SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-094
District Docket No. XIV-09-171E

IN THE MATTER OF
ARTHUR R. GLOESER
AN ATTORNEY AT LAW

Decision

Argued: September 15, 2011

Decided: October 7, 2011

Michael J. Sweeney appeared on behalf of the Office of Attorney Ethics.

Robyn M. Hill appeared on behalf of respondent.

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

This matter was before us on a recommendation for discipline filed by Special Master Joseph A. McCormick, Jr. The complaint charged respondent with knowing misappropriation of trust funds, in violation of RPC 1.15(a) (failure to safeguard client property), RPC 8.4(a) (violating the Rules of Professional Conduct), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation),

and the principles of In re Wilson, 81 N.J. 451 (1979), In re Hollendonner, 102 N.J. 21 (1985), and In re Richards, 197 N.J. 30 (2008).

The special master found that respondent negligently misappropriated trust funds and recommended that we impose a nine-month suspension. We are unable to agree with that finding and recommendation. We recommend to the Court that respondent be disbarred for knowing misappropriation.

Respondent was admitted to the New Jersey bar in 1981. He was reprimanded in 1995 for gross neglect, lack of diligence, and failure to communicate in two matters. In re Gloeser, 140 N.J. 77 (1995).

During the relevant time, respondent was engaged in private practice at the firm of Lacovara & Gloeser (the firm). Respondent's partner, Nicholas T. Lacovara, serves as a municipal court judge in a number of locations and spent less time in the law office than respondent. The firm maintained a trust account and a business account at Newfield Bank. Respondent did not review the reconciliations of the firm's accounts. As of an April 2009 interview by the Office of Attorney Ethics (OAE), respondent had not read the recordkeeping rule.

By way of background, in February 2008, a pipe burst in a wall in the firm's office, causing damage to a major portion of the office space and causing severe disruptions to the firm's practice and finances. That same year, Lacovara experienced personal difficulties, when both his wife and mother-in-law were diagnosed with cancer. The illnesses in his family further kept him from the practice.

The conduct that gave rise to this matter was as follows:

In October 2008, the firm's business account contained an amount insufficient to meet its payroll obligations, which were due on October 16, 2008. On October 15, 2008, respondent directed Tina Bouchaud, the firm's bookkeeper, to transfer $26,208 from the firm's trust account to the business account to provide sufficient funds to meet the payroll obligations (the Pannell transfer or the Pannell fee). Respondent took this action, anticipating his receipt of a legal fee of $26,208, resulting from a September 12, 2008 settlement order in the Pannell workers' compensation matter. According to respondent, he believed that the Pannell fee would be received from the State and would be available for use by his office, prior to utilization of the trust funds. In addition, he contended that

there were fees and reimbursements due to the firm that remained in the trust account.

Exhibit R-3, the firm's notes in the Pannell matter, indicate that, on October 10, 2008, five days before respondent's transfer of funds from the trust account to the business account, Bouchaud spoke with someone at "the State office," who advised her that the fee check would take at least four-to-six-weeks to be processed and that, as of that date, it had not yet been processed. In fact, the firm did not receive the Pannell fee until mid-November 2008. The October 15, 2008 transfer, thus, caused an invasion of trust funds on October 16, 2008, in the amount of $10,902.53. The State did not have the firm's tax identification number, a circumstance that held up the check's receipt by the firm. Respondent conceded that he did not follow up to confirm that the Pannell fee had been received from the State.

On December 16, 2008, respondent directed Bouchaud to transfer $26,208 from the business account to the trust account to restore the previously removed funds. Respondent maintained that, until then, he thought that the transferred funds had already been replaced.

From October 29, 2008 to February 18, 2009, there were seven additional transfers from the firm's trust account to the business account, as follows:[1]

Transfer from Trust to Business		**Return Transfers from Business to Trust**	
DATE	**AMOUNT**	**DATE**	**AMOUNT**
10/29/08	$ 3,000	11/24/08	$ 3,000
12/19/08	$17,500	01/08/09	$ 1,000
12/23/08	$ 1,000	03/09/09	$12,000
12/23/08	$ 2,000	03/11/09	$14,000
01/07/09	$14,000	03/24/09	$17,500
01/21/09	$ 4,000		
02/18/09	$ 6,000		

[C¶7.][2]

Whether respondent directed Bouchaud to make these seven transfers or whether she acted without his authorization is the subject of dispute. All seven transfers and the Pannell transfer were, by necessity, performed electronically. The

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[1] The period in which these seven transfers and the initial transfer on October 15, 2008 were made is referred to in the record as "the critical period."

[2] C refers to the complaint, dated September 18, 2009.

firm's computer program would not allow Bouchaud to make transfers via check, unless they were attributed to a specific client matter.[3] Exhibit C-5 reflects the invasions of trust funds stemming from Bouchaud's transfers of funds.[4]

The consistency or lack thereof in the statements made by respondent and the additional witnesses in this matter is a key to unraveling what occurred at the firm of Lacovara and Gloeser. We have, therefore, set out their statements in the different "venues" in which they were made: reporting letters, OAE interviews, and hearing testimony.

I. THE REPORTING LETTERS

By separate letters, dated March 24, 2009, both Lacovara and respondent reported the trust account infractions to the OAE. Lacovara's letter states, in relevant part: "I learned

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[3] A major element of respondent's defense was that he could not have directed the electronic transfers because he did not know about the firm's electronic banking capabilities. In fact, respondent himself had executed an internet banking application, in July 2007. The special master found respondent credible on this issue, noting that the execution of an internet banking application "was not necessarily a memorable event."

[4] It appears, from exhibit C-5, that not all seven transfers resulted in an invasion of trust funds.

late last week, that starting in October of 2008 my partner authorized the use of client trust account funds to pay office expenses. This occurred on several occasions and was repaid with office funds."

The record also contains an undated certification from Lacovara, in which he stated ". . . eight transfers of trust fund monies were made or directed by my partner, Bob Gloeser, to our general business account for various expenses." In the same document, Lacovara stated: "I began a review of my office's monetary transactions and confirmed the existence of eight transactions that improperly invaded the trust account. The information I am supplying is a result of my reconstruction of what was done by Bob Gloeser and - at his direction - by our bookkeeper."

