Supreme Court Of New Jersey
Disciplinary Review Board
Docket No. DRB 18-337
District Docket No. XIV-2015-0222E

In The Matter Of

Dwight Hugh Simon Day

An Attorney At Law

Decision

Argued: January 17, 2019

Decided: April 8, 2019

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

Tisha N. Adams 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 disciplinary recommendation for disbarment filed by Special Master Harold W. Fullilove, J.S.C. (Ret.). The three-count formal ethics complaint charged respondent with violations of RPC 1.15 (presumably, subsection (a)) and the principles of In re Wilson, 81

N.J. 451 (1979) (knowing misappropriation of client funds), RPC 3.3(a)(1) (false statement of material fact to a tribunal), RPC 8.4(b) (commission of a criminal act 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) (count one); RPC 8.1(b) (failure to cooperate with disciplinary authorities) (count two); and RPC 1.15(d) and R. 1:21-6 (recordkeeping) (count three).

The Office of Attorney Ethics (OAE) recommends respondent's disbarment. Respondent contends that, at most, his misconduct constituted negligent misappropriation of client trust funds, and, therefore, disbarment is not warranted.

For the reasons detailed below, we find that respondent knowingly misappropriated client trust funds and, thus, recommend his disbarment.

Respondent earned admission to the New Jersey bar in 2004. During the relevant time frame, he was a solo practitioner, with an office in Newark, New Jersey. He has no prior discipline.

During the relevant time frame, respondent maintained an attorney trust account (ATA) at PNC Bank and an attorney business account (ABA) at Wells Fargo. In September or October 2010, the grievant, B.N., retained respondent to sue the federal government in connection with injuries he claimed to have

received when he was assaulted while incarcerated in federal prison. Respondent and B.N. executed a contingent fee agreement that provided for attorneys' fees "based on a percentage of the net recovery," but failed to set forth the specific percentage.

On August 12, 2011, respondent filed a lawsuit in behalf of B.N., naming the federal government and multiple federal employees as defendants. Almost three years later, in February 2014, the parties to the lawsuit executed a Stipulation of Dismissal, whereby B.N. agreed to dismiss the complaint, with prejudice, in return for a $10,000 settlement.

In a July 14, 2014 letter, respondent informed B.N. that he had not yet received the settlement proceeds, but would deduct $3,000 from them for his costs, expenses, and attorneys' fees. In that letter, respondent asked B.N. to provide him instructions for disbursing B.N.'s portion of the settlement. Two days later, on July 16, 2014, an Assistant United States Attorney hand-delivered to respondent a $10,000 United States Treasury check, payable to respondent's law firm. That same day, respondent deposited the check in his ATA, bringing the balance to $14,524.38, which included the $10,000 for B.N., $4,394.50 for an unrelated client matter (Nelson), and $129.88 in unidentified trust funds.

Although respondent initially alleged that he was entitled to almost $6,000 of the settlement amount, he later negotiated with B.N. and agreed that, of the $10,000 settlement, respondent would receive a $2,000 fee, and B.N. would receive $8,000. Respondent made this concession because he did not have documents supporting the costs he claimed he had incurred in B.N.'s case. Moreover, respondent admitted that he had neither prepared nor provided to B.N. a settlement statement, as he routinely did for other clients in civil matters. Respondent admitted that he had never sent B.N. the final $1,000 of the $8,000 he owed to his client.

During the ethics hearing, respondent repeatedly admitted that, although he knew that he had an express obligation to hold a client's settlement funds in his ATA until they are disbursed, he had not done so in respect of B.N.'s trust funds. Respondent further admitted that, notwithstanding his awareness of his duty to safeguard B.N.'s funds, within approximately one month of receipt of those trust funds, he had disbursed $9,500 of the $10,000, via checks issued to himself, and promptly spent those funds on personal and business expenses.

Specifically, on July 17, 2014, the day after depositing the $10,000 settlement check, respondent issued to himself ATA check 2137, in the amount of $3,000, cashed that check, and deposited $2,950 in cash into his ABA. Also on that same date, respondent issued to himself ATA check 2139, in the

amount of $3,500, and deposited all of those funds in his ABA. By July 18, 2014, the balance of respondent's ATA account had been reduced to $8,575.38. After depositing the funds from ATA checks 2137 and 2139 into his ABA, respondent promptly disbursed all of those funds to pay various personal and business expenses unrelated to B.N.

