SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-363
District Docket Nos. XIV-2003-0190E and XIV-2003-0214E

IN THE MATTER OF	
JAMES K. RECORD	
AN ATTORNEY AT LAW	

Decision

Argued: March 18, 2010

Decided: May 17, 2010

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.[1]

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

This matter was before us on a recommendation for a four-year suspension filed by Special Master John F. Kearney, III (two years for each of the two charged offenses). The first count of the complaint charged respondent with knowing

[1] Respondent indicated his agreement with the special master's findings and recommendations.

misappropriation of client's funds, a violation of RPC 1.15(a) (failure to safeguard client's funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and In re Wilson, 81 N.J. 451 (1979) (knowing misappropriation of client's funds requires disbarment). The complaint alleged that respondent deposited in his personal checking account a $15,000 check received from a client and then proceeded to spend a portion of it for his own purposes. The check had been earmarked for a private investigator's fee.

The second count of the complaint charged respondent with violating RPC 8.4(b) (commission of a criminal act that adversely reflects on the attorney's honesty, trustworthiness or fitness as a lawyer in other respects), RPC 8.4(c), and RPC 8.4(d) (conduct prejudicial to the administration of justice). Essentially, that charge stemmed from respondent's fabrication and use of a driver's license bearing his brother's information. At the time, respondent's driver's license was suspended.

The special master did not find knowing misappropriation. The Office of Attorney Ethics ("OAE") urged us to find knowing misappropriation and recommend respondent's disbarment. A four-member majority of this Board found no knowing misappropriation and determined to impose a two-year suspension, with conditions, for the aggregate of respondent's conduct.

Respondent was admitted to the New Jersey bar in 1989. He has no prior discipline.

At all times relevant to the complaint, respondent was employed by the law firm of Klafter Mason Record & Socher ("Klafter Mason"), in Manalapan, New Jersey. According to the New Jersey Lawyers' Fund for Client Protection report, respondent retired from the practice of law on June 25, 2008.

On the date of the first hearing before the special master, scheduled for September 9, 2009, respondent did not appear, despite having had notice of the hearing. On the morning of the hearing, respondent sent an email to the office of his then-attorney, announcing that he would not be attending the hearing "due to work and other very important obligations." Respondent's counsel then indicated to the special master that he intended to file a motion to withdraw from the representation. Counsel explained that, in July 2009, when respondent had communicated to him that he was suffering from post-traumatic stress disorder, counsel had requested

> information from the doctors that would be more detailed than just some handwritten note on a prescription pad and requesting, if he were hospitalized, where; and appreciating that he would update me on the status of his health.
>
> I also indicated that I will need to meet with him in August prior to this hearing. None of that which occurred [sic].

> In addition, I received on Tuesday, August the 19th a response from Mr. Record, which I will not disclose at this time as an overabundance of caution, so as not to invade the attorney/client privilege. I will merely categorize the letter as saying that he is less than satisfied with the job I've done with [sic] him as his lawyer.
>
> [1T5-8 to 23.][2]

According to the special master, respondent discharged his counsel immediately thereafter, rendering unnecessary the motion to withdraw from the representation. Respondent proceeded pro se.

On February 20, 2008, the OAE and respondent, while still represented by counsel, entered into a joint stipulation of facts. Hearings took place on April 17, May 29, and June 19, 2009. The grievant, Elizabeth Mahoney, who currently lives in Massachusetts, testified via telephone. She is a registered nurse at the New England Baptist Hospital, in Boston. She also has a J.D., but has not practiced law since her 1987 graduation from law school.

1. The Knowing Misappropriation Charge

In June 2002, Mahoney retained respondent and paid a $25,000 retainer to Klafter Mason by way of a wire transfer. According to Mahoney, at the time, "the active part of [her]

[2] 1T refers to the transcript of the September 9, 2009 proceeding before the special master.

matrimonial matter had virtually concluded." She had obtained an adverse result in her child custody case, but both she and her matrimonial lawyer, Kalman Harris Geist, "felt it would be a waste of funds to continue on at that point." She then hired Klafter Mason "to investigate what was going on with respect to the continued harassment and stalking at both [her] workplace and [her] place of residence."