Respondent's letter sets forth similar information:

> Please accept this letter as a self report of an ethical lapse with regard to use of funds from the Law Firm's IOLTA Account. By way of background I wish to explain the nature of the funds that our law firm commonly holds in trust are funds that most often represent outstanding medical bills. These normally are medical bills for which our personal injury clients are obligated but insurance reimbursement is still being pursued. The funds are separately accounted but deposited in a single commingled IOLTA Trust account. Upon payment of the

> insurance proceeds all money representing reimbursed medical bills are returned to the clients.
>
> The basic facts of the ethical lapse involved the invasion of these trust funds as follows: From 2008 to the present, electronic transfers have been made to and from the IOLTA account maintained by the law firm. I authorized this activity and did so in a misguided effort to avoid employee layoffs and staff reductions. I did not monitor each transfer in detail. <u>I instructed that all IOLTA funds were to be returned as soon as they were available from the business account as a result of business income received</u> [emphasis supplied].
>
> [Ex.C-9.]

During a subsequent OAE interview, respondent stated that, at the time he wrote the letter, his intent was to be fully candid with the OAE and that the statements in the letter were true.

II. THE OAE INTERVIEWS

Lacovara

Lacovara's recollection was that he had learned about the trust account improprieties from respondent, on a Thursday or Friday afternoon, after his inquiry about the firm's finances. "[Respondent] said, well, I had to <u>borrow</u> some money from the trust, but I don't think it's going to be a big deal. It's the

kind of thing if you get caught; they just slap your hand." [Emphasis supplied]. Lacovara asked respondent how much had been taken and respondent directed him to speak to Bouchaud. Lacovara did so that Friday or the following Monday. Bouchaud confirmed that funds had been borrowed from the trust account and that the transactions had been accomplished electronically. Lacovara stated that he "never asked her did [respondent] tell you to do this, or, I mean, because it was implied; it's not something that she would do . . . on her own."

The following exchange took place between Lacovara and OAE investigator Edward F. Carangi:

> Mr. Carangi: [Bouchaud] never said anything to you when you first asked her about was there money borrowed or transferred from the trust accounts? She never said anything, like, oh yeah, Bob told me to do this or Bob told me to do that, or -- and don't guess. I mean, if you don't remember, you don't remember. But I know you said you didn't specifically ask, but did she volunteer anything?
>
> Mr. Lacovara: I have a recollection of a conversation with her subsequent to my initial conversation.
>
> . . .
>
> Mr. Lacovara: And I had called her at home the night before and she didn't return my call. But she had probably -- I think she was scared to death at that point. She was just very scared that she didn't know how wrong what she

did was or wasn't and if she would be in trouble or who would be in trouble.

So I went down to her office, and I -- I, you know, I gave her the rule, and I gave her a couple of instructions on how we're going to proceed very clearly from this point on. And she said, well, I only did it because Mr. Gloeser said so. And that's the only time that she made a comment like that. And it was protecting herself. It wasn't -- it was after she had time to reflect.

So in fairness to Bob, I don't know -- I mean, it was said, you asked whether she ever said anything.

Mr. Carangi: Right.

Mr. Lacovara: That's that's [sic] what she said. But in its context I'm not entirely sure that it wasn't a little self --

Mr. Carangi: A little C-Y-A?

Mr. Lacovara: A little bit. Yes.

. . .

Mr. Lacovara: It's possible it's not, it's possible it is. But I do recall her -- she was very scared, and she kind of blurted that out at one point in our conversation.

[Ex.C-2 at 35-4 to 37-3.][5]

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[5] During Bouchaud's cross-examination before the special master, she stated, "I don't know why he thought I was scared and trying to protect myself."

On March 20, 2009, the Friday before Lacovara's March 24 2009 letter was sent to the OAE, he advised respondent that he would have to report his conduct to disciplinary authorities. Respondent replied that he, too, should be reporting it.

Respondent

As of the day of respondent's interview by the OAE, in the face of the serious allegations against him, he had still not reviewed R. 1:21-6, the recordkeeping rule. He admitted that he had directed the transfer of trust funds to the business account in anticipation of his receipt of the Pannell fee from the State. He did not review Bouchaud's reconciliations of the firm's records. When asked if, prior to the beginning of the critical period, the firm had the capability to electronically disburse trust account checks, respondent replied, "Not that I knew of."

As to respondent's reliance on the anticipated Pannell fee, the following exchange took place between him and the presenter:

> Respondent: In any event, we had a large settlement that was put through in -- in September, September 12th. And I started to -- to track it. I made calls and I found out who the attorney -- the DAG -- it was -- the State of New Jersey was the defendant in

that, and I stressed how we'd like to get the funds in as soon as possible.

And I started, you know, calling to the bookkeeping department when will the check be cut. Oh, it's -- it's already been processed. And I was led to believe that it would be there any day. That it had already been done. And I -- I decided to -- to take the risk of moving the trust amount to the business account hoping that it wouldn't actually be used. This is something that since 1986 we've -- we've never done. We didn't put the trust amounts mingled in with the business. We always waited til checks cleared before we did anything.

Presenter: I guess for me honestly I'm a little confused. This first transfer from the trust account to the business account in October, October 15, 2008, in the amount of $26,208, you authorized that those funds be transferred from the trust account to the business account, correct?

Respondent: I did.

Presenter: And you did so to accomplish what purpose?

Respondent: To make sure that the business account had enough munds [sic] in it -- money in it, and hoping and believing that --

Presenter: Well, wait a minute.

Respondent: -- before funds would actually be appropriated to some non-trust use, that the money would be put back into the trust account.

Presenter: Okay. So at the time that you authorized the transfer, there was some business need for funds, correct, that you were trying to cover with the transferred funds from the trust account? I mean, there --

Respondent: Sure. I -- I was concerned --

Presenter: And what was that -- what was that business need that you were trying to --

Respondent: I was concerned that we'd have to lay people off. That we -- we'd have to --

Presenter: It was to cover payroll?

