Supreme Court Of New Jersey
Disciplinary Review Board
Docket No. DRB 18-298
District Docket No. XIV-2017-0244E

In The Matter Of	:
John Churchman Smith, Jr.	:
An Attorney At Law	:

Decision

Argued: November 15, 2018

Decided: February 28, 2019

Johanna Barba Jones 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 motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14(a). The motion arises from respondent's one-year suspension in Pennsylvania, based on a Joint Petition in Support of Discipline on Consent, for respondent's admitted violations of Pennsylvania's RPC 1.3 (lack of diligence), RPC 1.4(a)(3)

(failure to keep a client reasonably informed about the status of a matter), RPC 1.4(a)(4) (failure to promptly comply with reasonable requests for information), RPC 1.15(b) (failure to hold funds separate from the lawyer's property, failure to identify or safeguard funds), RPC 1.15(e) (failure to promptly deliver funds to clients or third parties), RPC 1.15(h) (commingling funds in the trust account), RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and Pa. R.D.E. 203(b)(3) (failure to complete annual registration requirements). By Order dated January 25, 2019, he was reinstated to active status in Pennsylvania.

The OAE urges us to recommend respondent's disbarment. For the reasons expressed below, we agree with the recommendation.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1990. He has no history of discipline in New Jersey. Respondent has been ineligible to practice law in New Jersey since 2016 for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection.

On January 18, 2017, the Pennsylvania Office of Disciplinary Counsel (ODC) filed a "Joint Petition in Support of Discipline on Consent Under Rule 215(d), Pa.R.D.E." (petition). The petition set forth the facts giving rise to

respondent's admission that he violated the above rules. The facts are as follows.

During the relevant time, respondent represented in his Pennsylvania registration that he had three law offices – one in Marlton, New Jersey with the firm of Donald F. Manchel, one in Philadelphia, and the third in Bala Cynwyd, Pennsylvania, with the firm of Lowenthal & Abrams, P.C.

Manchel, who was not admitted in New Jersey, referred client Jennifer Harley to respondent for a personal injury matter. Respondent filed a lawsuit on Harley's behalf in New Jersey.

On October 10, 2013, respondent appeared at an arbitration proceeding, at which Harley was awarded $22,500. In November 2013, respondent settled Harley's matter for the amount of the arbitration award, which was to be paid evenly by two defendants (Hong Huynh, d/b/a Angel Nails, and Cedar Trust Realty). Respondent and Manchel were due 33 1/3 percent of the settlement, together with costs.

In a November 12, 2013 letter, respondent informed Harley about the resolution of the matter and enclosed a release for the $22,500 settlement, which Harley executed and returned.

From the gross settlement, respondent and Manchel were entitled to $7,500 in fees, $938 in costs to Manchel, and $176.88 in costs to respondent, for a total of $8,614.88, leaving a balance of $13,885.12 for Harley.

On December 12, 2013, respondent received $11,250 on behalf of defendant Angel Nails, and deposited the funds in his PNC Bank IOLTA account. On his 2014-2015 Pennsylvania Attorney's Annual Fee Form, respondent failed to identify the PNC account as one in which he held client or fiduciary funds. Instead, he identified Manchel's IOLTA account as an account in which he held such funds.

On December 18, 2013, respondent issued two checks from his IOLTA account: one to himself for $3,166.88; the other to Manchel for $4,938, totaling $8,104.88. Thereafter, respondent was entitled to an additional $510 from the balance of the settlement he was yet to receive. On January 15, 2014, respondent issued a $2,500 check to Harley from his IOLTA account. She was still entitled to receive $11,385.12.

On April 2, 2014, after receiving $11,250, the balance of the settlement from Cedar Trust Realty, respondent deposited the check into his IOLTA account. Prior to that deposit, the account had a balance of $756.42. Following the deposit, respondent had sufficient funds to cover the $11,385.12 owed to Harley and the balance of his fee, which was $510. Nevertheless, on June 13,

2014, respondent issued a check to himself from the IOLTA account for $2,000, even though he was entitled to only $510. His account was, therefore, out of trust in the amount of $1,490. On July 2, 2014, respondent issued another $4,200 check to himself from the IOLTA account, increasing the shortage to $5,690, the amount he had "misappropriated" for his own use.

Respondent admitted that, at the time he issued the checks to himself, he knew he was not entitled to the additional $5,690. Therefore, his misappropriation was "knowing and intentional."

On October 6 and November 7, 2014, respondent deposited $4,200 and $1,500, respectively, of his personal funds maintained at PNC Bank into his IOLTA account, thereby commingling personal and fiduciary funds. In connection with the Harley matter, respondent's IOLTA account was out of trust for almost five months, from June 13 to November 7, 2014. He failed to promptly disburse funds to Harley from her settlement.

From January 2014 to at least April 2015, Harley unsuccessfully attempted to obtain information from respondent about the status of her matter, particularly the distribution of the settlement proceeds. She was able to speak with respondent only once, in the fall of 2014. At that time, respondent told her that he had been hospitalized and would "straighten out" her file, which he could not locate. However, he failed to contact her thereafter.