A retainer agreement between Mahoney and Klafter Mason, purportedly signed on November 14, 2002, stated that the purpose of the engagement was "investigation and prosecution of burglary, theft, harrassment [sic], stalking and child endangerment.[3] Working with private investigator and any County Prosecutor [sic] Offices."

Parenthetically, there is no clear explanation as to why the retainer agreement is dated November 14, 2002, some five months after Mahoney retained respondent's services and, as detailed below, six weeks after she sent him a note, dated September 30, 2002, demanding the return of the unused portion of her retainer.[4]

---

[3] Mahoney believed that her ex-husband, who had obtained custody of the children and allegedly had been abusive to her, was also abusing the children.

[4] Mahoney's formal notice of termination of respondent's representation, however, was sent to him on December 29, 2002.

At the ethics hearing, Mahoney disputed the accuracy of the retainer's date, as well as the accuracy of a $20,000 fee mentioned in the agreement, given that she had paid $25,000 to Klafter Mason. Indeed, Klafter Mason's business account statement for June 2002 reflects Mahoney's $25,000 wire transfer.

Although, at the ethics hearings, considerable time was spent on the above discrepancies, the record does not clearly reconcile them. Respondent testified that he had dated the agreement November 14, 2002 and that Mahoney had signed it in his presence on that date. Mahoney, however, disputed the legitimacy of the November 14, 2002 date.

As seen below, the private investigator who was hired for the Mahoney case, too, recalled that he had met with both respondent and Mahoney on November 14, 2002, the date of the retainer, at Klafter Mason's Freehold office. On the other hand, Klafter Mason's invoice for the Mahoney case lists the services performed on November 14, 2002 as (1) respondent's office conference with Mahoney in the Manalapan office (1.00 hour), (2) respondent's office conference with the investigator in the investigator's Brick Township office (4.25 hours), and (3) respondent's office conference with the investigator (location not disclosed) (2.00 hours). Those entries seem to suggest that

respondent first met with Mahoney alone and then had two meetings with the investigator, without Mahoney.

In any event, the significance of the late date on the retainer, of the parties' divergent accounts of the meeting dates and location, and of the parties' seemingly different recollection of the meeting participants, although perhaps relevant to the question of credibility or to who had a more precise recollection of the events, is not critical to the most serious issue in this matter -- whether respondent knowingly misappropriated Mahoney's funds, as charged in the complaint. We mention the parties' contrasting versions about the retainer only because of the inordinate amount of time spent on them at the ethics hearings.

We now return to the issue of the private investigation services to be performed on behalf of Mahoney, as reflected in the retainer agreement.

In addition to having paid Klafter Mason a $25,000 retainer for respondent's representation, Mahoney gave respondent a $15,000 check, in July 2002, payable to him personally. The check was intended to cover the services of a private investigator. Mahoney asserted that she had reported to the police the "incredible amount of harassment, stalking, breaking and entering of [her] home," but that the police had not given

them due attention. The investigator's job was "to investigate who [was] behind the stalking activities and breaking and entering" of Mahoney's home.

According to respondent, Mahoney had asked him to find a New Jersey private investigator for her, inasmuch as she was living in Massachusetts at the time. Respondent's reply was that, although, as her attorney, he would recommend against hiring a private investigator at that early stage of the representation, he would comply with her request and not charge her for time spent on finding a private investigator.

On July 18, 2002, respondent deposited Mahoney's $15,000 check into his personal account at First Union Bank. According to Mahoney, respondent did so without her knowledge or consent. The balance in respondent's account at the time was $974.47.

It was Mahoney's understanding that the $15,000 would be deposited "into the attorney trust account and used for legal purposes . . . ." She stated that "[a]ll the attorneys in [her] matrimonial matter [had] all worked with private investigators and [she] had made out checks to the attorney for that purpose, but they were always deposited into an attorney trust account and payments were made by the attorney."

