SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-139
District Docket No. XIV-2009-0401E

IN THE MATTER OF

NEIL A. MALVONE

AN ATTORNEY AT LAW

Decision

Argued: July 19, 2012

Decided: October 25, 2012

Melissa A. Czartoryski appeared on behalf of the Office of Attorney Ethics.

James M. Curran 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 a one-year suspension filed by special master Bernard H. Shihar. The complaint charged respondent with failure to safeguard client funds, concealment of assets subject to equitable distribution

in his client's divorce action, and knowing misappropriation of client funds, violations of RPC 1.15(a) and RPC 8.4(c).

For the reasons set forth below, a five-member majority of the Board determined to impose a three-year suspension on respondent for assisting his client in defrauding the matrimonial court and the client's wife.

Respondent was admitted to the New Jersey bar in 1993. He had no history of discipline. At the relevant times, he was a partner at Lombardi & Lombardi, an Edison, New Jersey, law firm.

The disciplinary hearing in this matter took place on March 9, 10, and 21, 2011. The special master received testimony from respondent, his client (and grievant) Michael Gerald King, Office of Attorney Ethics (OAE) disciplinary investigator John Rogalski, Lombardi & Lombardi partner Michael F. Lombardi, and respondent's treating psychiatrist, Joel S. Federbush, M.D., who also was qualified as an expert witness in this matter.

The facts are as follows:

Respondent and King were good friends, who had known each other since their college days. They socialized before and after they were married. King spent a lot of time at the home of respondent and his wife and was always invited to their social gatherings.

Respondent and King were avid sports fans, who attended Rutgers football games and were fantasy football partners for

"many, many years." According to King, an accountant, respondent handled the financial transactions involved with the league, which was run from the Lombardi law firm. Payments were made in cash, as they did not involve large amounts of money.

Respondent's alleged misconduct took place during respondent's representation of King in his divorce from his second wife, Dulce. Respondent also represented King in the divorce from his first wife and in other unrelated matters. He never charged King a legal fee because King was a "very good friend." According to respondent, he had no intention of charging King a fee for representing King in the second divorce matter. He never sent King a bill. King concurred, stating that respondent neither asked him to sign a retainer agreement nor requested the payment of a legal fee for the representation.

King testified that, because he had been divorced before, he was aware that Dulce might make a claim for equitable distribution. He knew that monies traceable to him could be subject to equitable distribution. To avoid sharing them with Dulce, he sought a plan to remove them from his account, with the appearance that they had been given to someone else for a legitimate reason. He sought respondent's advice in this regard.

Respondent testified that he "advised [King] that he had several options in terms of attempting to conceal money from his

wife," such as paying rent to his father, in whose home he was living, gifting the money to his sister's children, and even gambling away the money in Atlantic City.[1] Finally, according to respondent, "we talked about that he could give money to me." Respondent testified:

> Well, I told him that it was very – you know, it was going to be an awkward situation. Because I was, you know, his attorney and his friend.
>
> I guess the mistake that I made was blurring that line. I told him that if he wanted to write checks to me, that would be something that he could do. You know, he would have to understand that money would not, technically, be his.
>
> [2T63-13 to 22.][2]

Ultimately, King gave the money to respondent, who agreed to hide it. To carry out the plan, respondent instructed King to write three checks, totaling $11,000. Respondent offered the following explanation for the partial disbursements:

> The main reason was it would have looked a little curious for an $11,000 check to have been written at one time from

---

[1] Upon respondent's advice, King began to pay rent to his father. Respondent did not know if King gifted any money to his sister's children.

[2] "2T" refers to the March 10, 2011 transcript of the ethics hearing.

> [King's] account. And he explained to me, as an accountant, that sometimes banks will look at those kinds of checks in that amount of money.
>
> So, he was actually the one who suggested that we break it up over — with no more than a $5,000 check to be written.
>
> [2T64-14 to 23.]

On November 19, 2007, King wrote the first check, payable to "cash," for $5000, with a notation on the memo line that read "legal fees." On the same date, King issued another check, in the amount of $1000, payable to "cash," with the notation "fantasy football" on the memo line. Nearly six months later, on May 2, 2008, King sent to respondent another $5000 check, payable to "cash," bearing the notation "legal fees" on the memo line.

Both King and respondent testified that the purpose of the notations on the memo line of each check was to establish an explanation for them and, in the words of respondent, to "effectuate the deception." King admitted that his notations "legal fees" and "fantasy football" were untrue.

King testified that, once the divorce was finalized, he would use the hidden funds to pay Dulce any sums required by the divorce agreement. He would then keep the difference.

According to King, respondent told him that he could put the funds into the Lombardi firm's trust account and hold them there until the divorce was finalized. King expressed a belief

that all three checks would be deposited into that account, despite the fact that they were payable to cash, sent to respondent's home address, and, one of them, the notation read "fantasy football." That King was an accountant did not cause him to question any of the above. He explained:

> Mr. Malvone, I trust him, he's a friend of mine, who I expected to get legal advice from. He told me to make it out to cash. He was putting these into the law firm's trust account. Those explanations were as per Mr. Malvone, because he could explain why he has the money.
>
> [1T44-10 to 16.][3]

Later, King asserted: "He's never done me wrong before, so why would I question him?"