On July 20, 2014, respondent issued to himself ATA check 2141, in the amount of $1,000. On July 21, 2014, respondent used an ATM in Florida to deposit those funds in his ABA, which had a balance of $37.68, and issued ATA check 2142, in the amount of $1,000, payable to himself. That same date, B.N. wrote to respondent, suggesting that respondent cash the $10,000 settlement check and deposit $8,000 directly into B.N.'s prison account, via a certified bank check. By that time, respondent already had disbursed $8,500 of the $10,000 settlement to himself, via ATA checks.

On July 22, 2014, respondent used an ATM in Florida to deposit ATA check 2142 in his ABA, increasing the balance of that account to $6,575.38. After depositing the funds from ATA checks 2141 and 2142 in his ABA, respondent admittedly disbursed all of those funds to pay various personal and business expenses unrelated to B.N.

On July 25, 2014, respondent disbursed $800 from his ATA to his ABA via wire transfer, increasing the balance of the ABA to $5,607.38.

On August 13, 2014, respondent deposited ATA check 2143, in the amount of $200, payable to himself, into his ABA, increasing the balance of that account to $982.88. As of that date, he should have been holding $8,000 in his ATA, inviolate, in behalf of B.N. Instead, as a result of the numerous disbursements to himself, he held only $500 in his ATA in behalf of B.N. Fifteen days later, on August 28, 2014, the balance of respondent's ABA was ($108.13).

On September 9, 2014, after he already had improperly disbursed nearly all of B.N.'s client trust funds, respondent wrote to B.N., representing that B.N.'s portion of the settlement proceeds would be deposited in his prison account "in short order." On October 27, 2014, respondent again wrote to B.N., representing that he would "be following [B.N.'s] instructions. Please check [your prison account] on your end approximately 10 days after you receive this letter to confirm receipt on your end." In October 2014, however, the balance of respondent's ATA was only $450.23.

On December 19, 2014, respondent again wrote to B.N., stating "I do not know what happened to your check. Can you resend me the address to which it should be sent? Plus, it never came back and has not been cashed." The OAE investigation of respondent's financial records revealed no evidence that respondent actually had issued and mailed the check referenced in

respondent's December 19, 2014 letter to B.N. Moreover, during the ethics hearing, respondent was unable to confirm that he had actually sent a check in connection with that letter, or to point to evidence of same within his financial records. By letter dated December 24, 2014, B.N. suggested that respondent send B.N.'s portion of the settlement proceeds via United States Postal Service (USPS) money orders.

On January 30, 2015, more than six months after receiving B.N.'s settlement funds, respondent sent B.N. one USPS money order, in the amount of $1,000, representing the first disbursement of settlement proceeds respondent had made to B.N. On February 3, 2015, B.N. again instructed respondent to deposit B.N.'s portion of the settlement proceeds in his prison account, or, instead, to send the settlement proceeds to B.N.'s father.

By letter dated April 20, 2015, B.N. complained to United States District Court Judge Robert B. Kugler that respondent had misappropriated his settlement funds, and had remitted only $1,000 of the $8,000 he was owed. On April 22, 2015, B.N. filed an ethics grievance against respondent, alleging that he had misappropriated B.N.'s settlement funds. Shortly thereafter, respondent sent B.N. six more USPS money orders, totaling $6,000, which were deposited in B.N.'s prison account on May 7, 2015.

On May 6, 2015, respondent wrote to United States Magistrate Judge Ann Marie Donio, representing that he had paid B.N. a total of $7,000 in connection with the personal injury settlement. In that letter, respondent further represented that his costs and attorneys' fees in the case had been $3,000.

On May 14, 2015, the OAE sent to respondent a copy of B.N.'s grievance, requiring a written response no later than May 28, 2015. The OAE also directed respondent to produce his ATA and ABA records and client file in the B.N. matter. On June 11, 2015, respondent wrote to the OAE, but neither replied to the grievance nor provided his ATA and ABA records. On June 17, 2015, the OAE subpoenaed respondent's ATA and ABA records.