The OAE presenter asked Mahoney if, "at any time during the time that [respondent] was acting as [her] attorney did [she]

agree that the retention of [the private investigator] was a side transaction that had dealt with [respondent] personally as opposed to [respondent] as a Klafter Mason attorney." Mahoney's response was that she "understood that [respondent] was going to provide attorney related services" and that the private investigator "was going to . . . work closely with [respondent] regarding anything he found out to explain the harassment and stalking activities."

On July 1, 2002, respondent met with a private investigator, Rocco Fushetto, from Argus Investigations. According to respondent, he had found Fushetto through a yellow pages search. Fushetto understood that respondent was hiring him as a representative of Klafter Mason.

On July 22, 2002, respondent issued check no. 417 from his First Union account to Argus Investigations, in the amount of $5,000, despite his representation to Fushetto, in a subsequent letter of July 24, 2002, that "[a] retainer of $15,000 [would] be forwarded to [Fushetto's] office to be used in the following manner: $5,000 Equipment [and] $10,000 Investigation." Apparently, Fushetto did not press respondent for the payment of the remaining $10,000. As seen below, respondent did not give the $10,000 to Fushetto until October 2002.

In the interim, the $10,000 belonging to Mahoney did not

remain intact in respondent's First Union account. Respondent utilized it for his personal debts, such as credit cards, loans, and utilities. For instance, on July 22, 2002, the same date of the $5,000 check to Fushetto, respondent issued a $76.68 check to PSE&G; a $31 check to The Port Authority of New York and New Jersey; a $285.62 check to Wachovia Bank for a business loan; a $1,380.66 check to First USA Bank, N.A.; a $3,000 check to American Express; a $700 check to PNC Bank, N.A. for a loan; and a $200.15 check to Verizon. These checks totaled $5,674.11, while the starting balance in his account had been $974.47 and no additional deposits had been made to fund respondent's personal disbursements. The account statement for the period from July through August 15, 2002 showed a $31 "insufficient funds charge" on July 26, 2002.

By August 9, 2002, the account balance was a mere $177.16. Respondent made only one additional deposit: $54.07 on August 12, 2002. The statement for the period from August 16 to September 17, 2002 reflected an opening balance of $231.32 and a closing balance of $3,293.19. None of the disbursements that followed the $5,000 check to Fushetto related to Mahoney's case.

Mahoney testified that she never gave respondent permission to use her money for his personal benefit and that he never disclosed to her that he was using it for his own expenses.

The balance in respondent's checking account remained below the $10,000 belonging to Mahoney until September 27, 2002, when respondent deposited $10,000, which he had obtained from his parents. That deposit brought the account balance to $13,184.29.

Following the $10,000 deposit, respondent wrote check no. 448 to Argus Investigations for $10,000. Although the check has a date of August 15, 2002, respondent stipulated that the check was not given to Argus until October 1, 2002. Indeed, the back of the check bears a "for deposit only" date of October 1, 2002. The details of this false date are discussed below.

Respondent's deposit of the $10,000 was prompted by Mahoney's request for the return of her funds, "less that portion attributable to [the] time spent on [her] matter." According to Mahoney, eventually she had become dissatisfied with respondent's representation. She "realized that there was absolutely no work product and a total of about $40,000 had been given to [respondent and that] whenever [she] tried to pursue a work record, he just had nothing to show. [She] had no statements, no idea of what he was doing at the time." She then consulted with her matrimonial lawyer, Geist, who wrote a letter to respondent, on September 25, 2002, strongly recommending that respondent refund the $25,000 retainer and the $15,000 investigator's fee to Mahoney.

In response to Geist's letter, Gary Mason, the managing partner at Klafter Mason, sent him a letter, dated September 26, 2002, announcing that, until such time as the firm received "written instruction in Ms. Mahoney's handwriting and signed by her terminating the attorney client relationship," the firm would continue to represent Mahoney. Mahoney then handwrote a note to respondent, dated September 30, 2002, requesting the unused portion of her retainer.