As it turned out, all three checks were deposited into respondent's personal savings account, not the Lombardi firm's trust account. During respondent's interview with the OAE, he stated that King "absolutely knew" that the $11,000 was going to be placed in his personal account. He denied that he had ever led King to believe otherwise. His testimony at the disciplinary hearing was consistent with his statement to the OAE. He told the special master that, if the money were deposited into the

---

[3] "1T" refers to the March 9, 2011 transcript of the ethics hearing.

Lombardi firm's trust account, King would not have received it back.

On September 25, 2008, King's divorce from Dulce was finalized. The property settlement agreement, which respondent prepared, was incorporated into the final judgment of divorce. Under the property settlement agreement, King was required to pay Dulce $5000 as equitable distribution of a bank account in his name. The agreement, dated September 25, 2008, stated, in relevant part:

> The parties warrant and represent that they have made a full disclosure of all assets prior to the execution of this Agreement. Although said disclosure did not take a formal form, the parties acknowledge that reference has been made within this Agreement to assets that were acquired during the marriage.
>
> [Ex. 8, Article XI.¶11).

At that point, King was able to satisfy the $5000 obligation only from the monies he had given to respondent.

About a month after the divorce, King learned from respondent that respondent had not given the $5000 to Dulce. According to King, respondent told him that he "was busy," but promised that he would "get to it." He never did. King contacted respondent monthly regarding the payment of the $5000 to Dulce. Each time, respondent had a "different excuse[]."

On March 17, 2009, Dulce filed a motion to enforce payment of the $5000. According to King, when he contacted respondent and asked him why the money had not been paid, respondent replied that he had been busy and that they would have to meet to "discuss a plan of action." The meeting never took place. At some point, respondent told King that he was out on leave and was not able to meet with him.

Ultimately, the court ordered King to pay Dulce the money. King claimed that to comply with the order he had to dip into his IRA account.

King testified that, after he failed to resolve the matter with respondent, he went directly to Lombardi & Lombardi and talked to partner Michael Lombardi, who told him that respondent's employment with the firm had been terminated. Lombardi also informed King that he had a copy of respondent's savings account bank statements, which showed that King's three checks had been deposited into that account. Allegedly, this came as a surprise to King, who understood that respondent had deposited the checks into the Lombardi firm's trust account.

At the ethics hearing, Lombardi testified that he had acquired respondent's personal banking records in the course of a lawsuit that the firm filed against respondent. Lombardi stated that, when he reported the results of his investigation

to King, King appeared surprised and repeatedly stated that he had given the money to respondent for the firm "for the purpose of future support obligations and legal fees."

In August 2009, King filed a grievance against respondent, at Lombardi's suggestion, after he had asked Lombardi how he could get his money back. On February 3, 2010, respondent wrote to King and enclosed an $11,000 check.

OAE investigator John Rogalski investigated the King grievance. He interviewed King and subpoenaed the statements for respondent's personal savings account from Enterprise Bank. Rogalski analyzed these records and interviewed respondent, who was represented by counsel at the time.

Rogalski testified that, on November 27, 2007, respondent's savings account statement showed a balance of $608.68. Between November 28, 2007, the date of the $6000 King deposit, and May 1, 2008, the day before the second $5000 King deposit, the only additional credits to the account were in the form of a $1000 cash deposit, on March 17, 2008, a $5750 cash deposit, on April 7, 2008, and $54.84 in interest payments. Juxtaposed against these credits were $1720 in ATM withdrawals, $5 in surcharges for certain ATM withdrawals, and $11,600 in cash withdrawals. By April 30, 2008, the balance was $88.52. When the second

$5000 King check was deposited, on May 2, 2008, the balance rose to $5,088.52.

According to Rogalski, all cash and ATM withdrawals made by respondent occurred after the deposit of King's money. There was no documentation to explain the purpose of the withdrawals.

Rogalski testified that, after respondent deposited the second $5000 check, on May 2, 2008, the only additional credits for the month of May were two interest payments totaling $5.47. During that month, respondent made $880 in unexplained ATM withdrawals and $4200 in unexplained cash withdrawals. As of May 30, 2008, the account balance was $11.49.

King testified that respondent never told him that the monies had been deposited into his personal savings account and that he had made twenty-one ATM withdrawals against King's funds. King stated that, at no time, had he authorized respondent to use the funds.

King's and respondent's versions of the disposition of the $11,000 were inconsistent. King told Rogalski that, at some point, he would have to comply with the divorce judgment, pay legal fees to respondent, and keep any remaining balance. King also told Rogalski that he did not authorize respondent to use the $11,000 for purposes unrelated to the divorce.

According to Rogalski, King did not tell him, during the OAE interview, that he was trying to hide money from Dulce; that he had been through a divorce previously and that he had to give some of his money to his first wife; and that he had mailed the checks to respondent. Based on King's testimony during the disciplinary hearing, Rogalski thought that, "[t]o a certain extent," King had not been completely "upfront" with him, during the interview.

As to respondent's statements to the OAE, Rogalski testified that respondent admitted to having instructed King to prepare the two $5000 checks and the one $1000 check, payable to cash. He claimed that both he and King were concerned that King would lose his pension money in the divorce. Thus, respondent stated, "I discussed giving the money to me to hold until the divorce was over and that's what I did." Respondent told Rogalski that he intended to return the money to King, after the divorce was finalized, that the purpose of his holding on to it was to hide it from Dulce, that the checks were deposited into his personal savings account "to keep it from anybody seeing it," and that he understood that hiding the money "was wrong on many levels." Respondent explained that he was "trying to help a friend."