Despite Harley's repeated requests, respondent neither disbursed her portion of the remaining settlement funds nor provided her with an accounting of those funds.

On May 5, 2015, thirteen months after he had received the settlement funds from Cedar Trust Realty, respondent issued an $11,385.12 check to Harley from his IOLTA account. On that same day, "in response to an inquiry" from the ethics investigator, respondent faxed information relating to the Harley matter.

In the petition, respondent admitted having violated RPC 1.3 (failure to act with reasonable diligence and promptness), RPC 1.4(a)(3) (failure to keep a client reasonably informed about the status of the matter), RPC 1.4(a)(4) (failure to promptly comply with reasonable requests for information), RPC 1.15(b) (failure to hold "all Rule 1.15 Funds[1] and property separate from the lawyer's own property"), RPC 1.15(e) (failure to promptly deliver to a client or third person any property, including Rule 1.15 Funds, that the client or third person is entitled to receive, and upon request by the client or third person,

[1] "Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such." Pa. Rule 1.15(a)(10).

promptly render a full accounting regarding the property), RPC 1.15(h) (prohibition against depositing the lawyer's own funds in a trust account), RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and Pa.R.D.E. 203(b)(3) (failure to file proper forms with the Attorney Registration Office relating to the lawyer's IOLTA accounts).

The parties jointly recommended a one-year suspension for respondent's ethics violations. Respondent submitted an affidavit consenting to the discipline and proffered mitigating circumstances: (1) his expression of remorse; (2) his acceptance of responsibility for his conduct; (3) his full restitution, which thereby "rectified his misappropriation" prior to "any involvement" by the ODC; (4) his explanation that he "believed" he had a "life-threatening" physical condition requiring that he replace a heat pump that was not working in his residence,[2] for which he did not have available funds, which led him to use client funds from his IOLTA account; (5) his cooperation with ODC in its investigation of the matter; (6) character letters attesting to his

[2] Respondent maintained that he had significant respiratory issues, exacerbated by extreme heat and humidity, and was ultimately diagnosed with chronic obstructive pulmonary disease and congestive heart failure.

integrity; (7) "credible assurances that he will not succumb to temptation again;" and (8) no disciplinary history.

According to the petition, as respondent's physical health declined, he experienced a concomitant decline in his mental health. His physical maladies resulted in his misappropriating client funds for what he believed was a "necessary investment to alleviate his breathing difficulties." His mental decline resulted in his neglect of Harley's matter. As his physical health improved, so did his mental health.

On February 14, 2017, the Disciplinary Board of the Supreme Court of Pennsylvania approved the petition in which respondent consented to a one-year suspension, and recommended to the Supreme Court of Pennsylvania that the petition be granted. On March 30, 2017, the Supreme Court of Pennsylvania granted the petition and suspended respondent for one year. He was reinstated on January 25, 2019.

By letter dated April 28, 2017, respondent self-reported to the OAE his Pennsylvania discipline.

According to the OAE, under R. 1:20-14(a)(4)(E), respondent's conduct warrants different discipline than that imposed in Pennsylvania – disbarment – based on his admission of knowing misappropriation. Respondent used entrusted settlement funds to pay for his personal "medical" expenses, which

Pennsylvania authorities properly viewed as both criminal conduct and conduct that involved dishonesty, fraud, deceit or misrepresentation.

The OAE contends that disbarment is the invariable result of knowing and intentional misappropriation, regardless of mitigating factors: emotional pressures on the attorney, which caused his misdeed; his subsequent compliance with client trust account requirements; his candor and cooperation with the ethics committee; his contrition; or restitution.

The OAE argues that "[g]iven respondent's unequivocal, sworn admissions to use of entrusted settlement funds to pay personal medical expenses, the OAE has satisfied its burden of proving a violation of the Wilson[3] Rule necessitating misconduct by clear and convincing evidence." Moreover, his reimbursement of funds to his IOLTA account does not affect the application of the Wilson Rule.

At oral argument before us, respondent blamed the misappropriation of client funds on "a mix up or delay of a . . . few days" on his receipt of funds from his Vanguard 401(k) account. He maintained that the funds did not clear in time for him to pay for the installation of the heat pump for his "life-threatening situation." When workers came to install the pump, they threatened to leave if he did not immediately pay them $4,200. According to respondent,

[3] In re Wilson, 81 N.J. 451 (1979).

he was not concerned about the propriety of his actions and "went to the bank and transferred money from [his] IOLTA account into [his] personal account" and gave the installers the $4,200 to have the installation completed that day.

After respondent received the Vanguard funds, he did not replenish the funds in his IOLTA account for a few weeks. The additional shortage was not replenished for several months, thereafter. Presumably, the delay in replenishing the funds was due to his depression. Respondent reiterated that he made restitution to the client before the ODC "got involved."