Respondent: Well, I was hoping it wouldn't have to cover payroll. I was hoping that the -- the money would be back. I -- I believed that the check was cut and that -- that things would be back in trust and everything -- and that nothing would be used in a wrong way.

. . .

Presenter: You knew they were trust funds. They -- they weren't law firm funds, correct?

Respondent: Some part of it was law firm funds. The check was on its way. Some -- some part of it was law firm funds.

. . .

Respondent: -- what we hold in trust does not get tapped into a final settlement. So there are portions in the trust that are attorney's fees. There are portions in the

trust that are reimbursement for costs that we've expended. Those exist in there. So it's not all other people's money.

. . .

Presenter: Okay. You had a belief that at least some part of this $26,208 represented trust funds, non-law firm funds, correct?

Respondent: I didn't sit down and calculate it.

. . .

Respondent: I think a more accurate way of saying is I didn't really think it through. And --

Presenter: Well, I'm trying to --

Respondent: -- I knew what I was doing was a wrong thing to do because it was exposing money that was in -- in trust.

Presenter: Exposing it in what way?

Respondent: Exposing it --

Presenter: In what did you understand --

Respondent: Potentially being used for a purpose other than furthering that -- those particular client's interests --

Presenter: But --

Respondent: -- that were made up by the --

Presenter: But you're saying that you didn't know whether the funds represented trust fund -- I mean, on one hand you're saying I didn't know that it represented

trust funds because I'm -- I asked you I said -- I asked you didn't you know that at least some part of it represented trust funds, and then you told me you didn't know.

Respondent: I think I should have known.

Presenter: You believed that some part of it represented trust funds, right?

Respondent: I didn't give it careful thought.

Presenter: Well, okay. But you thought enough to feel that it was at least some risk that you were being -- creating by transferring the monies from trust over to the business account to meet this payroll need, correct.

Respondent: Absolutely.

[Ex.C-3 at 43-12 to 48-13.]

According to respondent, he anticipated that, as soon as the Pannell check was received, the funds would be redeposited in the trust account.

The presenter asked respondent how he thought the trust funds would not be affected if he authorized the transfer on October 15, 2008, the payroll checks were to be disbursed on October 16, 2008, the Pannell check had not yet been received, and, once received, it would still have to clear the bank. Although respondent did not know how fast the funds would have

been made available, he noted that "in the modern ages it's -- it's very quick."

In addition, respondent testified that, although he was unaware of the total balance in the business account, he was "hoping and believing" that the sum was greater than what their ledger was showing. He took no steps to ascertain what was in the account.

As noted previously, due to a delay, the Pannell check was not received until November 2008 and was not deposited to the trust account until December 16, 2008. The presenter asked respondent whether it had occurred to him that there might have been "a problem" because of the delay. He asked respondent if he had taken any steps to determine whether there had been a problem:

> Presenter: And I want to know did you think of that? And also whether you did anything to -- to assure yourself by looking at conciliations [sic], or looking at whatever you felt you need to look at, to determine whether a problem did occur? Did you -- did you –
>
> Respondent: Well, look, I -- there weren't checks being returned for insufficient funds. There weren't checks bouncing. There weren't things going haywire and -- and wrong, and clients claiming in any way there -- there -- there weren't uses being made of -- of -- of money that belonged to

somebody else. There's just none of that stuff was happening.

. . .

Presenter: -- right there, there was not use of anybody else's money, how did you know that?

Respondent: I just believed.

Presenter: Based on what?

Respondent: (No verbal response)

Presenter: What was the basis of I believe?

Respondent: I don't know. I know that when I look back in hindsight, it's -- it's shocking to me. I was confident that things were back in place.

Presenter: Based on what though?

Respondent: I felt that if it wasn't the case, that there would be people running around screaming and letting me know that things were wrong.

[Ex.C-3 at 62-7 to 63-13.]

As to the remaining seven transfers from the firm's trust account to the business account, respondent contended that he had not instructed Bouchaud to make the transfers "as specific instructions." Respondent speculated that it was his initial $26,208 transfer from the trust account to the business account that had set "a precedent" for her.

Respondent acknowledged having "limited knowledge" of the other transfers as a group. The following exchange took place at respondent's OAE interview:

> Presenter: . . . Now prior to Mr. Lacovara telling you that he discovered what he discovered, did you know about any of these other transactions that are on that list?
>
> Respondent: I knew there had been others. I didn't know the amount, I didn't know the dates.
>
> Presenter: But you --
>
> Respondent: And I didn't know the returns.
>
> Presenter: You knew there had been others prior to Mr. Lacovara bringing to your attention what he had found out?
>
> Respondent: I also knew that --
>
> Presenter: Well, let's stop. Because I need you to explain then what you knew. I mean, and when did you know it. You know, you knew there had been other transfers, you didn't know the amounts. What did you know about the other transfers? When did you find that out? And I want to know the circumstances of --
>
> Respondent: I don't recall the dates of -- of these. And I --
>
> Presenter: Well, how did you --
>
> Respondent: -- don't --
>
> Presenter: -- know there were other transfers?

Respondent: Because I had a conversation at least on two, maybe three occasions with Tina when she said -- when I'd ask how are things. Do we have funds? And she said, yes. And I said, all right. And then somewhere in that conversation she said, yeah, I -- I transferred money. I said, Tina, that has to be transferred back. We have all these settlements that involve funds -- and there were a lot of settlements in -- in December and -- and January. We had lots of fees coming into the law firm. And I just felt confident that it was more than enough that this didn't have to be going on. And she said she understood, and that -- that's -- that's what I knew. I -- I don't recall the dates of the conversations, and I don't recall discussing specific amounts.

Presenter: Well, your written statement says, with the exception of the first transfer, Mr. Gloeser had limited knowledge of the amounts transferred. And then you're listing the amounts transferred. So I'm assuming you're saying you had limited knowledge of each and every one of these transfers?

Respondent: That's right.

Presenter: Okay

Respondent: Well, I had limited knowledge about -- about each and every one of those that that whole list, which is the entire list; all the transfers, I had limited knowledge about those.