Respondent also told Rogalski that, although the divorce was concluded after he left the Lombardi firm, he knew that the case had been settled. He conceded that the $5000 payment should have been made to Dulce upon the divorce settlement and that he had told King that he would return the money to him at the beginning of the year, that is, January 2009. He explained to Rogalski that the payment was not made because "at that point I, I had completely lost myself. It was right around the time that I stopped working."

Respondent further told Rogalski that King "absolutely ... didn't authorize [him] to spend" the monies and that, after they were deposited into his personal savings account, he "forgot that it was there and [he] was just taking care of bills and stuff and just forgot. [He] just, [he] literally forgot that [he] had the money there, that it was his."

As of the date of the OAE interview, November 9, 2009, respondent had the $11,000 and the intention to return it to King. However, upon the advice of counsel, he did not do so, in the absence of a court order, due to the pendency of the ethics matter. According to respondent's lawyer, payment to King might be viewed as an incentive to withdraw the grievance.

At the ethics hearing, respondent's testimony differed from his statements made to the OAE. At the hearing, he denied that

he and King had ever discussed his keeping the money untouched and then returning it to King in one lump sum. He explained:

> It was given to me with the purpose of his detaching that money from himself. Because, again, otherwise, the deception would have been revealed. Money had to be given as a complete separation from himself.
>
> This was the pattern, including the money that he gave to family members, as well, was to completely detach himself from that money and to reduce the amount of assets that he had in his account.
>
> . . . .
>
> The way we discussed it was he would get the money back over time, once the divorce had been resolved, and all of the — any ancillary issues were resolved, as well.
>
> Again, as I explained to him, the final divorce is not the last time that his assets can be subpoenaed or reviewed. So, as he asked to have the money given to me in pieces, it was to be returned in the same fashion.
>
> [2T65-24 to 2T66-21.]

According to respondent, "[i]t was not a situation where [King] just expected the money to be sitting somewhere. He knew that the money will be used again, so as to, you know, continue the plausibility of this fraud." Respondent intended to trickle back the money to King over time "to make the deception more easily hidden."

Respondent testified that, although he could not say that King had expressly authorized him to use the money, he understood that he could do so. When confronted with his answer to the complaint, in which he admitted that King did not expressly authorize the expenditure of his funds, respondent stated: "Yeah. He did not expressly authorize, yes." Similarly, when confronted with his statement to the OAE that King had not authorized him to use the funds, he answered, "[t]here was no express authorization, yes."

Respondent disputed the presenter's claim that, when he withdrew the money from his savings account, he knew that he was using King's funds, even though King had not authorized him to do so. The following exchange took place at the ethics hearing:

> Q. So, when these withdrawals are being made from this account into which you had deposited the King funds, you knew that you were invading his funds, despite the fact that he had not authorized you to do so. Correct?
>
> A. No, that's incorrect. At the point that the money was given to me, they were no longer his funds in terms of the detachment that had to take place between him and the money.
>
> Q. So, then the Verified Answer that you filed in this case, are you now saying that that's not true, that the statement – finally, you admit that Mr. King did not expressly authorize the expenditure of any of Mr. King's funds. That's not true?

A. That's not what I'm saying. What I'm saying is that he didn't come right out and say it, but it was understood that in order to effectuate the fraud, the money couldn't just sit in an account. That when the time came to repay him, he would have received his money.

[2T88-7 to 2T89-3.]

The presenter then confronted respondent with his answers to the questions posed during the OAE interview:

Q. Line 1437, you are asked, "Did you tell him you were going to hold it?"

What is your response?

A. "Absolutely. He knew that, again, though we had, you know, discussed this. That's why we put fantasy football down. So that if he and anybody had been questioned, because he and I were partners in a fantasy football league, that was a way of paying me back all the money that I funded him over the years. So, again, it was never any" —

Q. On line 1456, you are asked, "Is it safe to say that he did not authorize you to uses [sic] his funds?"

What's your response?

A. "Oh, absolutely. He didn't authorize me to spend it. That was a mistake, absolutely. It was my intention, like I said, once the divorce was over, to wait a couple of months and give the money back to him. I didn't want to give it to him right away after the divorce. It would have looked fishy."

Q. Line 1471, you are asked, "Did you intend to pay it back to him?" What's your response?

> A. "Absolutely, it's his money. I have the money. It is just like I said, I didn't want to pay it with the case pending."
>
> Q. On line 1485, what does that say?
>
> A. My response was, "I understand that this was wrong on many levels. I mean, obviously, hiding an asset from an adversary was something I shouldn't have done. You know, again, I guess, [sic] trying to help a friend."
>
> [2T89-23 to 2T91-7.]

At the ethics hearing, respondent admitted that he had told the OAE, during its investigation, that he had forgotten that King's money was in his savings account. When the presenter asked him whether that statement was false, respondent replied that it was, and that he knew where the money was.

Respondent admitted knowing that it was wrong to help King hide assets from Dulce.

According to respondent, King asked him for his money back once, in December 2008, after the divorce had been concluded. Specifically, King requested $5000 so that he could give that to Dulce, pursuant to the judgment of divorce. Respondent then told King to take the money from King's own account, since the judgment of divorce specifically provided for distribution from that account, and that later, in January 2009, he would get his

money back. According to respondent, King was "fine" with that course of action.

