SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-125
District Docket No. XIV-2008-0524E

IN THE MATTER OF	:
ANTHONY M. MAHONEY	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 15, 2011

Decided: October 7, 2011

Lee Gronikowski appeared on behalf of the Office of Attorney Ethics.

Joel A. Kobert appeared on behalf of respondent.

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

This matter came before us on a recommendation for disbarment filed by Special Master Miles S. Winder, III. The one-count complaint filed by the Office of Attorney Ethics (OAE) charged respondent with knowing misappropriation of client funds, a violation of RPC 1.15(a) (failure to safeguard funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or

misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979). Based on our finding that respondent knowingly misappropriated client funds, we recommend his disbarment.

Respondent was admitted to the New Jersey and New York bars in 1972 and 1971, respectively. On March 18, 2000, he consented to be temporarily suspended in connection with this ethics matter. In re Mahoney, 163 N.J. 66 (2000). He remains suspended to date. He has no history of final discipline.

On May 15, 2007, the OAE filed with us a motion for final discipline, seeking respondent's disbarment. The motion was based on respondent's New Jersey convictions of forging the signatures of his clients, Clark and Barbara Ferry, on a settlement check issued by an insurance company. Although respondent had also been convicted of misapplication of entrusted property and of theft by failure to make required disposition of property, those convictions were reversed by both the Appellate Division and the Supreme Court.

In its motion for final discipline, the OAE argued that, although respondent's theft convictions had been reversed, we could find that the forgery convictions established an intent to defraud and that respondent had intended to misuse his clients' funds. In essence, the OAE contended that we could find knowing misappropriation by implication. We, however, determined that

the record did not contain sufficient facts to permit a finding that respondent had used his clients' funds for his own purpose, without their authorization.

On November 29, 2007, thus, we denied the motion for final discipline and directed the OAE to file a complaint charging respondent with the commission of a criminal act, knowing misappropriation of client funds, misrepresentation, and such other RPC violations as the OAE deemed appropriate.

On March 27, 2009, the OAE filed a complaint.[1] The ethics hearing before the special master took place on January 12, 2010. At that hearing, the OAE presented no testimony, submitting only documentary evidence, including the Supreme Court opinion and the Appellate Division decision in the criminal matter, the OAE's brief and appendix filed in support of the motion for final discipline, transcripts from the criminal trial and from parallel ethics hearings that took place in New York, as well as other exhibits. The OAE did not conduct an audit of respondent's attorney records. Respondent and two character witnesses testified at the New Jersey ethics hearing.

Before we set out the facts in detail, we provide a brief synopsis of the case. In 1998, respondent represented Clark and

[1] Although the complaint provided details about respondent's two forgery convictions, it did not charge a violation of RPC 8.4(b) (criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer).

Barbara Ferry in connection with a claim resulting from the wrongful death of their son, Clark Jr., known as C.J. After respondent settled the claim for $75,000, he deposited the insurance check in his trust account. He immediately issued a series of trust account checks, none of which were to or for the benefit of the Ferrys, depleting all of the insurance proceeds. During several separate telephone conversations with Clark and Barbara,[2] respondent misrepresented that he could not disburse their share of the settlement funds until certain events took place, such as the receipt of tax clearance certificates. Those statements were not true. Finally, after the Ferrys reported the matter to law enforcement authorities and after the Union County Prosecutor's Office executed a search warrant at respondent's law office, respondent issued a check to the Ferrys, in payment of their share of the settlement funds. This disbursement was made more than eleven months after respondent had received the insurance check.

Respondent denied that he had knowingly misappropriated the Ferrys' funds, contending that: (1) he was unaware that he had a shortage in his trust account because he had not properly kept his books and records due to his ill health and staff shortage; (2) there was confusion about the payment of the funds because of

[2] For ease of reference, we use the parties' first names in this decision.

marital discord between the Ferrys; and (3) estate law required the Ferrys to obtain letters of administration for C.J.'s estate before the settlement funds could be disbursed to them.

The Union County Prosecutor's Office referred this matter to the OAE on January 4, 2000.

We now present a detailed recitation of the facts. On or after May 1998, Barbara contacted respondent in connection with telephone messages that she had received from an insurance company, following C.J.'s death. C.J. had been killed after being hit by a car, on February 7, 1998. Several months later, a representative of Harleysville Insurance Company (Harleysville), the driver's insurer, left two telephone messages at the Ferrys' home. Because Barbara and Clark were too emotionally upset over C.J.'s death to return the calls, Barbara asked respondent to do so.[3] Respondent then reported to Barbara that Harleysville wanted to settle a claim to avoid a lawsuit.