Presenter: Okay. And --

> Respondent: I'm not saying that I had limited knowledge about the 10/29 transfer. I had another limited piece of knowledge about the 12/19 transfer, another limited knowledge about the 12/23 transfer, I'm not saying that. I had limited knowledge about this group. All of these transfers. I did not know the -- the dates and the specific amounts and specific return dates.
>
> Presenter: All right. So then what you're saying with respect to all of these transfers from the trust and business account, you had a limited knowledge that Tina was making transfers. And it turns out these are the transfers, but you had limited knowledge that she was doing -- making these transfers?
>
> Respondent: That's right.
>
> [Ex.C-3 at 83-24 to 86-17.]

Respondent told Bouchaud that the money had to be transferred back to the trust account. He did not orally instruct her that it was improper to transfer trust funds to the business account. He believed, however, that that notion "was communicated through [his] behavior in some way."[6]

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[6] Similarly, in his amended answer, respondent stated, "While he admits that he never told the bookkeeper <u>not</u> to make any electronic transfers, he believed that that instruction was implicit in his comments to her. Again, he had an honest belief that sufficient fees were coming in to the firm to cover any issue."

The following exchange took place during the OAE interview of respondent:

> Mr. Carangi: So that leads me to my question then, why were there eight transfers?
>
> Respondent: I don't know.
>
> Mr. Carangi: You said you had more than one conversation with her about these? Why --
>
> Respondent: I did have a conversation --
>
> Mr. Carangi: Why wasn't it stopped? You said you had more than one though? Why --
>
> Presenter: That leads me to ask how many conversations did you have?
>
> Respondent: Like I said the first time, maybe two or three conversations at least. I had my -- I don't -- I don't know whether there was a --
>
> Mr. Carangi: Okay.
>
> Respondent: -- fourth.
>
> Mr. Carangi: So it's very clear or it was very clear in your mind at this time that these transfers were improper, and you've had two or three conversations with her at least about these transfers. But at no time did you tell her don't do this, it's not right?
>
> Respondent: (No verbal response)

> Respondent's Counsel: I think he said about six times that he never said that --
>
> Mr. Carangi: Well, I just need him to -- because I'm going to --
>
> Respondent's Counsel: -- he never used those words.
>
> Mr. Carangi: That's fine. But I just want you to understand that I'm going to ask [Bouchaud] that question too.
>
> [Ex.C-3 at 110-6 to 111-10.]

Bouchaud

Bouchaud stated that she had made the eight electronic transfers in question from the trust account to the business account. Contrary to respondent's statements, she contended that he had directed her to do so.

With regard to the Pannell transfer and respondent's expectations about the imminent arrival of the Pannell fee check, Bouchaud stated as follows:

> Ms. Bouchaud: Well, the first one actually has to do with a worker's comp case.
>
> Presenter: Uh-huh. Okay.
>
> Ms. Bouchaud: So that one we were getting this exact amount within probably a week or two. We were expecting it. That's what we

were told by the state, which was the defendant in that file.

. . .

Presenter: All right. So who told you about this particular case that it was -- the money was coming in in a week or two?

Ms. Bouchaud: Well, Mr. Lacovara told me it settled, but then us as secretaries we would follow up with the company who sent us the money, and by way of a phone call to them. They -- the State of New Jersey told us we're going to mail you the check such-and-such day.

. . .

Presenter: Now I want to -- we want to know how did you gain that understanding specifically.

Ms. Bouchaud: Okay.

Presenter: Either you got it personal knowledge, because you talked to the people and they said, well, the checks coming in, or paralegal talked to them and told you, or Mr. Gloeser told you, because he had done something with somebody else in the firm. That's what we want to know.

Ms. Bouchaud: Okay. Well, initially when the case settled we expect the checks in two weeks, about that. So we knew that this was coming, and then I have actually myself made a phone call to the state to say what's the status of this check, and I think Mr. Gloeser made a phone call himself. Because it did come in later than we expected.

Presenter: Uh-huh.

Ms. Bouchaud: And there was a delay with the state, I guess.

Presenter: But at the time of October 15th, 2008 when the trust funds were transferred from the trust account --

Ms. Bouchaud: Uh-huh.

Presenter: -- at the time that that transfer was made --

Ms. Bouchaud: Uh-huh.

Presenter: -- you're saying you had already previously spoken to someone at the state who told you the check's coming in two weeks, and so had Mr. Gloeser. Is that what you said?

Ms. Bouchaud: At the initial time I was told it may -- I'm not sure. It may have been Mr. Gloeser, or I'm not -- I don't remember that day, but I was told when I transferred it would be within two weeks time. And then I started following up after that, and Mr. Gloeser he -- he also made a follow-up phone call to them, because, you know, it came late.

[Ex.C-1 at 26-4 to 30-12.]

As to the remaining seven electronic transfers, Bouchaud stated that respondent had directed her to make each one to pay for the firm's expenses. Respondent had told her to borrow funds from the trust account and to put the money back in the trust account, as soon as they had extra funds available. He

had directed the specific amount that she was to take, after she had presented him with a set of bills. She added that he had "never indicated to [her] that it was wrong to do that."

As to respondent's contention that, because he had told her to make the Pannell transfer, she thought that she could repeat the practice the additional seven times they needed funds without direction from him, Bouchaud stated, "Absolutely not." Bouchaud kept written confirmations of the transfers, with notations of when she had returned the money to the trust account.

III. HEARING TESTIMONY

Ruskowski

William Ruskowski, OAE Chief of Investigations, testified about his conversation with respondent, shortly after Ruskowski's receipt of the March 24, 2009 letters from respondent and Lacovara. Respondent stated that his firm had been having financial difficulties and that, at some point, he had told Bouchaud to start making transfers of funds from the trust account. Respondent referred to more than five transfers. At no time during their conversation, did respondent tell

Ruskowski that Bouchaud had made the transfers of her own accord, without his approval or authorization.

Carangi

Edward Carangi, OAE Investigative Auditor, testified about his analysis of the firm's trust and business account records. Carangi's analysis revealed that, during the critical period, the firm maintained no earned legal fees in its trust account.