By letter dated August 7, 2015, the OAE again directed respondent to produce his ATA and ABA records by August 21, 2015, and scheduled a demand audit for August 27, 2015. The OAE then granted respondent's request to postpone the demand audit, provided that he produce his ATA and ABA records by September 11, 2015. On September 10, 2015, respondent provided the OAE with certain client ledger cards, including an incomplete, handwritten ledger card for B.N., which indicated "in dispute." That ledger card reflected a client balance of $10,000 for B.N., despite the fact that, by that date, respondent had disbursed at least $9,500 of those funds to himself. Moreover,

the ledger card did not comply with R. 1:21-6, as it did not provide the source of the settlement funds or reflect any of the disbursements that respondent made, including the $7,000 disbursed to B.N.

By letter dated September 17, 2015, the OAE reminded respondent that he had failed to produce the required financial records and scheduled a demand audit for October 14, 2015. On October 16, 2015, after respondent appeared at the demand audit, the OAE informed respondent that his ATA and ABA records were grossly incomplete and that he had failed to comply with R. 1:21-6 and RPC 1.15(d). The letter directed respondent to submit complete financial records for his ATA and ABA by November 30, 2015. On December 20, 2015, after the OAE had granted multiple extensions of time, respondent produced some financial records.

On February 19, 2016, the OAE conducted a continuation demand audit with respondent. Tisha N. Adams, Esq. informed the OAE that she represented respondent. On March 21, 2016, the OAE sent Adams a copy of its October 16, 2015 letter and informed her of the steps required to bring respondent's recordkeeping into conformity with R. 1:20-6 and set a due date of April 4, 2016 for respondent to comply. Because respondent failed to produce the required records by that deadline, the OAE sent Adams letters, dated May 5

and 19, 2016, warning her that respondent would be charged with a violation of RPC 8.1(b) for his failure to cooperate.

Although respondent ultimately produced certain financial records, the OAE informed him that his records lacked sufficient detail, such as failing to identify the source of each item deposited as well as the payee for disbursements, as R. 1:21-6 requires. From January 1, 2014 through January 2017, respondent failed to properly maintain his ATA and ABA books and records. During the ethics hearing, respondent stipulated to the recordkeeping violations charged in count three of the complaint.

During the ethics hearing, respondent repeatedly maintained that, despite the fact that he had spent $9,500 of B.N.'s $10,000 in client trust funds, he had not knowingly misappropriated those funds, because he had maintained "personal" funds in excess of $15,000 in cash, held in a safe in his office, for immigration emergencies. Upon questioning from the special master, however, respondent conceded that those funds were never earmarked for B.N., and would have been spent in the event of such an immigration emergency.

In his November 8, 2018 brief to us, respondent asserts that the record does not contain clear and convincing evidence of knowing misappropriation, but, rather, proves that he committed gross negligence in respect of his financial and recordkeeping practices, and negligent misappropriation of client

trust funds. Despite overdrawing his ATA by more than $100 prior to disbursing any of the settlement proceeds to B.N., respondent maintains that he did not intend to invade client trust funds, and that no client suffered financial injury as a result of his misconduct. Respondent further claims that he safeguarded B.N.'s funds in his office safe, despite having admitted under oath, during the ethics hearing, that those funds constituted personal funds that he maintained for immigration emergencies, and were never designated specifically for B.N.

During oral argument before us, respondent's counsel conceded that respondent had not submitted into evidence any proof of the purported $15,000 in his office safe, and that respondent maintained no ledger system for those funds.

In respect of count one of the formal ethics complaint, the special master concluded that the OAE proved, by clear and convincing evidence, that respondent committed knowing misappropriation, emphasizing that, despite respondent's asserted defense, he admitted that he knew of his duty to safeguard B.N.'s settlement proceeds. Yet, respondent had disbursed $9,500 of B.N.'s client trust funds to himself, and used those funds to pay personal and business expenses. The special master noted that B.N.'s "[p]ermission was neither sought nor received" in respect of respondent's use of his client's

funds. The special master rejected respondent's asserted defense regarding the cash he maintained in an office safe, reasoning that such funds did not "qualify as safeguarding [B.N.'s] funds." The special master pointed out that, had an immigration emergency occurred, "the settlement funds from [B.N.'s] case would have disappeared." The special master concluded that respondent's improper use of B.N.'s client trust funds also constituted a violation of RPC 8.4(c). The special master did not specifically address the RPC 3.3 and RPC 8.4(b) allegations set forth in this count of the formal ethics complaint.