Respondent testified that he and King remained friends until March 2009, when respondent's depression prevented him from answering either his phone or the door. During this time, King continued to call and leave messages for respondent to call him.

A good deal of testimony focused on respondent's history with the Lombardi firm and his ability to function as an attorney. Lombardi testified that respondent joined the firm in April 1994. In 2001, he was made a non-equity income partner, which meant that he received a percentage of the firm's profits on an annual basis. Respondent had no signatory authority over the trust account.

According to Lombardi, until the fall of 2008, respondent was a good lawyer. Lombardi had received no complaints about his performance. In the fall of 2008, however, Lombardi learned through a client that respondent was "misleading" her by not paying her share from a six-figure settlement. When Lombardi confronted respondent, he said that he had let the file "slip through the cracks" and that he was trying to settle the matter directly with the client. Respondent told Lombardi that he had been too embarrassed to bring the situation to his attention.

Lombardi and his brother, Stephen, the other name partner in the firm, let that incident go, rationalizing that it was the first one in fourteen years.

Within a few weeks, other problems were brought to Lombardi's attention. For example, an attorney called the firm on behalf of one of respondent's clients to determine the status of a workers' compensation claim that respondent had filed nine-to-ten years earlier. Lombardi's investigation revealed that the matter had been dismissed. When Lombardi confronted respondent about the case, he assured Lombardi that a superseding claim had been filed and that the matter was back on track. This was untrue. When confronted again, respondent claimed that he was working with an attorney friend of his to resolve the matter and settle it.

By way of further example, in December 2008, a judge called the firm to express her belief that respondent had handled a file poorly.

As a result of these problems, the Lombardi firm worked with respondent to resolve the problematic matters, to lighten his case load, to monitor his files, and to limit his case load to workers' compensation cases, since he did not seem to be having a problem with those matters. Respondent assured the Lombardis that no other matters were being mishandled.

By late 2008, however, Lombardi believed that respondent "was definitely acting in a way that demonstrated . . . that he had a lot of pressure." The last straw occurred one Saturday, in February 2009, when a Mr. Barakat came to the office, very upset, and asked to talk to one of the Lombardis. At the time, respondent was upstairs, talking to Stephen Lombardi about his struggles. Lombardi talked to Barakat, who told him that respondent had settled a case on his behalf a month or two before, that he had signed a release, and that he had not received settlement monies. Lombardi grew suspicious when he saw that the releasor was "Acme Manufacturing Company."

Lombardi excused himself, went upstairs with the release, and confronted respondent, who broke down, confessed that it was not legitimate, and admitted that he had mishandled Barakat's case. Respondent fabricated the release because he was afraid of the client, whom Lombardi described as "a little quirky." The release reflected a $27,000 settlement, which respondent planned to pay by borrowing funds from relatives.

Lombardi went downstairs and told Barakat what had happened with his case. After finishing his conversation with Barakat, Lombardi went upstairs, where respondent was crying uncontrollably. Once respondent calmed down, Lombardi told him to take a leave of absence and to get some help.

Respondent's last day at the Lombardi firm was February 27, 2009. Respondent testified that, after he left, he was on disability for six months.

Lombardi testified that, after respondent went out on his leave of absence, the firm uncovered "numerous matters" that he had mishandled, missing files, and "other instances where [respondent] had not been completely honest with clients." The firm reported the situation to its malpractice carrier. Respondent's leave became a termination from employment.

Respondent testified that Lombardi & Lombardi hired him in March 1994, about three months after he had passed the bar exam. He covered "various appearances" for "different attorneys," in personal injury, workers' compensation, and municipal court matters. After he had been with the firm for about a year, one of the attorneys "had an issue that he couldn't practice for several months." Consequently, respondent was asked to take over his practice, which involved real estate and matrimonial work. Respondent handled other matters as well, including personal injury cases, Social Security disability claims, and wills and estate work, to name a few. Respondent claimed that, unlike other attorneys in the firm, who specialized in a particular area of the law, he was "able to handle any particular case that came in the door." He worked five days a

week, often until 7:30 p.m. and on Saturdays as well. He often took work home.

In 2004 or 2005, two Lombardi & Lombardi partners left and formed their own firm. One of them had been respondent's mentor in the workers' compensation cases. When the partner left, 150 files remained behind. Respondent was instructed to review the files, get them up to speed, and call the clients to ensure that they would remain with the firm. At this time, respondent was taking home twenty to thirty files a night, in addition to his normal case load. He had more than 300 files by this point. It became difficult for him to keep up.

Respondent testified that, in February 2009, after his problems surfaced, Lombardi called the New Jersey Lawyers Assistance Program (the LAP). Respondent met with Bill Kane on February 26, 2009. He was referred to a therapist, Ellen Levine, who has treated him since March 2009. Through therapy, respondent learned that he had been suffering from depression without having realized it.

According to respondent, he has a "perfection complex," which involves trying to do everything and to be perfect. He did not believe that he could tell anyone that he was unhappy or overloaded with work. He did not go to either Lombardi with his problem because they were so hard-working and he was embarrassed

to tell them that he had made mistakes and that he could not keep up with his caseload. He fell behind on matters that involved deadlines, such as motions and complaints. He then made misrepresentations to the clients, in order to stave off the clients and the Lombardis' knowledge of his problems.