Lacovara

Lacovara first learned of the transfers in early March 2009, when respondent told him that "[they] had to borrow some money from the trust" because the firm's finances had been "a little tight." During that initial conversation, respondent told Lacovara that his borrowing of trust funds was not "a serious matter" because, "if the [OAE] discovered it . . . it would be a kind of a thing somebody would get a slap on the wrist for." At that time, respondent did not say that anyone had made disbursements that he had not directly approved. Lacovara spoke with Bouchaud to learn how much money had been borrowed from the trust account.

After Lacovara reported the matter to the OAE, he spoke again with Bouchaud, who explained the details of the electronic

transfers. Bouchaud "seemed very concerned and scared about what was going on" and "blurted out, Gloeser told me to do it."[7]

Lacovara also noted that, "[g]enerally, earned legal fees were taken" from the trust account. To his knowledge, the firm did not have a practice of leaving earned fees in the trust account.

Respondent

Respondent conceded that he rarely reviewed the firm's trust and business accounts and did not review reconciliations, relying on his conviction that Bouchaud would not steal. He made no effort to learn how much money was in the firm's business account, after the Pannell transfer. He did not review either the bank statements or the reconciliations, between the October 2008 transfer of funds and his discovery, in March 2009, that the account was out of trust.

As to the Pannell transfer, respondent testified about the basis for his belief that the fee check's arrival was imminent.

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[7] The special master noted Lacovara's "C-Y-A" comment, during his OAE interview, and also noted that Lacovara's hearing testimony "suggested that he believed Bouchaud." The special master found that contradiction "troubling."

According to respondent, Bouchaud had been advised by the State office in question, on October 10, 2008, that it would take four-to-six-weeks for the check to be processed, following settlement, and that the Pannell check had not yet been processed. As previously noted, exhibit R-3 bears Bouchaud's note, memorializing that call. After receiving the information from Bouchaud, respondent placed a series of calls to the State. He was ultimately advised that the check had been processed on September 24th or 27th, 2008, and "was on its way."[8] He did not recall the date of that conversation. Exhibit R-3 contains respondent's notes of the conversation and it reads, "Has been processed 24th 27th."

On the next hearing date before the special master, the presenter questioned respondent further about his understanding of when he could expect the check:

> Q. Okay. And it's your testimony that you authorized the transfer in reliance on having been told that the check has been processed, correct?
>
> A. Yes.
>
> Q. And also that the check was on its way, correct?

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[8] This is contrary to the information Bouchaud received that, as of October 10, 2008, the check had not been processed.

A. Yes.

Q. You learned at some point that the check had not been processed prior to when you authorized the first transfer, correct?

A. I don't know that.

Q. Well --

A. Yeah, I think in hindsight what I -- what would be more accurate to say is I learned that my understanding of the word "processed" and the state's understanding of the word "processed" meant two different things, you know.

They meant it had been processed out of bookkeeping and I understood it that the check was on its way.

Q. Were you told that the check was on its way?

A. Yes.

Q. Okay. Were you told the check was in the mail? Was that language ever used?

A. That's my recollection.

Q. So you actually recall being told that the check was in the mail?

A. I don't recall the words.

Q. I thought you just said that's your recollection?

A. Maybe it's more accurate to say that that's my understanding.

Q. All right. Do you have a specific recollection of being told the check is in the mail?

A. No.

Q. Now, it's true that when you directed that first transfer you believed you would need to use the trust account funds until the Pannell fee was received to restore the trust money, correct?

A. Can I hear that question again?

Q. It's true that when you directed the first transfer you believed you would need to use the trust funds until the Pannell fee was received to restore the trust money, correct?

A. I think that's overstating it. I knew I was transferring $26,000 because that's the amount of the fee that we were owed in Pannell.

I didn't know that that $26,000 would be used.

Q. Well, if you believed that the Pannell fee check was going to be received the next day on payroll, why didn't you just wait until the Pannell fee check came and use those funds without borrowing from the trust account?

A. I don't think I would have done that without that hard conversation, you know, the one that I said I avoided.

Q. Well, it's your testimony that you didn't really believe you were going to actually impact the trust funds by your actions, correct?

A. I believed that I was going to avoid that, yes.

Q. So, why did you transfer the trust funds at all, then, if you believed that it wasn't going to be necessary to use them?

A. Because there was a risk.

Q. A risk of what?

A. A risk that if that 26,000-dollar fee wasn't transferred into the business account that some employee checks would bounce.

Q. And you just testified earlier that in directing the first transfer you knew that that created a risk to the client funds, correct?

A. Yes, it created a risk to client funds, yes.

Q. Okay. So, in fact, at the time you directed the first transfer you were faced with two risks, correct?

Strike that question.

Isn't it true that at the time of directing the first transfer, you were aware that if you did not direct the transfer from the trust account there was a risk that payroll would not be met, correct?

A. Yes, some.

Q. You also knew that if you did direct the transfer you were risking the improper use of client funds, correct?

A. Probably.

Q. Faced with that dilemma you chose to risk the client funds and not the risk of not meeting payroll, correct?

A. Correct.

[3T63-23 to 3T65-18.][9]

Respondent acknowledged that he did not have his clients' permission to use their funds for his payroll, that he believed "borrowing" the funds was improper, and that he knew that the firm did not have sufficient funds to cover its payroll obligations.

Respondent produced exhibits, in particular, exhibit R-2, intended to document that earned legal fees were left in the trust account. He conceded, however, that he could not determine from his exhibits the amount of earned fees that remained in the trust account on the day in question. Respondent added that exhibit R-2 contained the information to

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[9] In an earlier submission to the OAE, exhibit C-12, respondent had stated that "[h]is expectation was that the check would arrive before October 15. On October 15 when Mr. Gloeser authorized the transfer it was with the hope and expectation that the funds would be returned to the trust account within a day or two and without being actually paid to any business obligation."
3T refers to the transcript of the hearing before the special master on May 25, 2010.

determine if there were earned fees in the account on October 15, 2008, "if somebody wanted to go through all of the work."

Respondent reiterated that, at the time of the Pannell transfer, he was unaware that the firm's computer system would not allow a withdrawal by check, unless attributed to a specific client matter.[10] He did not learn that information until December 2008.