On August 13, 1998, respondent sent a letter to Harleysville, confirming that he represented the Ferrys. About four months later, in December 1998, respondent sent a contingent fee agreement only to Barbara, as administratrix ad prosequendum

[3] The Ferrys were longtime friends of respondent's paralegal/secretary, Maureen Holahan. Respondent had represented the Ferrys in three prior legal matters.

of the estate of C.J.[4] The agreement, dated December 17, 1998, provided for a legal fee of one-third of any recovery obtained.

On December 30, 1998, respondent and Rachel Brown, a Harleysville claims adjuster, reached an agreement, with the Ferrys' approval, to settle the wrongful death claim for $75,000. According to respondent, Clark was not involved in the wrongful death claim until after the case settled, when he contacted respondent and asserted that he wanted to take part in the process.

At respondent's request, the Ferrys accompanied him to the Ocean County Surrogate's Office, on January 4, 1999, where both Ferrys signed applications to be appointed as administrators ad prosequendum of C.J.'s estate. During their meeting at the Surrogate's Office, respondent explained that the State holds settlement funds for thirty days.

On January 7, 1999, respondent "faxed" a letter to Brown, confirming that the Ferrys were executors of the estate. On that same date, Brown mailed to respondent release forms to be executed by the Ferrys. She received the releases, purportedly bearing the Ferrys' signatures, the next day, January 8, 1999.

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[4] Susan Walters, Chief Clerk of the Ocean County Surrogate's Court, explained that letters of administration ad prosequendum permit the next of kin to file a wrongful death lawsuit on behalf of a decedent.

Respondent had taken the jurats on the releases. The Ferrys, however, denied having signed the releases.

After receiving the executed releases, Brown sent to respondent a $75,000 check payable to "Clark B. Ferry & Barbara Ferry, as Administrators Ad Prosequendum for Estate of Clark Ferry, Jr. and Mahoney & Mahoney, as attorneys." Brown sent to the Ferrys the following letter, dated January 12, 1999:

> In accordance with N.J.A.C. 11:2-17.11, Unfair Claims Practices, we are required to notify you of settlement of your third party liability claim with your legal representative.
>
> We are required by the above act to provide you with the following information.
>
> 1. The amount of payment: $75,000
> 2. The party/parties to whom the check was made payable; Clark Ferry & Barbara Ferry, as Administrators Ad Prosequedum [sic] for Estate of Clark Ferry, Jr. and Mahoney & Mahoney, as attorneys
> 3. The party to whom the check was mailed; Mahoney & Mahoney
> 4. The address of the party to whom the check was mailed; P.O. Box 309 Westfield, NJ 07090
>
> If you have any questions concerning this matter, please contact your legal representative.
>
> [Ex.R-5.]

At the criminal trial, the Ferrys' testimony about this letter was contradictory. According to Barbara, she did not read the letter when she received it, setting it aside for Clark.

They did not discuss the letter until October 1999. Clark, however, testified that he discussed the letter with Barbara soon after receiving it. Clark recalled that, although he did not understand the significance of the letter at first, as he talked about it with Barbara, he realized that a payment had been made.

Based on respondent's representation that the State holds settlement monies for thirty days, Barbara waited until March 1999 to ask him about the release of the funds. When she inquired further, respondent replied that the delay related to "the New Jersey income tax."

In April 1999, Clark contacted respondent to determine the status of the release of the funds. According to Clark, respondent replied that the funds would be released in one month to six weeks. At that time, Clark had obtained a commitment to refinance his first mortgage, contingent on the satisfaction of a second mortgage. Clark had expected to apply the settlement funds to the pay-off of the second mortgage. Upon learning that he would not receive the settlement funds on time, Clark canceled the mortgage transaction.

In August 1999, Clark again inquired about the status of the settlement funds. Respondent indicated that no liens against C.J.'s estate had been disclosed, that he planned to file a

motion for the release of the funds, and that he expected to receive the monies in September.