Respondent testified that his caseload had overwhelmed him and that he had not slept through the night in the two-year-period preceding March 2009. He gained fifty pounds in a year. On two occasions, he was transported to the hospital because of chest pains. As of the date of the ethics hearing, he was going through a divorce.

Respondent also testified that he was under the care of a psychiatrist, Dr. Federbush, for medication management and that he continues to see Levine on a weekly basis. Once a month, he attends a men's discussion group at the LAP, comprised of attorneys who suffer from depression. He stated "unequivocally that the LAP saved [his] life."

In September 2009, respondent opened "a little practice." He received per diem work from other attorneys and had a case load of no more than thirty files. As a result, he enjoyed practicing law again. He appeared in workers' compensation court and did special civil part work, some collection cases, some municipal court work, and family matters.

As of the date of his testimony, respondent continued to practice law, albeit under the supervision of a proctor. They met every few months to review his files and to prepare file review forms for the OAE. The proctor also countersigned trust account checks. However, because respondent did not want "any trust account responsibilities," he decided not to handle third-party claims any longer.

Respondent's treating psychiatrist, Joel S. Federbush, M.D., was qualified as an expert in the fields of psychiatry and forensic psychiatry. According to Federbush, Levine referred respondent to him because she believed that respondent might benefit from an anti-depressant. On March 10, 2009, Federbush evaluated respondent and diagnosed him with major depression and implemented a treatment plan that included continued therapy with Levine, as well as medication.

Federbush attributed the onset of respondent's depression to 2005, when the two of the firm's partners left, increasing his workload. Respondent was overwhelmed and started making mistakes and having symptoms of depression, which affected his work at that time and going forward.

Federbush testified that respondent has shown "significant improvement" since March 2009, when he first saw respondent. Respondent has more insight into his illness and what led to his

depression. He is sleeping better, more focused and able to concentrate, and has a better attitude. Moreover, he is back to trying cases, attending settlement conferences, and functioning as an attorney, though not on a full-time basis. In short, respondent is "back to doing the things he liked to do, and doing them at a good level."

Federbush explained that people who are clinically depressed have the "inability to be productive in their work." There is absenteeism and loss of productivity. In respondent's case, his depression caused him to be impaired in his decision-making and occupational functioning.

During the time that Federbush was treating respondent, he was always oriented to time and place and he was never delusional. He did not hallucinate and was not "actively suicidal."

Federbush, who was familiar with the M'Naughten rule, and who had given an opinion as to whether an individual met the definition of insanity, stated: "I do not believe Mr. Malvone was legally insane." Nevertheless, he did "believe that respondent's symptoms of depression interfered with his ability to act appropriately:"

> I think that's important to note because while I do not believe Mr. Malvone was legally insane, however, it is not uncommon when people are not sleeping, not

> eating, not focusing, feeling depressed, not motivated, have no energy to have that interfere with our ability to work.
>
> I mean any of us who have had a child who was up all night and had to go to work the next morning, we go to work but we may not have had our A game because we were foggy.
>
> Or if you're sick. If you have a tremendous headache. Or you're physically sick. You may not function at a good level. Well, think about that happening over a long period of time. That is going to interfere with your ability to perform your duties to the best of your ability. And that includes not always showing good judgment and not always doing the right thing. That's not to say assumption [sic] legally insane.
>
> So while all of us who throughout whatever we have, we have more better days than worse days. When you have this depression interfering with your ability to function at a good level it's going to affect your productivity.
>
> [3T24-9 to 3T25-7.][4]

Because Federbush was not treating respondent between November 2007 and May 2008, he could not state that respondent was depressed at that time or that he was not operating within his "A game" during that time. Nevertheless, Federbush could say that the picture that respondent presented to him with, that

[4] "3T" refers to the March 21, 2011 transcript of the ethics hearing.

is, his history, was consistent with someone who was depressed at that time and that his symptoms "would have [had] an impact on his work product."

At the conclusion of the hearing, the special master found that

> [t]here is no question nor issue raised and it is therefore found as a matter of fact that the funds paid over to Respondent by King were to be held by him pursuant to his agreement with King to hide the asset from his wife and further that these funds were deposited into Respondent's personal Enterprise Bank account and that these funds were spent by Respondent and not returned to King. Further it is found as a matter of fact that King did not authorize Respondent to utilize the funds which were paid over for his personal expenses.
>
> [SMR¶11.][5]

The special master noted that respondent had admitted to the OAE that it was he who had directed King to issue the three checks, totaling $11,000, that he had deposited the checks into his personal savings account, and that he had spent the money even though, he admitted, "King did not authorize him to utilize his funds." In this regard, the special master pointed to

---

[5] "SMR" refers to the March 22, 2012 report and recommendation of the special ethics master.

respondent's statement to the OAE that he had forgotten that the funds were in his account and had utilized them by mistake.[6]

The special master considered Federbush's testimony that, although respondent was not legally insane at the time of his misconduct, in his opinion, respondent's symptoms of depression had interfered with his ability to act appropriately.