As to the seven transfers, respondent testified that he recalled only one conversation with Bouchaud, in February 2009, about transferring funds from the trust account to the business account. She advised him that the firm had insufficient funds in the business account to pay office expenses. Respondent recalled that the firm had settled a number of cases and asked Bouchaud if they had funds available in the trust account, meaning earned fees.[11] He did not recall any conversations with Bouchaud about low business account balances and transferring funds, between October 2008 and their February conversation. He was unaware of the dates of the seven transfers and their specific amounts, until

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[10] See discussion, infra.

[11] Ruskowski did not recall respondent's use of the phrase "transfer of available funds," during their conversation.

he was preparing for the OAE demand audit. Specifically, respondent's counsel asked: "When did you become aware that the seven additional electronic transfers had been made from the IOLTA account?" Respondent replied:

> A. That's two part because it asks the seven and it asks electronic.
>
> Q. Okay.
>
> A. The seven, and the amounts I became aware of after my initial report after the Ruskowski discussion, after receiving a demand letter from [the presenter], a demand audit letter. In preparation for responding to that, I was gathering together exhibits and one of the things was to get the list that Mr. Lacovara had obtained specifying the dates and the amounts of transfers and when they occurred, so that part, that is, the amounts and the fact -- the exact number and the dates, that's the timeframe for that, gathering together those exhibits to respond to the demand audit.
>
> [3T6-23 to 3T7-13.]

As previously noted, when respondent reported his conduct to the OAE, he stated in his letter, "I authorized this activity [the electronic transfers]," intending to absolve Lacovara. When asked why he had not also stated in the letter that Bouchaud may have misunderstood his instructions, he replied, "I didn't want to point fingers at anybody. I have never done that in my life." With regard to why Bouchaud had made the transfers

if he had not authorized them, respondent repeated his statement to the OAE that he had set an example for her, when he used trust funds in anticipation of the Pannell check, and that she had the impression that taking funds from the trust account was permissible.

Bouchaud

Bouchaud testified that respondent instructed her to make the first of the eight transfers of trust funds to the business account to satisfy firm obligations at a time when the firm had insufficient funds in the business account to cover its obligations. At the time, the firm did not have sufficient funds of its own in the trust and business accounts combined to cover the transfer. Respondent further instructed her to transfer funds back to the trust account, when they became available.

At the time of the initial transfer, in October 2008, Bouchaud told respondent that the firm's computer accounting system would not allow a withdrawal by check from the trust account, unless it was attributed to a particular client matter. Thus, the transfer had to be made electronically. She did not

recall "much of a conversation" with respondent about the issue, but "Just, okay, that's the way it had to be done."

She agreed that the Pannell fee was expected; "it was due into our office within like a week or two" from the date of the transfer. She also stated that the firm did not have a practice of leaving earned fees in the trust account.

Bouchaud recorded the transfers as "loans" in the firm's ledger, to characterize "borrowing money from the trust" that was to be paid back. She also decided, on her own, to prepare the account reconciliations with "inflated" amounts for the months when the transfers that were not attributable to any client matter were made "so none of the records would be messed up for the clients."

Bouchaud testified that the firm's need to make payroll and pay bills led to the additional seven transfers, which she contended, were made at respondent's direction. He told her specific amounts to transfer. Respondent understood that the transfers were made electronically.

As of the date of the first hearing before the special master, Bouchaud was still employed as the firm's bookkeeper.

Character Witnesses

Respondent offered a number of character witnesses, in addition to three letters from other individuals, attesting to his good character and professionalism. One, his wife, described him as "cheerfully careless" with regard to their finances. Two attorneys testified about their high opinions of respondent's character and legal skills. A former part-time bookkeeper, who worked with respondent at the firm when it had been owned by Lacovara's father, testified about respondent's good character. She added that, during her tenure at the firm, respondent had not been involved in the financial aspects of the business. A former legal secretary characterized respondent as "very detailed and ethical." She testified about alleged "mistakes" that Bouchaud made, while she worked there.

IV. THE SPECIAL MASTER'S REPORT

In his report, the special master called respondent's transgressions "significant," noting that, during his watch at the firm, there had been invasions of trust funds and that the firm had not established appropriate procedures and safeguards to protect the public, a situation made worse by their inexperienced bookkeeper.

The special master divided the transgressions in this case into two categories: the Pannell transfer and the remaining seven transfers.

As to the Pannell transfer, the special master noted that respondent had authorized the transfer of funds from the trust account to the business account, prior to his receipt of the Pannell fee, that he had asserted a belief that receipt of the fee was imminent, and that the OAE had presented proofs indicating that respondent knew that it would not be immediately received. The special master had to resolve whether respondent's use of trust funds, in anticipation of receipt of the fee, was a knowing or negligent misappropriation of client funds.

The special master was unable to conclude that respondent's misappropriation was knowing. He found respondent's testimony about his anticipated receipt of the fee credible and Bouchaud's testimony "not certain."[12] However, he noted, it was clear that the transfer should not have been made, even if respondent

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[12] The special master did not find Bouchaud "a convincing witness although this could be attributed to a lack of sophistication and experience." In his view, she appeared "concerned over the impact these transfers could have on her position."

believed that the fee would be received and deposited prior to the client funds' being spent. The special master concluded that respondent was guilty of negligent misappropriation, in violation of RPC 1.15(a).

As to the seven other transfers, the special master considered respondent's testimony that, because of cases that had settled during the time in question, he believed that the firm had adequate fees in the trust account to cover "the requested transfers."[13] Respondent supported his contention with exhibit R-1, a chronological list by client of deposits to, and checks from, the firm's trust account, from October 8, 2008 to March 24, 2009. In the special master's view, although the exhibit did not exist at the time of the transfers, "it did provide a basis to support his testimony to the extent necessary to controvert the allegation that these transfers were knowing misappropriations." In connection with the seven transfers, too, the special master found respondent guilty of negligent misappropriation, in violation of RPC 1.15(a).

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[13] The special master referred to the "requested transfers," despite respondent's testimony that the transfers, except for one in February 2009, were accomplished without his knowledge.

