knowingly engaged in lapping, having stipulated to his knowledge that shortages for clients' matters were cured using funds from later clients. Respondent's misconduct in this respect was a violation of RPC 1.15(a) and In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1984).

The special master was correct to dismiss the charge of knowing misappropriation as it related to respondent's use of the $30,000 earmarked for Michael's Stelfox purchase, inasmuch as those funds were in the nature of a loan. Importantly, they were not in the nature of a deposit, which would have required the informed consent of the other party to the transaction, in addition to Michael's permission. Therefore, we dismiss the charge that respondent knowingly misappropriated the $30,000 in funds for the Stelfox transaction.

Respondent is also guilty of other, less serious infractions. He failed to comply with the recordkeeping requirements of R. 1:21-6 and RPC 1.15(d), commingled personal funds in the trust account with those of his clients, a violation of RPC 1.15(a), and failed to perform three-way reconciliations of his attorney trust account, as required.

In addition, respondent placed personal funds in his trust account to hide them from the IRS in an attempt to avoid the government's lien on his attorney business account, conduct that was dishonest (RPC 8.4(c)) and prejudicial to the administration of justice (RPC 8.4(d)).

We do not agree, however, with the special master's determination that respondent did not violate (RPC 1.8(a) in respect of the $19,000 Michael loan to settle the Katz

litigation. Respondent admitted that he failed to adhere to the requirements of the Rule that a client's informed consent to a business transaction with the attorney be in writing. That both respondent and Michael felt no need for such a formality is of no consequence – RPC 1.8(a) is not aspirational in that regard. We find, thus, that respondent violated RPC 1.8(a).

In respect of Michael's $30,000 loan of the Stelfox funds, the special master correctly declined to find misconduct because the complaint did not charge respondent with a violation of RPC 1.8(a) for that transaction.

In conclusion, respondent is guilty of knowingingly misappropriating client trust and escrow funds held in the trust account for the Holguins and for Katz. He also violated the recordkeeping requirements of R. 1.21-6 and RPC 1.15(d), RPC 1.8(a), RPC 8.4(c), and RPC 8.4(d).

Respondent asked us to consider several mitigating factors. First, respondent provided character letters from more than a dozen individuals who attested to his fine work as an attorney and his good character. Moreover, respondent acknowledged his actions herein and made the parties whole. He also felt significant pressure to pay monthly medical coverage expenses, in what was a "bad" earnings year, because of his wife's illness. Finally, respondent cooperated with ethics

authorities by entering into a stipulation of facts with the OAE. However, in light of our finding that respondent is guilty of knowing misappropriation, we may not consider his mitigation in determining the appropriate sanction. See In re Wilson, supra, 81 N.J. at 461.

Thus, given the mandate in Wilson, supra, 81 N.J. 451, and Hollendonner, supra, 102 N.J. 21, we are constrained, respondent's substantial mitigation notwithstanding, to recommend his disbarment.

Accordingly, we need not consider the appropriate quantum of discipline for respondent's additional misconduct.

Members Gallipoli and Hoberman 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. Blumenthal
Docket No. DRB 16-411

Argued: February 16, 2017

Decided: June 23, 2017

Disposition: Disbar

Members	Disbar	Did not participate
Frost	X	
Baugh	X	
Boyer	X	
Clark	X	
Gallipoli		X
Hoberman		X
Rivera	X	
Singer	X	
Zmirich	X	
Total:	7	2

Ellen A. Brodsky
Chief Counsel