Respondent testified that, on receiving Geist's letter, he "was in shock. I had no idea -- I didn't realize that I had used [Mahoney's] money. I just didn't have any recollection. I left the office, I went home, checked my bank book, saw what happened, and that's when I called my parents." The $10,000 check from respondent's parents is dated September 25, 2002, the same date of Geist's letter demanding the return of Mahoney's $40,000. Respondent admitted that Geist's letter had spurred his request for $10,000 from his parents.

Fushetto testified about a meeting with respondent, in late September 2002, in which respondent had admitted having used Mahoney's funds.[5] According to Fushetto,

> [respondent] had called me up and he was very distraught and he told me that he had a real problem, he had to meet with me, and at that time, the evening, I was down at my

[5] Fushetto, too, testified by telephone.

> Brick office, and I had just completed a polygraph examination or met with a client down there, I don't have a record of that exact date, but he came down and [was] very hysterical and told me that he had messed up, that he had taken money from Ms. Mahoney, [was] supposed to have given me $15,000 and wanted to then give me the 10,000, but that he had gotten into a jam and he had used the money and he asked if I would help him, and I said I would, so he gave me a check number 448 from his account from the First Union Bank, it was undated, and I said leave it undated because I didn't have my file with me so I didn't know what proper date to put in, and I had agreed I would try to help him to clear this thing up.
>
> [3T9-18 to 3T10-8.]
>
> We didn't know what date it should have been on. It was my idea [not to date the check] and I said if I have my file here, I'll leave it blank and I'll put the date in.
>
> [3T27-3 to 5.]

On cross-examination, respondent asked Fushetto if, when he had appeared "hysterical" to Fushetto, Fushetto remembered his mentioning "all the different problems that [he] was having." Fushetto replied:

> No, I don't remember them, Jim. I remember that you were hysterical, you were crying, you said you screwed up big time and that you got into a jam, and you had to do something or use her money and could I help you, that's what I basically recall, and I agreed to do that.
>
> [3T25-21 to 3T26-1.]

According to Fushetto, he received an undated check from respondent at the end of September 2002. Fushetto made a copy of it because "every time we deposit or do anything, we make copies." He then dated it August 15, 2002 because "when I went back and I realized when [respondent] had given the first check, seemed like around the right time that it should have been, and I had no specific reason for that date other than it was after the first check." In a memorandum to the OAE, Fushetto explained that he had entered the August 15, 2002 date "in order to try and help [respondent]."[6]

On November 26, 2002, at Mahoney's request, Fushetto retrieved her files from respondent's office. Fushetto continued to work for Mahoney, however.

By letter dated December 29, 2002, Mahoney gave "formal" notice to respondent that she was discontinuing his professional services. Fushetto testified that, at Mahoney's request, he had edited the letter, as reflected by his handwritten notations on a draft of the letter. The final, revised version of the letter is also part of the record.

On March 31, 2003, Klafter Mason sent Mahoney an invoice

[6] We note that the August 15, 2002 date would not have helped respondent out of a finding that he had utilized Mahoney's funds for his personal expenses. As previously indicated, he started using Mahoney's funds as early as July 22, 2002.

for $9,564.40 for services rendered and enclosed a refund check for $10,435.50. Respondent was dismissed from the firm. Although respondent could not recall when his association with Klafter Mason had ended, when the presenter suggested that it had been on March 27, 2003, respondent did not disagree with that statement.

Although respondent stipulated that he had used Mahoney's funds to satisfy personal debts, he claimed, in his answer, that he had "lost track of the balance in [his] checking account, and believed that there was at least $25,000 before the deposit in question." He maintained that "back then" he usually left a balance of "about 20 to $30,000" in his account.

OAE investigator Mary Jo Bolling reviewed respondent's bank statements from January 17 through June 17, 2002. According to Bolling, the account's daily balance remained under $15,000, except for a short period, in March 2002. Respondent's February/March 2002 bank statement shows that, on March 13, 2002, the balance in the account was $42,965.29, following a $28,177.67 deposit on that same date. $27,000 of that deposit was comprised of four checks from respondent's parents, all dated March 8, 2002 (check no. 1108 for $5,000; check no. 353 for $9,000; check no. 1001 for $9,000; and check no. 1002 for $4,000). Respondent professed to have no recollection of the

purpose of his parents' checks.