Respondent pointed out that the firm by whom he had been employed had dissolved, he was suffering from financial problems, and his health difficulties impeded his securing alternate employment. As of the date of the hearing before us, he was working as a cashier at Home Depot. He stated that he was "atoning for [his] sins by taking a blue collar job."

* * *

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), "a final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." Thus, with respect to motions for

reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3). In Pennsylvania, "evidence is sufficient to prove unprofessional conduct if a preponderance of the evidence establishes the conduct and the proof of such conduct is clear and satisfactory." Office of Disciplinary Counsel v. Duffield, 537 Pa. 485 (1994); see also Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 444 (2000) and Office of Disciplinary Counsel v. Keller, 509 Pa. 573 (1986).

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
>
> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
>
> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

Subsection (E) applies in this matter because the unethical conduct warrants substantially different discipline. Respondent unequivocally admitted that he knowingly misappropriated Harley's funds. Thus, as the OAE emphasized, disbarment is the appropriate sanction for respondent's conduct, which also included the numerous other violations cited above.

In Wilson, the Court defined misappropriation as "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." Wilson, 81 N.J. at 455;n.1.

The Court has held that no amount of mitigation will suffice to overcome the disbarment sanction in knowing misappropriation cases. In re Noonan, 102 N.J. 157, 160 (1986). Respondent's mitigation included his claim that he "rectified his misappropriation by making full restitution." The Wilson Court emphasized that, although restitution may compensate an individual, and conceivably may "partially restore the shattered faith of a particular client," it does not "significantly retard the subtle but progressive erosion of public confidence in the bar." Wilson 81 N.J. at 458. The Court stated further:

> When restitution is used to support the contention that the lawyer intended to "borrow" rather than steal, it simply cloaks the mistaken premise that the

> unauthorized use of clients' funds is excusable when accompanied by an intent to return them. The act is no less a crime. . . . Lawyers who "borrow" may, it is true, be less culpable than those who had no intent to repay, but the difference is negligible in this connection. Banks do not rehire tellers who "borrow" depositors' funds. Our professional standards, if anything, should be higher. Lawyers are more than fiduciaries: they are representatives of a profession and officers of this Court.
>
> The overwhelming majority of misappropriation cases involves lawyers who undoubtedly intended to return the funds. They misappropriated initially with precisely such intent. Anticipated money for repayment fails to materialize. Other clients' trust funds are then used for "restitution," and the initial embezzlement spawns many more. Wholesale exemption from strict discipline for misappropriation would result if such "borrowing"were excused.
>
> [Id. 458-59.]

Thus, the fact that respondent made restitution lacks significance under New Jersey precedent.

Respondent justified the misappropriation of client funds on his imminent need for a heat pump, due to his "life-threatening situation." He had to pay the heat pump installers immediately and, therefore, transferred $4,200 from his IOLTA account, on July 2, 2014. Respondent's explanation of imminent need, however, is undercut by his previous unauthorized withdrawal of $2,000 from Harley's funds on June 13, 2014.

The petition cited, as mitigation, the fact that respondent had "rectified the misappropriation" prior to any involvement by the ODC. This assertion, however, is not supported by his admission that he faxed information to the ODC on the same day, May 5, 2015, that he issued $11,385.12 to Harley. Respondent made the payment only after the ODC became involved in the investigation. Thus, we view with skepticism his proffer that the restitution should serve as mitigation. Moreover, once respondent received funds from Vanguard, he did not replenish immediately the amounts he had taken from the IOLTA account. Respondent took several months to cure the shortage and, as a result, Harley did not receive the balance of her funds for almost an entire year from their receipt.

Respondent also blamed his health problems for his mental decline, which resulted in his neglect of his client's matter. He claimed that, once his physical health improved, so did his mental health. Respondent did not proffer a Jacob-type defense. In In re Jacob, 95 N.J. 132 (1984), the attorney admitted his misappropriations of client funds, but asserted a medical defense. The Court found no "demonstration by competent medical proofs that respondent suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." Id. at 137. Likewise, respondent did not argue that he suffered a "loss of competence, comprehension or will" or an "inability to appreciate the

difference between right and wrong or the nature and quality of [the] acts." In re Romano, 104 N.J. 306 (1986).

In short, none of respondent's explanations, justifications, or mitigation override the mandates of In re Wilson. Thus, under Wilson, we recommend that respondent be disbarred for his knowing misappropriation of client settlement funds, and other violations equivalent to New Jersey RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep a client reasonably informed about the status of a matter or to promptly comply with reasonable requests for information), RPC 1.15(a) (failure to safeguard funds and commingling funds), RPC 1.15(b) (failure to promptly deliver funds to a client), RPC 1.15(d) (recordkeeping violations), RPC 8.4(b) (criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Member Rivera 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 John C. Smith, Jr.
Docket No. DRB 18-298

Argued: November 15, 2018

Decided: February 28, 2019

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer	X		
Gallipoli	X		
Hoberman	X		
Joseph	X		
Rivera			X
Singer	X		
Zmirich	X		
Total:	8	0	1

Ellen A. Brodsky
Chief Counsel