The special master concluded that respondent's conduct in the first instance, when he disbursed trust funds in reliance on a fee check's being "in the mail," was grossly negligent. Taking into account respondent's "prior record" and the character testimony that was offered, the special master deemed a six-month suspension appropriate discipline for respondent's initial transfer of the funds.

Although the special master did not find that respondent had been grossly negligent in connection with the seven remaining transactions, he concluded that, due to their number, a suspension was necessary. He recommended an additional three-month suspension for the seven transactions.

* * *

Following a de novo review of the record, we are satisfied that the special master's conclusion that respondent was guilty of unethical conduct was supported by clear and convincing evidence. We are unable to agree, however, with the special master's finding that this is not a knowing misappropriation case. The clear and convincing evidence compels the conclusion that respondent knowingly improperly utilized trust funds. Before discussing the basis for our conclusion, two issues must be addressed.

First, although respondent executed the internet banking application, in July 2007, he professed a lack of knowledge about electronic transfers. At the OAE interview, he claimed that he did not know that electronic transfer had been an option. Before the special master, he testified that he did not authorize the seven additional transfers to be electronic. He claimed that his first conversation with Bouchaud about electronic transfers occurred in December 2008, when they discussed moving the "borrowed" funds back to the trust account. In an attempt to impeach respondent's credibility, the OAE argued that he had to have known about the firm's electronic banking capabilities earlier than he claimed, because he himself had executed the July 2007 application.

Although much was made of the electronic transfer issue, it is of little relevance. If, in fact, Bouchaud told respondent that the Pannell transfer had to be made electronically, it is likely that he thought nothing of the method being utilized to make the transfer, as long as it was being made and his payroll obligations would be met. Likely, he neither knew nor cared how the transfers were being accomplished. In addition, we agree with the special master's conclusion that respondent's execution

of the electronic banking form, in July 2007, was probably not "a memorable event."

Second, exhibit R-3 contains a form from the State, requiring the firm's tax identification number. The OAE argued that respondent's signing this form evidenced that, contrary to his testimony, he knew, as of October 29, 2008, when he signed the form, that the Pannell fee had not yet been received. We note, however, that nowhere on the form is there a connection to the Pannell case. There is no proof that respondent made the connection between the form and the missing Pannell check. According to respondent, it was not until December 2008 that he learned that the check had not been received when it had been expected, in October 2008.

The Pannell Transfer

In finding respondent guilty of knowing misappropriation, we are mindful that knowing misappropriation "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." In re Noonan, 102 N.J. 157, 160 (1986).

Admittedly, respondent intentionally borrowed trust funds, hoping that he would not have to use them. He knew that he had

no right to them and acted without their owners' consent. He believed that his firm was about to receive a fee check that he needed to meet his firm's expenses, specifically, his payroll. Although he allegedly did not think that it would be necessary for him to use trust funds, he made a conscious decision to move them to his business account to serve as security for his payroll expenses. He expected the trust funds to be returned to his trust account in a day or two, without being used to satisfy any of his office expenses.

During his OAE interview, respondent stated that he was hoping that trust funds would not be affected, based on his belief that the Pannell fee would be received.[14] That he was hoping not to use them is irrelevant to a finding of knowing misappropriation. Hope and belief are two different things. A reasonable, but mistaken belief, may at times save an attorney from a finding of knowing misappropriation. As we stated in In re Riva, 172 N.J. 232 (2002), "[a]t times, as in this matter, an attorney will rely on an asserted belief to defend against a

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[14] It is true that, unlike a fee check from a client, the check was coming from the State and was a certainty. Nevertheless, a lawyer cannot borrow trust monies in anticipation of the receipt of guaranteed funds.

knowing misappropriation charge. We must then determine whether that belief is reasonable. A reasonable, albeit erroneous or mistaken belief may succeed in proving that a misappropriation was negligent, not knowing." In the Matter of Robert E. Riva, DRB 01-157 (January 29, 2002) (slip op. at 18).

In Riva, an attorney attempted to defend against a charge of knowing misappropriation of over $24,000, claiming that he had believed that he had over $30,000 of family money in his trust account and, therefore, could not have knowingly misappropriated the funds. We found no evidence of the reasonableness of Riva's belief that he had deposited the $30,000 and noted his differing versions of the events surrounding the $30,000, his general lack of credibility, and his numerous "misunderstandings." Riva was disbarred for knowing misappropriation.

In another matter, In re Rogers, 126 N.J. 345 (1991), the attorney's mistaken belief that he could use escrow funds saved him from disbarment. There, after the attorney disbursed funds following a real estate closing, American Express improperly levied on his trust account to satisfy his personal debt to American Express. As a result, the attorney's check issued to pay off a prior mortgage against the property was returned for

insufficient funds. The attorney thereafter paid most of the mortgage and obtained the consent of the mortgagee to repay the balance after the resolution of his financial difficulties. When American Express returned the monies to the attorney, however, he deposited them into his business account, instead of his trust account, and did not pay off the mortgage. Although the attorney paid some of the mortgage balance, he used the remainder to pay business and personal debts. The attorney testified that, because he believed that he had assumed the obligation to pay the mortgage, it was his understanding that the "loan" from the mortgagee converted the nature of the monies returned by American Express from escrow funds to personal funds, available for his personal use. The Court found that knowing misappropriation had not been established:

> [W]e are unable to conclude that under the totality of circumstances the record clearly and convincingly demonstrates that respondent knowingly misappropriated the escrow funds. The evidence indicates that respondent may have had a good faith belief that the character of the returned American Express check had been converted from 'escrow funds' to his own funds, subject of course to his debt to [the mortgagee]. Although respondent's belief was incorrect we cannot conclude from this record that his misappropriation was 'knowing.'
>
> [Id. at 347.]

The Court imposed a two-year suspension.

Here, respondent contended that, at the time of the Pannell transfer, the arrival of the fee check had been imminent. If he knew that the Pannell funds were not there and would not be there in time to keep safe the funds he had in trust, then there is no basis in the law for us to find him not guilty of knowing misappropriation. We look then to his alleged belief that the funds would be there in time and must determine if his belief was reasonable. We conclude that it was not.