The $42,000 balance lasted two days. On March 15, 2002, a check in the amount of $31,518.50 (no. 350) cleared the account.[7] When the presenter pointed out that the $28,000 preceded a check for $31,518.50, presumably implying that the deposit had been specifically earmarked for that large disbursement, respondent stated that he had no recollection of those transactions.

In addition to alleging, in his answer, that he thought that he had about $25,000 in his account and that, therefore, he did not know that he was using Mahoney's funds, respondent contended, also in his answer, that, because "Mahoney was not a client regarding the transaction," he may not be found guilty of knowing misappropriation of client's funds. He claimed that he "truly believed" that Mahoney had given him the $15,000 for "personal and not professional reasons in order to hire a private investigative firm for her."

At the ethics hearing, respondent expanded on his defenses to the knowing misappropriation charge:

> At the point that I deposited Ms. Mahoney's check into my checking account I fully believed that I was doing that personally, not professionally. I really didn't know what else to do. I didn't even think of a

[7] The record does not reveal the identity of the payee. Bolling testified that the bank was unable to provide her with a copy of the check.

trust account because it was really her hiring Argus Investigation, not the firm, so without really knowing what else to do and certainly not being the clearest of mind, I put it in my account. I fully believed at that point that I had plenty of money in my account. I never ever intended or knew that I was using Ms. Mahoney's money. I'm sure one or many people here are questioning how could that possibly be. One, I thought I had plenty of money in my bank account. In fact, I believe there was one statement during this hearing about a check that I wrote out for approximately $30,000. What was that for, where did that go. I thought I had plenty of money there. How could one not know how much money one has when one drinks to the point of passing out and one drinks all weekend long, never mind thinking about killing themselves, never mind having the police come knocking at your door ready to arrest you on a daily basis, being under severe stress, depression, daily thoughts of death, if one could fathom how that feels on a daily basis to hate one's life to the point of wanting to kill themselves, maybe, possibly one could understand that during the weekend, when the bills would come in, that I would cut checks. I never balanced a checkbook. I just wrote out the checks. I thought there was plenty of money there and I ended up dipping way down into the account, which I did not know and still did not know until this letter came in I believe either from Mr. Geist or somebody about owing Ms. Mahoney money. I'm not even sure if I knew that I wrote out either the 5,000 or the 15,000. I didn't know at that point. I drove directly home, looked at my bank book, realized what I had done.

There was no way during this period of time that I could form any intent to take her money to use it. I didn't have to. If I needed money, lucky enough for me my parents are very well-to-do and would have never had

> a problem giving me money. I don't need to steal and I never have.
>
> When Rocco said I went to his office hysterical, damn right. Those were his words or his word was hysterical. Crying, yes. Does it sound like somebody who knowingly did something wrong, that was trying to be deceitful that I would be hysterical and crying because I got caught with taking some money. With a grown man, I don't think in the right state of mind would be hysterical and be crying over something like that. If I was so devious, why wasn't I the one who came up with the idea of backdating that check? I just wanted to give Rocco the money that was owed to him, but I never intended to use Ms. Mahoney's money, and during that period of time, Your Honor, I could not have formed any intent to do so. I was never in any frame of mind to be able to do so, and it wasn't just the alcohol. I was doing my best to live, to stay alive on a daily basis.
>
> [4T81-5 to 4T84-8.][8]

Respondent contended that his considerable problems had caused him to lose track of his personal life at the time. Asked by the presenter if he had lost track of his professional life as well, respondent answered "I lost track of a lot of it." He acknowledged, however, that he had continued to represent clients during 2002 and that, during the months preceding September 25, 2002, he was capable of paying his bills and, in fact, had done so. He also acknowledged that, throughout 2002,

[8] 4T refers to the transcript of the June 19, 2009 hearing before the special master.

he was practicing law and representing clients in court.