In October 1999, Barbara reached out to an acquaintance, who worked in the office of a New Jersey state senator, to obtain information about the tax law that was purportedly delaying the release of the settlement funds. According to Barbara, when she reviewed the January 12, 1999 Harleysville letter at the state senator's office, she learned that the settlement check had been issued. On the advice of the acquaintance, Barbara requested and received from Brown a copy of the front and back of the settlement check issued by Harleysville.

The Ferrys testified that the signatures on the check were not theirs. According to the Ferrys, they had not authorized anyone to sign the check for them.

After receiving a copy of the settlement check, Barbara called Maureen Holahan, at respondent's office. Holahan told her that the funds had been released and that Barbara should receive them at the end of the month.

The Ferrys then contacted the police department in Westfield, where respondent's office is located. The Westfield Police Department referred the Ferrys to the Union County Prosecutor's Office. On December 16, 1999, the Union County

Prosecutor's Office arranged for the recording of a telephone call between Barbara and respondent.

During that December 16, 1999 telephone conversation, respondent misrepresented to Barbara that he had finally received an order, in late November, providing the State with thirty days to release the settlement funds; that "they" (presumably, the State) should have to "pay it" at the end of the month; that "they" should provide a writing indicating that there is no tax; that the Surrogate was waiting for a tax clearance certificate from the taxing authority; that they should have that document by the end of the year; and that Barbara should expect to hear from him within a couple of weeks. At the hearing before the special master, respondent acknowledged that the above statements were not true.

According to Susan Walters of the Ocean County Surrogate's Court, court approval is required to disburse funds when assets are received by an estate. In the criminal case, both the Appellate Division and the Supreme Court noted that, "when, as here," a check is made payable directly to the heirs of an estate and their counsel, no court approval is required to disburse the funds. Walters asserted that the Surrogate's Office never was notified of any assets received by the estate, never received a tax waiver or a tax clearance certificate for the

estate, and would have had no reason to withhold insurance settlement monies.

On December 21, 1999, five days after the tape-recorded conversation between Barbara and respondent, the police executed a search warrant of respondent's law office, removing various bank documents, computers, the Ferry client file and other items.

Ten days later, on December 31, 1999, Holahan delivered to Barbara a $50,000 trust account check payable to Clark and Barbara Ferry for the estate of Clark Ferry, Jr. The Ferrys deposited the check in their bank account.

Respondent's criminal proceedings revealed that, meanwhile, respondent had deposited the $75,000 Harleysville check in his trust account on January 20, 1999. On January 15, 1999, before that deposit, the balance in his trust account was $250.19. A $6,000 deposit, unrelated to the Ferry matter, was made on January 21, 1999.

On January 21 and 22, 1999, respondent issued and signed the following checks from his trust account:

Check Number	Date	Amount
1762	1/21/99	$17,045.08
1763	1/21/99	$17,954.92
1764	1/21/99	$15,000.00
1765	1/22/99	$ 6,000.00
1766	1/22/99	$18,827.08
1767	1/22/99	$ 4,517.92
	Total	$79,345

The checks were neither issued to, nor on behalf of, the Ferrys. The $6,000 check was issued to respondent's law firm, in payment of fees for another client matter. All of the other checks were issued to or for clients other than the Ferrys. As of January 27, 1999, the trust account balance was $1,905.19.

During January 1999, respondent's business account had a negative balance of $596.79. Between February and August 1999, respondent's bank sent him five notices of insufficient funds in the business account.

For his part, respondent claimed that he had not been aware of a shortage in his trust account. He, thus, contended that the misappropriation of the Ferrys' funds was negligent, not knowing.

Respondent asserted that his health issues caused him to neglect his law practice. In April 1997, almost two years before he received the Ferry settlement check, respondent suffered a heart attack, during a trial. He underwent two angioplasty procedures, including the insertion of a stent, to treat two blocked coronary arteries. His cardiologist ordered him to institute lifestyle changes, such as reducing the number of hours spent working, improving his diet, losing weight, and exercising. Respondent followed this advice.

Thereafter, in March or April 1998, an associate left respondent's law practice. As a result, Holahan ceased performing the office bookkeeping and concentrated on paralegal tasks. According to respondent, although he intended to assume the bookkeeping responsibilities, he never did. He claimed that this staff shortage also contributed to his lack of awareness of the state of his financial records.