As to count two, the special master concluded that respondent's failure to provide documents that the OAE repeatedly requested in connection with the audit of his ATA and ABA constituted a violation of RPC 8.1(b).

In respect of count three, the special master cited respondent's stipulation, both in his answer and at the ethics hearing, to having failed to comply with R. 1:21-6. The special master, thus, concluded that respondent violated RPC 1.15(d).

Based on his determination that respondent knowingly misappropriated B.N.'s client trust funds, the special master recommended respondent's disbarment.

Upon a de novo review of the record, we are satisfied that the special master's conclusion that respondent's conduct was unethical was fully

supported by clear and convincing evidence. Respondent knowingly misappropriated B.N.'s client trust funds, in connection with the $10,000 settlement of his lawsuit, in violation of RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979). Moreover, the record contains clear and convincing evidence that respondent violated RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and RPC 1.15(d) and R. 1:21-6 (recordkeeping).

In respect of the allegation of knowing misappropriation of B.N.'s client trust funds, the strongest evidence is respondent's numerous admissions, under oath, to having done so, despite affirmative knowledge of his duty to safeguard those funds. Specifically, he concedes that he spent at least $9,500 of the $10,000 in B.N.'s settlement proceeds on personal and business expenses, without his client's consent or authorization. At best, respondent was entitled to $3,000 of those funds, but ultimately had agreed to accept $2,000 as his portion of the settlement proceeds. If $1,000 were in dispute, respondent had an obligation, which he also acknowledged under oath, to segregate and safeguard such disputed funds.

In Wilson, the Court described knowing misappropriation of client trust funds 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.
>
> [In re Wilson, 81 N.J. 455 n.1.]

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' . . . 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 . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant.
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the presenter must produce clear and convincing evidence that the attorney used trust funds, knowing that

they belonged to the client and knowing that the client had not authorized him or her to do so.

As detailed above, the record clearly establishes that respondent knowingly spent at least $9,500 of the $10,000 in B.N.'s client trust funds that he had deposited in his ATA, despite his entitlement to only $2,000 of those funds. He claims that he should escape disbarment due to the more than $15,000 in cash he purportedly kept in an office safe. His affirmative defense to the allegation of knowing misappropriation, however, does not pass muster, and constitutes nothing more than a desperate attempt to blur the truth - that he had used B.N.'s client trust funds as his own, with no regard to the bright-line ethics rules governing attorney trust accounts.

The Court has previously rejected similar proffered defenses regarding cash in a safe. See In re Freimark, 152 N.J. 45 (1997). Recently, we rejected a similar defense of substitute collateral in a knowing misappropriation case, stating that "[w]e shudder to think of the consequences that would flow if all attorneys approached their fiduciary duties in such a casual fashion." In the Matter of Antoinette M. Wooten, DRB 18-084 (June 27, 2018) (slip op. at 16). The Court disbarred Wooten. In re Wooten, 235 N.J. 358 (2018).

In connection with his knowing misappropriation of B.N.'s trust funds, respondent ignored B.N.'s repeated requests that he disburse the client's

portion of the settlement proceeds; engaged in efforts to delay the disbursement of the client's portion; and made an affirmative misrepresentation to the client that he had sent a check for a portion of the proceeds when, in reality, he had not done so. That deceitful behavior violated RPC 8.4(c).

Additionally, respondent wholly failed to maintain required financial records, client ledgers, disbursement journals, and three-way reconciliations, as he stipulated, in both his answer and at the ethics hearing. Respondent, thus, violated RPC 1.15(d) and R. 1:21-6. Moreover, respondent's repeated failure to comply with the OAE's demand audit requirements, and failure to properly recreate his ATA records violated RPC 8.1(b).

The record contains insufficient evidence for us to conclude that respondent violated RPC 3.3(a)(1) or RPC 8.4(b). As a matter of precedent, RPC 8.4(b) is usually not found merely in conjunction with a finding of knowing misappropriation.

Given that the record is replete with proof of respondent's knowing misappropriation of B.N.'s client trust funds, we recommend his disbarment.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Dwight Hugh Day
Docket No. DRB 18-337

Argued: January 17, 2019

Decided: April 8, 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: | 9 | 0 | 0 |

Ellen A. Brodsky
Chief Counsel