At the last ethics hearing, respondent gave a detailed account of his emotional problems and alcohol addiction. He testified that he had attempted to commit suicide on three occasions: in the late 1990s, in 2001, and in 2005/2006. He battled depression, went to sleep wishing that he would not wake up, drank in the morning and sometimes in the afternoon, and then drank at night until he passed out. He mixed alcohol with antidepressants, as well as blood pressure medication and sleeping pills.

In addition, a former girlfriend was making his life a "living hell." She made threats to his staff, unless they disclosed his whereabouts; she obtained his social security number and opened credit cards; she arranged for the electricity to be shut off at his home; and she made him "paranoid" by saying that the police were waiting for him outside of his home (respondent was driving on a suspended license at the time), thereby making him fearful to leave the house for the office or court.

Respondent testified that the depression, coupled with the woman's daily threats, made him "drink [himself] to sleep so that [he] didn't do anything worse to [himself]."

Respondent produced a letter from his internist, Ola Monastyrskyj, M.D., dated January 2, 2007, stating that

respondent, her patient since 1997, "has suffered with anxiety disorder, panic attacks and depression," in addition to alcohol abuse. Dr. Monastyrskyj stated that, in late 2001 and 2002, respondent's anxiety and panic attacks worsened. There was increased stress in his life, both personal and professional. She alluded to respondent's former girlfriend's harassment and opined that the "situation was near a crisis level."[9]

Although the presenter did not object to the use of Dr. Monastyrskyj's report for factual information to support respondent's testimony, she objected to any opinion about respondent's ability to comprehend what was going on in his life at the time. The presenter argued that, because Dr. Monastyrskyj was not present for testimony, she was unable to cross-examine her. Later, the presenter acknowledged that the report did not seem to contain an expert opinion on respondent's ability to comprehend "any particular item of his life."

In evidence also is a report from Lance L. Gooberman, M.D., J.D., dated July 31, 2002. Dr. Gooberman interviewed respondent only once, on July 5, 2007. Based on documents provided, his "knowledge and experience, and a review of the pertinent medical

[9] Dr. Monastyrskyj's handwritten notes of respondent's visits are attached to her letter. As pointed out by presenter, however, the notes do not show that respondent saw Dr. Monastyrskyj in 2002. Respondent explained that some pages were missing. He was unable to offer an explanation for the missing pages.

and scientific literature," Dr. Gooberman's diagnoses were "Sedative Dependence, Sedative-Induced Mood Disorder, and Sedative-Induced Anxiety Disorder." He found "no medical evidence on record to suggest the presence of a primary psychiatric illness." He stated that, in the course of an addictive disorder, the patient's personal life deteriorates before the patient's professional life and that, in [respondent's] case, "it was only late in the progression that his professional life was affected." He then concluded that respondent's "professional life was affected only to the extent of negligent behavior as opposed to willful misconduct with a purposeful malicious intent."

The presenter objected to the admission of Dr. Gooberman's report into the record on the bases that his resumé did not include his suspension from the medical practice and that, because he was not present for testimony, he could not be cross-examined. In fact, even respondent thought that Dr. Gooberman's report was unreliable:

> [My former attorney] asked me to go see Dr. Gooberman. I saw Dr. Gooberman once for about a half hour. He didn't even review my file before I got there. I think his report, although it states that I am an alcoholic and seriously depressed and receiving treatment, frankly I don't think it's worth even looking at. It doesn't state anything new. I don't think it states anything different and frankly any doctor that can

write a report after seeing somebody for one hour is not worth it.

[4T86-24 to 4T87-8.]

Although the special master found the presenter's objection to the absence of cross-examination to be well taken, he overruled it because, he said, he had permitted telephonic testimony by Mahoney and Fushetto. He asked respondent if he was willing to produce Dr. Gooberman for testimony by telephone. Respondent replied that he was not. He asked respondent if he was willing to stipulate that Dr. Gooberman's had been suspended for violations of his duties as a physician. Respondent replied that he was. The special master then determined to allow the report and to give it whatever weight it should be accorded, "depending on its internal consistency."

Respondent testified that he is currently being treated by a psychiatrist and that he still takes antidepressants. He stated that he "still thinks daily about ending it."