To be sure, there was no question that the Pannell fee would be received. The timeline, however, thwarts respondent's defense. He directed Bouchaud to make the Pannell transfer, on October 15, 2008, to meet his firm's payroll obligations, which were due on October 16, 2008. Given that the Pannell check had not been received by close of business on October 15, 2008, how could respondent expect that it would be used to cover checks issued the following day? According to respondent, he did not know how quickly those funds, once deposited, would be made available, but thought that, "in the modern ages . . . it's very quick." Moreover, he was told that the check had been processed, not that it had been mailed. Under these

circumstances, his expectation of the check's imminent receipt was unreasonable.

On this score, respondent was adamant that he had been assured by the State employee with whom he spoke that the check "was on its way." In addition, he had been allegedly told that the check had been processed on September 24 or 27, 2008 (the latter date was a Saturday). Twenty-one days later, when respondent ordered the transfer of funds, the check still had not arrived. Why did respondent think it would arrive on the twenty-second day?

The foregoing demonstrates that respondent's alleged belief that the Pannell check would arrive in time to cover his use of trust funds simply had no reasonable basis.

Moreover, respondent's contention that he had earned fees in the trust account from which he was drawing at the time of the Pannell transfer is not supported by the record. Carangi, the OAE investigator, testified that there were no firm's funds in the trust account. Lacovara testified that it was not the firm's policy to leave firm funds in the trust account. Respondent presented exhibits that, he contended, evidenced that the firm had fees in the trust account. Those documents, however, were created after the fact, for the ethics proceeding.

Respondent conceded that he never investigated the amount of fees that were in the trust account. Moreover, he conceded that, if there were firm funds in the trust account, they were not sufficient to cover the Pannell transfer.

Respondent's counsel argued that his conduct constituted commingling[15] and negligent, not knowing, misappropriation, the latter offense being premised on respondent's failure to ensure that sufficient firm funds were on deposit. However, respondent's invasion of trust funds was not caused by carelessness or mistake. This was not a recordkeeping error; respondent did not fail to reconcile his attorney accounts and believe that he had sufficient firm funds in his trust account to enable him to withdraw money; and he did not cause a misappropriation because someone in his firm used the wrong deposit slip, all typical negligent misappropriation scenarios. Indeed, had respondent believed that the trust funds would not have been affected and, in fact, they had not, he would have

[15] Commingling occurs when an attorney places personal funds in the trust account. Pursuant to RPC 1.15(a), with the exception of money for bank charges, only client funds are to be held in the trust account. Here, respondent transferred trust funds from the trust account to the business account, an impropriety that, more properly, constitutes a failure to safeguard trust funds.

been guilty of failure to safeguard trust funds, a violation of RPC 1.15(a) that occurred the moment that he transferred the funds from his trust account to his business account. But respondent's infractions did not stop there. He intentionally took trust funds, knowing that he had no right to use them. He hoped that the funds would be replaced, before they were used (or missed). His invasion of trust funds was deliberate and intentional.

We conclude, thus, that respondent was guilty of knowing misappropriation in connection with the Pannell transfer, a violation of RPC 1.15(a), RPC 8.4(a), RPC 8.4(c), In re Wilson, supra, 81 N.J. 451, and In re Hollendonner, supra, 101 N.J. 21, for which he must be disbarred.

II. The Seven Transfers

In In re Alcantara, 144 N.J. 257 (1995), the Court stated: "Consistency of testimony, both internally and between witnesses, is an important indicator of truthful testimony." Id. at 264. In this case, there were three major witnesses: respondent, Lacovara, and Bouchaud. Bouchaud's testimony has remained consistent throughout the proceeding: respondent directed her to make the eight transfers of trust funds to the

firm's business account to pay firm expenses when the firm did not have enough of its own money.[16]

Lacovara's testimony, too has remained consistent: respondent told him that funds had been taken from the trust account to pay business expenses. Indeed, Lacovara's reporting letter stated that, on several occasions, respondent had authorized the use of client funds to pay the firm's expenses.

Respondent, in turn, contended that, unbeknownst to him, Bouchaud had taken it upon herself to "borrow" funds from the firm's trust account to meet business expenses. Respondent speculated that the poor example that he had he set with the Pannell transfer had prompted her actions.

We are aware that, in his reporting letter to the OAE, respondent stated that he had authorized electronic transfers from the trust account in a "misguided effort to avoid employee layoffs and staff reductions." We are also aware of respondent's counsel's statement that respondent's letter had been written "in haste" and of respondent's explanation that the letter had been prepared hurriedly and without specificity, his main concern having been to

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[16] It has not escaped us that Bouchaud continues to be the firm's bookkeeper.

report the incident, to take responsibility for his actions to make it clear that his partner was not responsible therefor, and to advise the OAE that the situation had been corrected.

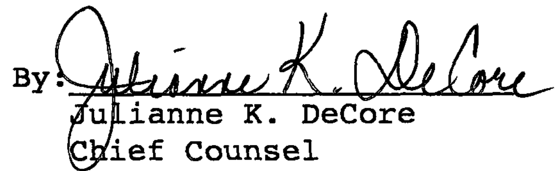
In light of the inconsistent statements regarding the seven subsequent transfers, we are unable to find clear and convincing evidence that respondent authorized Bouchaud to make those transfers. We noted that Bouchaud was not reticent about taking initiative in the performance of her bookkeeping duties. She admitted that she decided, on her own, to use "inflated" figures to balance out the trust account so that "none of the records would be messed up for the clients." We, therefore, dismiss the charge that respondent knowingly misappropriated trust funds by ordering the seven transfers.

For respondent's knowing misappropriation in connection with the Pannell transfer, a violation of RPC 1.15(a), RPC 8.4(a), RPC 8.4(c), and the principles of In re Wilson, supra, 81 N.J. 451, and In re Hollendonner, supra, 102 N.J. 21, we recommend that he be disbarred.

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
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

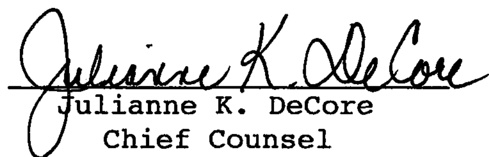
In the Matter of Arthur R. Gloeser
Docket No. DRB 11-094

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