Despite having made these findings of fact, the special master declined to rule that respondent had knowingly misappropriated King's funds, for several reasons. The special master found that King's testimony, when compared to his earlier statements to the OAE, "leaves much to be desired in terms of credibility." In particular, the special master found that "[t]he fact that the funds were deposited into Respondent's personal account is not dispositive of any issue favoring either party." The special master then found that King's "lack of credibility certainly raises issues as to whether the case is made out by clear and convincing evidence for a finding of a violation of the dictates of In re Wilson." The special master concluded that "[t]he manner in which the funds were transferred and the conflicting testimony of [King] does [sic] not prove a

[6] As previously indicated, respondent disavowed that statement at the ethics hearing.

knowing misappropriation of funds by Respondent." Presumably, the special master found insufficient evidence that King had entrusted the money to respondent for safekeeping in the firm's trust account, as opposed to hiding it elsewhere. In fact, the special master remarked that there was no clear and convincing evidence that "the exchange of funds fell within the attorney-client relationship regarding keeping funds separate."

Instead, the special master concluded that the clear and convincing evidence established only that respondent had participated in a scheme to hide King's assets from King's wife to avoid equitable distribution and that, in doing so, respondent had violated RPC 8.4(c). In recommending a one-year suspension, the special master noted respondent's unblemished disciplinary record, his mental condition at the time of the misconduct, his cooperation with the OAE investigation, his admission of wrongdoing, his expression of contrition and remorse, his representation of King without charge, and the absence of personal gain.

Following a de novo review of the record, including the parties' briefs, we are satisfied that the special master's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

We unanimously agree that respondent conspired with King to hide $11,000 from Dulce and from the court so that the funds would not be subject to equitable distribution in the Kings' divorce proceeding. Without question, respondent carried out the conspiracy by taking King's money, in a methodical manner, and depositing it into his personal savings account. Therefore, as the special master concluded, respondent violated <u>RPC</u> 8.4(c), by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation.

As to respondent's use of the $11,000, a five-member majority of this Board agrees with the special master's conclusion that the proofs do not support a finding of knowing misappropriation. Knowing misappropriation is the "unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any benefit or personal gain therefrom." <u>In re Wilson</u>, 81 <u>N.J.</u>, 451, 455 n.1 (1979).

First, there is no clear and convincing evidence that King directed respondent, or that respondent agreed, to place the monies into the Lombardi firm's trust account. Respondent denied that this was the case, the special master found no clear and convincing evidence that they were to be kept in the trust

account, and we note that, if they had been placed in the Lombardi firm's trust account, respondent's and King's goal of hiding them from Dulce and from the court would have been defeated. Certainly, they could not have been "hidden" in the Lombardi firm's trust account. We also note that the checks were made out to "cash," rather than to either respondent, in his capacity as attorney, or to the Lombardi firm. We agree with the special master that it cannot be found that "the exchange of funds fell within the attorney-client relationship regarding keeping funds separate."

Second, we are unable to find that King "entrusted" the money to respondent as trust funds, as we know them. This cannot be called a situation in which the client charged the lawyer with the safekeeping of property in the lawyer's capacity as a fiduciary.[7] A fiduciary is "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires." BLACK'S LAW DICTIONARY 563 (5th ed. 1979). Respondents' and King's illegal

---

[7] Respondent told the hearing panel that he agreed to conceal the funds in his capacity as King's friend of fifteen years, not as his attorney.

enterprise cannot be fairly described as a fiduciary relationship "founded on trust or confidence reposed by one person in the integrity and fidelity of another," a relationship that "exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith," a relationship requiring the exercise of "the utmost good faith." BLACK'S LAW DICTIONARY, supra, at 564. Words such as "special confidence," "trust," "utmost good faith," "fairness," equity," "good conscience," "fidelity", and "integrity" have no place in relationships that are formed to achieve an illegitimate goal, such as the one contrived by respondent and King. It would be incongruous to characterize as trust property, for instance, stolen goods that a lawyer knowingly agrees to hide for a client/thief until the thief is ready to reclaim them from the lawyer. If, in such a situation, the lawyer were to steal the goods from the thief, then the lawyer would be guilty of theft from the true owner, but not of knowing misappropriation.

The difference between knowing misappropriation and theft is critical because not every theft committed by attorneys results in disbarment. See, e.g., In re Kopp, 206 N.J. 106 (2011) (three-year suspension, retroactive to 2007, following guilty plea to third-degree identity theft, credit card theft,

and theft by deception; mitigating factors considered, including the attorney's "tremendous gains" in her efforts at drug and alcohol rehabilitation); In re Jaffe, 170 N.J. 187 (2001) (three-month suspension following conviction of theft by deception; the attorney submitted health insurance claims knowing that he was not entitled to reimbursement for the cost of prescribed formula for his infant child, who had life-threatening medical problems); In re Meaden, 165 N.J. 22 (2000) (three-year suspension for attorney who ordered golf clubs and other equipment worth $5,800 by using stolen credit card information; the attorney was arrested when he received the merchandise); In re Breyer, 163 N.J. 502 (2000) (three-year suspension for law librarian who stole $16,000 in books from a library in the Administrative Office of the Courts); In re Marinangeli, 142 N.J. 487 (1995) (three-year suspension retroactive to date of temporary suspension; attorney removed approximately four credit cards and two checks from mailboxes in the building where his mother lived; the attorney was sentenced to three years probation and was required to undergo urinalysis testing, treatment for his narcotics addiction, if necessary, and to make restitution ($21,734.21) of money obtained from his illegal use of the various credit cards and checks used to support his addictions to alcohol and crack cocaine); In re Gold, 115 N.J.