2. The Forgery and Use of False Driving Credentials

The allegations of this count of the complaint were the subject of a stipulation between respondent and the OAE. Accordingly, none of them were addressed at the ethics hearings.

Having learned, on February 20, 2003, that respondent was driving while on the suspended list and was using his brother's

driver's license, respondent's law partners -- Craig Klafter, Gary Mason, and Cori Socher -- conducted their own research on the ethics issues involved, consulted with an attorney who had served on a district ethics committee, made inquiries to the New Jersey Ethics Hotline, and had direct conversations with the OAE. The partners brought to respondent's attention that the use of a fraudulent driver's license was not only a violation of the RPCs, but also a fourth-degree indictable offense. They informed respondent that they were duty-bound to report his conduct to ethics authorities, as well as to mitigate his conduct by either expelling him from the firm or taking action to eliminate the conduct.

The three members of the firm then put together a list of requirements to which respondent had to agree, in order to remain a member of the firm. Specifically, respondent was required to immediately discontinue driving in connection with any matter related to the firm, to be driven by a private driver to be compensated from his "draw," to enroll in the New Jersey Lawyers' Assistance program because of his alcoholism, and to execute an affidavit attesting that he did not possess and would not use a false or altered driver's license and would not represent himself to a police officer or a government employee as anyone other himself, for the purpose of avoiding or

interfering with the administration of justice.

The three members emphasized that the conditions were "non-negotiable" and that, if respondent did not agree to their terms and affix his signature at the bottom of their memorandum on that same day, they "would have no other choice but to report [his] conduct to the Office of Attorney Ethics and expel [him] as a member of the firm . . . ."

On that same date, March 6, 2003, respondent signed the memorandum and agreed to the following:

> I HEREBY AGREE TO EACH AND EVERY CONDITION SET FORTH ABOVE AND REPRESENT THAT I WILL ACT IN ACCORDANCE THEREWITH. I UNDERSTAND THAT IF I DO NOT COMPLY WITH EACH CONDITION SET FORTH ABOVE, MY MEMBERSHIP IN THE FIRM OF KLAFTER, MASON, RECORD & SOCHER, L.L.C SHALL BE IMMEDIATELY AND IRREVOCABLE [SIC] TERMINATED AND THAT MY CONDUCT, AS DESCRIBED THEREIN, SHALL BE REPORTED TO THE OFFICE OF ATTORNEY ETHICS.
>
> [Ex.P-15 at 4.]

One month later, on April 4, 2003, Patrolman Robert Kelly of the Manalapan Township Police Department, having been notified by Cori Socher that respondent was driving while suspended and that he had called the office announcing that he was on his way, observed respondent operating a Mercedes Benz SUV in the parking lot of the firm's building. After respondent parked the vehicle, Patrolman Kelly asked him for his license, registration, and insurance card. Respondent produced the

requested documents, which identified him as John Record. John Record is respondent's brother, in whose name the vehicle was registered.

Respondent admitted to Patrolman Kelly that he was using his brother's identity because his license had been suspended. He also admitted that he had purchased the car using his brother's identification information, had manufactured the driver's license, and, with the exception of his own photograph, had placed his brother's information on the license.

According to the special master, respondent was charged with a variety of criminal offenses, including identity theft, a violation of N.J.S.A. 2C:21-17(a)(4); hindering apprehension, a violation of N.J.S.A. 2C:29-3(b)(1); forgery, a violation of N.J.S.A. 2C:21-1(a)(2); uttering a forgery, a violation of N.J.S.A. 2C:21-1(a)(3); false government documentation, a violation of N.J.S.A. 2C:21-2.1(c); falsifying or tampering with records, a violation of N.J.S.A. 2C:21-4(a); and unsworn falsification to authorities, a violation of N.J.S.A. 2C:28-3(b)(3). On October 27, 2004, he was admitted into a pretrial intervention program ("PTI"), which he later successfully completed.