Respondent's health problems continued. At the end of 1998, respondent's cardiologist recommended that he see a urologist to determine whether he had prostate cancer. In March 1999, after a biopsy was performed, the cancer diagnosis was confirmed. Respondent then spent his time and attention on researching treatment options, to the exclusion of his law practice. On July 6, 1999, he underwent radioactive seed implantation in Florida. The recovery period for this procedure was twelve weeks.

Respondent alleged that the prescription drugs that he was required to take for both his heart and prostate conditions caused severe side effects, including depression, light-headedness, inability to control his bladder and bowels, fatigue, and sleep interruption. According to respondent, these side effects also contributed to his failure to maintain his attorney books and records.

At the criminal trial, respondent offered the testimony of a cardiologist and a psychologist. Dr. Benjamin Zola, a cardiologist and internist, examined respondent in June 2002, four months before the criminal trial took place, for the purpose of evaluating him and offering medical testimony about his condition in 1999. Dr. Zola confirmed the effects caused by the medications that respondent was prescribed in 1998 and 1999. According to Dr. Zola, the prescription drugs rendered respondent "impaired in terms of his memory and his ability to perform higher level cognitive functions or higher level thinking functions" and caused poor memory, mood swings, and impulsive acts.

Dr. Zola conceded, however, that he did not know how long respondent took each medication or his health condition in 1999, except as reported to him by respondent. Dr. Zola also opined that the medications that respondent took would not cause one to forge people's names on a check or to misappropriate or steal client's money.

Dr. Susan Zorn, a clinical psychologist, was retained by respondent because he "wanted to know if it were possible that because of the two life threatening illnesses that he had this would have played a role in the legal problems that he was having." She prepared a report, based on a clinical interview with respondent and in reliance on his "self report." She

conducted no psychological tests on him. She did not review any of respondent's medical records before issuing her opinion, relying solely on information from respondent. She understood that he had never received treatment for any psychological disorders.

Dr. Zorn opined that, in 1999, respondent suffered from adjustment disorder with mixed anxiety and depressed mood. She described the disorder as the development of behavioral or emotional problems as a reaction to a stressor, which, in this case, was respondent's cancer diagnosis. According to Dr. Zorn, an individual with adjustment disorder also shows marked impairment in the workplace. Although she also suggested that respondent may have suffered from post-traumatic stress disorder, she could not form a definitive diagnosis.

According to Dr. Zorn, during her evaluation sessions with respondent, she asked whether he had diminished interest in any of his usual activities, which is one symptom of post-traumatic stress disorder. Respondent replied that

> he would be more interested in doing the court work which he found more interesting. But, for example, keeping the ledger[s] or doing the book[s], he said that he kindda [sic] let that slide because it really wasn't that interesting for him. And he said the books were a mess. Everything was chaos.
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> [Ex.C-17 at 71-9 to 14.]

On cross-examination, Dr. Zorn admitted that she could not say "for sure" whether respondent suffered from adjustment disorder or post-traumatic stress disorder in 1999, because she met with him in 2002, "three years after the fact." She stated that her opinion was rendered to "a reasonable degree of psychological probability," a term that she initially did not use in her report, but added at respondent's suggestion. In her view, this standard meant that the likelihood that respondent had experienced adjustment disorder was more than fifty percent.

Dr. Zorn acknowledged that neither adjustment disorder with mixed anxiety and depressed mood nor post-traumatic stress disorder causes one to forge checks, lie to clients, or steal.[5]

At the criminal trial, the State called two expert witnesses, who offered opinions about respondent's health. Dr. Ralph Oriscello, who was board-certified in internal medicine, cardiovascular diseases, and critical care medicine, testified that, within a reasonable degree of medical certainty, the medications in the dosages prescribed to respondent should not have affected his ability to function in his usual fashion on a daily basis. Dr. Oriscello, who had not examined respondent, based his opinion on his knowledge of the pharmacology of the

[5] Dr. Zorn conceded that, by submitting claims to respondent's health insurance company and receiving payment for nine sessions with him, a non-patient, she had committed insurance fraud.

drugs; his review of the records of respondent's cardiologist and primary care physician, which did not indicate the presence of adverse affects; and his own experience with the medications, which are commonly used in the same combinations. He asserted that, had side effects been noted by respondent's treating physicians, the records would have so indicated. Finally, he opined that the medications do not cause people to lie or steal.