239 (1989) (five-year suspension (time-served) for attorney who pleaded guilty to aiding and abetting embezzlement; the attorney admitted that he did nothing to prevent his brother and law partner from misappropriating clients' funds); In re Farr, 115 N.J. 231 (1989) (six-month suspension for assistant prosecutor who, among other serious improprieties, stole PCP (phencyclidine) and marijuana from the evidence room in the prosecutor's office); and In re Ragucci, 112 N.J. 40 (1988) (attorney converted to his own use a $194 check found on the floor of his apartment lobby; the attorney forged the payee's signature and deposited it in his account; on a motion for reciprocal discipline, the Court imposed the same level of discipline meted out in New York, a two-year suspension).

Third, there is no clear and convincing evidence that the funds were required to remain intact, after respondent deposited them into his personal savings account or that respondent agreed to leave the funds intact. The testimony is at odds in this regard. King claimed that he never authorized respondent to use the monies. Respondent, in turn, maintained that, although there was no "express authorization" from King for respondent's use of the monies, respondent understood that he was to spend them so that they would be completely disgorged and, therefore, eliminated as an asset belonging to King. As respondent

testified, King "didn't come right out and say it, but it was understood that in order to effectuate the fraud, the money couldn't just sit in an account."

The question now becomes whether respondent improperly used the money that he deposited in his personal account to conceal it from Dulce and the court. The Board's majority found no clear and convincing evidence that he did so. Respondent agreed that the $11,000 was to be returned to King, after the divorce proceeding was concluded. He did so, albeit not promptly after King's request. In the interim, he used the funds for personal reasons. But the proofs do not clearly and convincingly establish that the monies had to remain untouched until then. Although King denied having given respondent permission to use the monies and although respondent told the OAE, during its investigation, that King had not authorized him to utilize the funds for his own benefit and that, when he used them to pay his bills, he forgot that they were King's monies, at the disciplinary hearing respondent denied that he was required to keep the funds inviolate. He testified (1) that, although King had not expressly authorized him to use the money, he understood that he could do so ("[King] didn't come right out and say it, but it was understood that in order to effectuate the fraud, the money couldn't just sit in the account"); (2) that disgorgement

was essential to legitimizing the purpose of the $11,000 given to him; (3) that King knew that the money would be "used again" to "continue the plausibility of the fraud;" (4) and that the monies were to be trickled back to King, to "make the deception more easily hidden" and because, as he explained to King, "the final divorce is not the last time that his assets can be subpoenaed or reviewed."

It is true that respondent's differing versions during the OAE's investigation and at the ethics hearing cast doubt on his credibility. Nevertheless, as the special master found, King was not a truthful witness. When he met with the OAE, he stated that the $11,000 was intended for the payment of legal fees, child support, and equitable distribution, never mentioning the deception that was afoot.

In view of the foregoing, the Board's majority is unable to find that respondent either knowingly misappropriated the funds, as the OAE charged, or converted them to his own use.

Unquestionably, however, respondent masterminded and participated in an outrageous plan to defraud King's wife and the court. Respondent was quick to abandon his ethical responsibilities to conspire with a friend in concealing assets that might have been subject to equitable distribution, thereby tarnishing the image of the bar before the eyes of the public.

His conduct was simply deplorable and deserving of severe discipline.

Attorneys who have displayed conduct similar to respondent's, either to benefit clients or themselves, have received discipline ranging from a censure to a three-year suspension. See, e.g., In re Clayman, 186 N.J. 73 (2006) (censure imposed on attorney who knowingly misrepresented the financial condition of a bankruptcy client in filings with the United States Bankruptcy Court in order to conceal information detrimental to his client's Chapter 13 bankruptcy petition; in mitigation, we considered that the attorney appears to have been among the first attorneys in the local bankruptcy bar to experience changes in the U.S. Trustee's Office and the resultant strict requirements of a new chapter 13 trustee, that the attorney did not act of venality, and that there was a suggestion or indication in the record that he took advantage of a purportedly complacent bankruptcy system for the benefit of his client); In re Trustan, 202 N.J. 4 (2010) (three-month suspension imposed on attorney who, among other things, submitted to the court a client's CIS falsely asserting that the client owned a home and drafted a false certification for the client, which was submitted to the court in a domestic violence trial); In re Coffee, 174 N.J. 292 (2002) (on motion for

reciprocal discipline in matter where attorney received a one-month suspension in Arizona, three-month suspension imposed for attorney's submission of a false affidavit of financial information in his own divorce case, followed by his misrepresentation under oath that he had no assets other than those identified in the affidavit); In re Vella, 180 N.J. 170 (2004) (three-month suspension imposed on attorney who, at the time of the entry of a judgment of divorce that incorporated a property settlement agreement, failed to disclose to her adversary and to the court that her client had died two weeks earlier; mitigating circumstances considered); In re Kernan, 118 N.J. 361 (1990) (three-month suspension for attorney who, in his own divorce matter, submitted to the court a case information statement with a list of his assets and one day before the hearing transferred to his mother one of those assets, an unimproved 11.5 acre lot, for no consideration; the attorney's intent was to exclude the asset from marital property subject to equitable distribution; the attorney did not disclose the conveyance at the settlement conference held immediately prior to the court hearing and did so only when directly questioned by the court; the attorney also failed to amend the certification of his assets to disclose the transfer of the lot ownership; prior private reprimand); In re Lawrence, 185 N.J. 272 (2005) (six-month suspension imposed on