In addition, Dr. Louis Schlesinger, a board-certified forensic psychologist, examined respondent, administered psychological tests, and reviewed documents, such as witness statements, police and medical records, and expert reports. He noted that respondent's medical records contained no discussion of any psychological problem and no referral for a mental health consultation. During the interview with Dr. Schlesinger, respondent complained that the prosecutor's office, not the Ferrys, were the driving force behind his criminal charges, referring to the forgery allegation as "bogus." Respondent also asserted that Barbara had used him as a scapegoat because she had lost two children.[6]

According to Dr. Schlesinger,

> I also asked him why did you lie to your clients. And he said, "I was embarrassed by the delay to the Ferrys. I didn't want to

[6] The Ferrys' daughter, Desiree, had been killed in a one-car accident in 1993.

> admit I hadn't been doing anything with the paperwork because of my illness; so I told them about some estate tax." I asked if he was truthful with his clients and Mr. Mahoney said no.
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> [Ex.C-21 p.41 lines 3 to 9.]

Dr. Schlesinger questioned respondent about his thoughts, behaviors, and emotions from 1997 to 1999:

> I asked him his primary thoughts during that time period, and he told me it was not his illness that he was preoccupied with. He said he was mostly concerned about his ability to work and keep his illness private so that he would not lose clients if they knew that he was ill. He said he certainly thought about the heart attack and the prostate cancer when these events occurred. . . . but his primary thoughts were his — was his business. He said, "What I lived and worked for was what I did. It, being an attorney, was more than a job. If they learned my illness, I'd lose clients", "they" meaning his clients.
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> [Ex.C-21,56-11 to 57-1.]

During respondent's own testimony at the criminal trial, he confirmed this concern:

> I didn't tell any of my clients I had cancer. I didn't tell my clients I had a heart attack. I don't think that's the kind of news clients want to hear if they're going to employ you.
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> [Ex.C-19,65-3 to 65-6.]

Dr. Schlesinger opined that respondent had not suffered from either post-traumatic stress disorder or adjustment

disorder. He based this opinion on the lack of symptoms observed by any of respondent's medical professionals and on respondent's own denial of having had any such problems. He noted that the only consequence of respondent's alleged disorder was his negligent bookkeeping in the Ferry case. Moreover, he questioned how respondent could have a disorder so mild that no one could see it and, yet, be severe enough to form the basis of a legal defense.

In addition to presenting defenses to the knowing misappropriation charge, respondent offered an explanation for his failure promptly to disburse the insurance proceeds to the Ferrys. He alleged that a division between Clark and Barbara about the use of the insurance proceeds prevented him from disbursing the funds on a timely basis. According to respondent, before he received the settlement check, Barbara told him that, although Clark wanted to use the funds to pay off a mortgage, she wanted to move to Florida. Respondent asserted that, because of this purported dispute between the Ferrys, he required that they obtain refunding bonds. The refunding bonds would protect respondent in the event that either Clark or Barbara were required to return the funds, in the future.

At the ethics hearing, respondent offered two character witnesses. Teresa Kazistakasim worked for respondent, first

while in high school, then as a law clerk, and finally as an associate for about three years. In her opinion, respondent is honest and works hard for his clients. Respondent's brother and law partner, Dennis Mahoney, testified that respondent had a good reputation as a trial lawyer. He asserted that, although they were partners, he and respondent maintained separate trust accounts.

The special master determined that the evidence demonstrated clearly and convincingly that respondent knowingly misappropriated client funds. Although the special master acknowledged respondent's illnesses, he determined that they did not constitute a defense to the knowing misappropriation charge.

Recognizing respondent's obligation to reconcile his trust account, the special master discredited respondent's position that he had not been aware that the $75,000 that he deposited on January 20, 1999 "was entirely gone by the time the next account statement rolled around." He further noted that, in addition to the ten or eleven bank statements that respondent received in 1999, the Ferrys had contacted him on several occasions. The special master, thus, implied that, upon hearing from the Ferrys, respondent should have recalled that he had not disbursed their funds to them and that he knew, or should have

known, that he had failed to hold the Ferrys' settlement funds intact in his trust account.

As to respondent's failure to disburse the funds promptly to the Ferrys, the special master rejected respondent's defense that the dispute between the Ferrys was to blame. The special master observed that, by March or April 1999, when a dispute arose, in connection with the Ferrys' mortgage refinance, respondent had already dissipated the funds. He also noted that non-communication with clients would not, under any circumstances, justify an attorney's use of client funds for personal purposes.

The special master disregarded respondent's mitigating factors, concluding that a finding of knowing misappropriation is not affected by such mitigation as good character and the absence of a disciplinary history. Moreover, the special master rejected respondent's contention that the Ferrys had not suffered economic harm, noting that the "harm is in the taking, not in whether it cost the client anything."

Concluding that respondent "made a fatal error of judgment in negotiating the settlement check and taking the funds," 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.

Respondent received a $75,000 settlement check from Harleysville Insurance Company, payable jointly to the Ferrys and his law firm. Before he deposited that check, the balance in his trust account was $250.10. The day after the deposit, he issued three checks, totaling $50,000, the exact amount that he should have disbursed to the Ferrys. Those disbursements were to, or for the benefit of, other clients. The next day, he issued two additional checks, totaling $23,345, to, or on behalf of, other clients and a $6,000 check to his law firm. Thus, within two days of receiving the Ferry settlement check of $75,000, respondent issued six checks, for a total of $79,345, without disbursing any of the funds to the Ferrys.[7]

Unquestionably, respondent misappropriated the Ferrys' funds. He used them for purposes unrelated to the Ferry matter and without the Ferrys' knowledge. The issue before us is whether the misappropriation was negligent or knowing. The overwhelming evidence demonstrates that respondent knowingly misappropriated client funds.

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[7] Because respondent deposited $6,000 in his trust account the day after receiving the insurance check, he did not overdraw that account.

Respondent contended that his poor health, coupled with the loss of staff, caused him to neglect his recordkeeping responsibilities, such that he was not aware of the balance in his trust account. According to respondent, he had not realized that he had invaded the Ferrys' funds when he issued the unrelated checks. He further argued that he failed to pay the Ferrys their settlement funds in a prompt manner because a dispute between the Ferrys developed concerning the use of the monies. The record, however, does not support these arguments.

It is not disputed that, in April 1997, respondent suffered a heart attack and, after recovering from it, significantly reduced the number of hours that he worked. Moreover, about one year later, the departure of an associate caused respondent's secretary to forego performing bookkeeping functions and to concentrate on paralegal duties. Respondent claimed that, although he intended to assume the bookkeeping tasks, he did not do so because of the demands of his law practice and his reduction in office hours.

In other words, respondent alleged that, for a variety of reasons, he neglected his recordkeeping and, thus, was not aware that his trust account had a shortage. In this regard, the testimony of psychologist Susan Zorn, respondent's expert witness, is enlightening. According to Zorn, during her

evaluation of respondent, he indicated that he did not attend to his recordkeeping duties because they were not as interesting as trial work. Respondent, thus, admitted to his own expert that he had failed to perform required recordkeeping functions because he simply was not interested in doing so, not because his health and reduced work hours prevented him from accomplishing those tasks. He, thus, made a conscious decision to neglect his books and records.

Moreover, as previously indicated, within days of receiving the Harleysville check, respondent disbursed the funds to others. As of January 27, 1999, one week after respondent deposited the Ferrys' settlement proceeds, his trust account balance was less than $2,000. Respondent distributed these funds to or on behalf of other clients, thus raising the likelihood that he was "lapping," that is, invading one client's funds to pay another client. See In re Brown, 102 N.J. 12 (1986).

Furthermore, respondent's prostate cancer diagnosis occurred after he had depleted the Ferrys' monies. Respondent deposited the Harleysville check on January 20, 1999. He disbursed $50,000, the exact amount of their share of the settlement proceeds, the next day. He was diagnosed with prostate cancer in March 1999. Thus, he had already invaded the Ferrys' funds before he received the cancer diagnosis.

Other facts support a finding of knowing misappropriation. Even before respondent received the check from Harleysville, he had misrepresented to the Ferrys, while they were at the Ocean County Surrogate's Office, that the State holds settlement funds for thirty days. He, thus, planted the seed of deception, which he continued to foster when he repeatedly blamed the absence of authority from the State for his failure to disburse the Ferrys' funds.

Respondent's misrepresentations to the Ferrys continued. When Barbara contacted him, in March 1999, to ascertain the status of the funds, respondent replied falsely, telling her that the disbursement was delayed due to income tax issues. In August 1999, he misled Clark, indicating that he planned to file a motion for the release of the funds and expected to receive them in September. During the December 16, 1999 taped telephone conversation, respondent made the following misrepresentations to Barbara: (1) in November, he received an order giving the State thirty days to release the settlement funds; (2) the State should provide payment at the end of the month; (3) the State should provide a tax clearance certificate; (4) the Surrogate was waiting for the tax clearance certificate; (5) they should have that document by the end of the year; and (6) he would contact Barbara within a couple of weeks. Despite these

promises, respondent did not issue a check to the Ferrys until ten days after the execution of the search warrant of his law office.