attorney who, in his own bankruptcy and divorce matters, failed to disclose several assets and the payment of a pre-petition debt; mitigation included the attorney's consent to the denial of his discharge; prior private reprimand (now an admonition)); In re Forrest, 158 N.J. 428 (1999) (attorney was suspended for six months after he failed to disclose the death of his client to the court, to his adversary, and to an arbitrator and advised the surviving spouse, who was also a plaintiff, not to voluntarily reveal the death; the attorney's explanation was that "the only way that the defendant would put a fair value on the claim was to have the defendant evaluate it without considering the [co-plaintiff's] death" and that upon receiving the settlement offer he would have informed the defendant of the client's death); In re Telson, 138 N.J. 47 (1994) (six-month suspension imposed on attorney who concealed a judge's docket entry dismissing his client's divorce complaint and then obtained a divorce judgment from another judge without disclosing that the first judge had denied the request; the attorney later denied his conduct to a third judge, only to admit to this judge one week later that he had lied because he was afraid); In re Lowell, 178 N.J. 111 (2003) (three-year suspension for attorney who committed multiple ethics infractions in several matrimonial actions, including directing her client to

sign fraudulent promissory notes and false certifications claiming that gifts from her father were actually loans; the attorney also elicited false testimony at the divorce hearing from the father, stating that the gifts were loans; other violations included submitting an order to the court without first notifying her adversary of its terms, adding a sentence to a stipulation without the adversary's knowledge, having a secretary sign a name to a certification filed with the court without certifying the party's consent, drafting a motion on behalf of a client after the client had terminated her representation, and making misrepresentations in client bills); In re Yamada, 142 N.J. 473 (1995) (three-year suspension for attorney who assisted a client in evading federal income taxes, in violation of 26 U.S.C. §7201); In re Lunn, 118 N.J. 163 (1990) (three-year suspension imposed on attorney who misrepresented to the court allegations in his own personal injury suit); In re Power, 114 N.J. 540 (1989) (three-year suspension for attorney who pleaded guilty to obstructing the administration of justice, in violation of N.J.S.A. 2C:29-1, for advising a criminal defendant-client not to disclose any information to law enforcement authorities concerning a stock fraud investigation because the attorney feared that he himself was also a target in the fraud investigation; the attorney also assisted another client in filing false insurance claims; prior

three-month suspension and reprimand); and In re Kushner, 101 N.J. 397 (1986) (three-year suspension imposed on attorney who filed a false certification with a court with the intent to cause financial loss to a bank that had made a loan to the attorney's business; the false certification enabled the attorney to avoid his liability as a guarantor on the promissory notes).

Here, respondent's conduct was much more egregious that that of the attorneys in Kernan, Coffee, and Lawrence. Their improprieties took place in the course of their own matrimonial matters, when emotions sometimes trump good, moral judgment. Here, without compunction, respondent offered to hide the money for King, in the process forging an appearance that it had been given to him for a legitimate purpose ("legal fees," "fantasy football"). His actions were methodical and calculated. With nary a twinge of conscience, he gave his client advice and help in hiding assets from the client's wife and from the matrimonial court. What confidence may the public have in the integrity of the legal profession when an officer of the court counsels, assists, and conspires with a client to commit a fraud?

Also, unlike in Clayman, Vella, Forrest, and Telson, there are no mitigating circumstances here. Although we accept the proposition that respondent's depression caused him to feel

overwhelmed, nothing demonstrates that is was responsible for his role in the scheme to defraud King's wife and the court.

In aggravation, we considered that respondent drafted the property settlement agreement in which King falsely warranted that he had "made a full disclosure of all assets prior to [its] execution;" that he submitted the property settlement agreement to the court for its incorporation in the final judgment of divorce; and that he did not return the $11,000 to King until well over a year after the divorce was finalized.

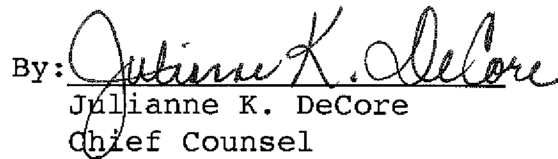
In the view of the Board's majority, respondent's conduct, aggravated by the factors mentioned above, requires the same level of suspension imposed in Lowell, Yamada, Lunn, Power, and Kushner, that is, three years. Although the conduct in those cases may not have been identical or similar in nature as that of respondent, it was unquestionably of equal egregiousness.

Chair Pashman and members Doremus and Wissinger voted for disbarment, finding that the concept of knowing misappropriation applies to this case and that respondent borrowed client funds without the client's permission.

Member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie Frost, Vice-Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

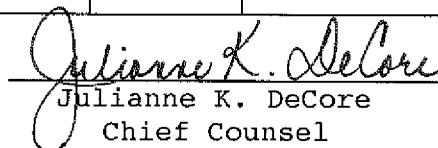
In the Matter of Neil A. Malvone
Docket No. DRB 12-139

Argued: July 19, 2012

Decided: October 25, 2012

Disposition: Three-year suspension

Members	Disbar	Three-year suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost		X				
Baugh		X				
Clark						X
Doremus	X					
Gallipoli		X				
Wissinger	X					
Yamner		X				
Zmirich		X				
Total:	3	5				1


Julianne K. DeCore
Chief Counsel