It is unquestionable that respondent suffered two very serious illnesses within a two-year period. It is also unquestionable that, in addition to his understandable concern for his health, he was alarmed about the effect that his condition would have on his law practice. According to Dr. Schlesinger, however, respondent indicated that, between 1997 and 1999, his primary concern was that, if his clients learned about his illnesses, he would lose business. Indeed, at the criminal trial, respondent admitted that he had not revealed his illnesses to any of his clients because he feared that they would no longer want him to represent them.

We find, parenthetically, that respondent's conduct implicates RPC 1.16(a). That Rule provides:

> Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

Based on the above rule, thus, if respondent had been unable, because of illness, to complete the Ferry matter, he should have withdrawn from the representation. Instead, he

permitted their matter to stall for almost one year, during which they did not receive the funds to which they were entitled, because he was concerned about losing clients.

Notably, although respondent claimed that he had neglected all of his clients during his illness, that his books and records were ignored, and that he was absent from his law office for long periods of time, only the Ferrys sustained a loss. If respondent's circumstances had been as dire as he claimed, one would expect more clients to have suffered harm from his inattention.

In addition, respondent's forgery conviction must be considered. Although that conviction does not inexorably lead to a finding of knowing misappropriation, it not only demonstrates that he endorsed the insurance check without the Ferrys' authority and indicates dishonesty, but also is a significant factor pointing in the direction of an intent to use the funds, as he, in fact, did.

As to respondent's delay in issuing a check to the Ferrys for their share of the settlement, respondent's argument – that a dispute between Clark and Barbara Ferry prevented him from disbursing the funds – is devoid of merit.

Respondent alleged that Clark was not involved in the wrongful death matter until the settlement check arrived. He

further asserted that Clark wanted to use the insurance proceeds to pay off a second mortgage to enable him to refinance his primary mortgage. According to respondent, Barbara was opposed to this plan, because she wanted to move to Florida. Respondent claimed that he needed the protection of refunding bonds, in the event that Barbara denied that Clark was entitled to any of the settlement funds. Again, the record does not support this contention.

Both Barbara and Clark were appointed administrators ad prosequendum of C.J. Ferry's estate. Harleysville issued the settlement check to both Barbara and Clark. Respondent, thus, was obligated to disburse the funds to both Barbara and Clark. He claimed that he was concerned about potential liability if he disbursed the funds without obtaining refunding bonds. Yet, after the Ferrys signed the necessary documentation, he took no action to submit it to the surrogate's office to obtain those bonds. Moreover, even if respondent had believed that a dispute between the Ferrys had developed, he was required to make some disposition of the funds, such as paying them into the registry of the court, rather than allowing them to languish in his trust account. Under no circumstances was he permitted to use the funds without his clients' authorization.

Significantly, although respondent attributed his failure to disburse the funds to the Ferrys to the purported dispute between them, he eventually issued a check to them without having obtained the refunding bonds that he claimed were required. Furthermore, he revealed to Dr. Schlesinger, the State's expert psychologist, that he had lied to the Ferrys because he was embarrassed that he had not taken the necessary action due to his illness. This explanation contradicts his contention that he had delayed making the payment to the Ferrys because of the disagreement between them.

In addition, both the Supreme Court and the Appellate Division found that respondent could have disbursed the funds without court approval, because the insurance check had been issued directly to the Ferrys, as heirs to C.J.'s estate. Although respondent argued that this finding was erroneous, even if he is correct on this score, he took no action to obtain court approval.

Finally, as the special master observed, the purported dispute between the Ferrys developed after respondent had already invaded their funds.

We, thus, find that respondent knowingly misappropriated client funds. Based on Wilson, he must be disbarred. We so recommend to the Court.

Members Clark and Stanton 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
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Anthony M. Mahoney
Docket No. DRB 11-125

Argued: September 15, 2011

Decided: October 7, 2011

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh	X					
Clark						X
Doremus	X					
Stanton						X
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	7					2

Julianne K. DeCore
Chief Counsel