On March 6, 2003, one month before being approached by Patrolman Kelly, respondent had signed the firm's required

affidavit, stating that he neither had in his possession nor would he use a false, fraudulent, or altered driver's license and that he would not misrepresent his identity to any police officer or other governmental employee, for the purpose of avoiding or interfering with the administration of justice.

At the conclusion of the ethics hearings, the special master found that, notwithstanding respondent's possible subjective belief that he was merely doing a favor for Mahoney "wholly apart from the representation," the evidence clearly and convincingly demonstrated that the $15,000 had been entrusted to him in connection with his legal representation. In the words of the special master, "[i]t is not Respondent's subjective belief that controls, but rather the objective fact that a substantial portion of the reason Ms. Mahoney entrusted the funds to him to hire an investigator was precisely *because* he was her attorney, even if it was intended to be a personal favor to her." The special master, thus, concluded that, by depositing the funds in his personal checking account, respondent had "commingled" his and client's funds. The special master also found that respondent had invaded Mahoney's funds for his own purposes, albeit negligently, not knowingly.

In a lengthy, thorough report, the special master rejected respondent's defense that his mental health crisis, abuse of

alcohol, and chaos created in his life by the former girlfriend's harassment "deprived him of the ability to act intentionally and knowingly." The special master concluded that respondent had not met his burden to establish that he was unable to appreciate the difference between right and wrong or the nature and quality of his acts, in essence, the M'Naughten insanity standard. The special master remarked that "[n]one of the medical evidence presented by Respondent includes such an opinion, nor do the facts support such an inference to the requisite degree."

On the other hand, the special master found that respondent presented credible evidence that his

> mental disease resulted *factually* in his not having the state of mind necessary to establish the Wilson violation, namely knowledge that he was invading Ms. Mahoney's money. I distinguish this from whether he was *capable of having* such knowledge, an issue on which I have found his evidence has not met his burden.
>
> [SMR33.][10]

For a number of reasons, including the following, the special master credited *respondent*'s testimony about his lack of knowledge:

> First, I found his testimony generally internally consistent and consistent with

[10] SMR refers to the special master's report.

> general life experience and common sense. No one in the midst of a simultaneous mental health crisis and alcoholic haze and under extreme stress to crisis levels from a dysfunctional relationship resulting in considerable harassment . . . is likely to balance his or her checkbook or keep meticulous track of his or her book balance (unless, perhaps, the mental disease suffered is obsessive compulsive disorder). Indeed, no one in that state is likely to manage either personal or professional life with a high level of competence. And, indeed, Respondent did not.
>
> . . . .
>
> Secondly, having had the opportunity to hear and observe Respondent testify at the hearing, I found his demeanor, tone and manner lent credence to his testimony. How he said it was consistent with what he said. The Respondent did not remember "too much," or "too little," or appear scripted or rehearsed. The obvious emotion with which he recalled his mental and emotional state during this period lent credence to his testimony. He was not evasive. In his appearance, tone and manner he seemed sincere. In short, the bulk of his testimony had the ring of truth.
>
> [SMR35-SMR36.]

The special master gave considerable weight to respondent's testimony that, as a result of the circumstances then present in his life, he had no knowledge of his account balance.

On the other hand, the special master found that

> the most damning evidence presented is the fact that, upon receiving Mr. Geist's letter . . . which, it must be emphasized, demands full refund of both the $25,000 fee and the

> $15,000 to hire an investigator, Respondent paid the $10,000 borrowed from his parents to Mr. Fushetto by way of an undated check later backdated by Fushetto. While this was Mr. Fushetto's idea . . . it was clearly acquiesced in by Respondent. It was, thus, an attempt to "cover up" the fact that the full $15,000 had not heretofore been paid.
>
> [SMR40.]

The special master added, however, that, while there was acquiescence in a "cover up" that could be construed as consciousness of wrongdoing, there [was] nothing to show whether that consciousness was of the wrongdoing or negligently invading Ms. Mahoney's funds, or the wrongdoing of knowingly doing so."

The special master remarked that

> [o]n the printed page, Mr. Fushetto's testimony as to his meeting with [respondent] reads much more sinister than it sounded when I heard it. He references [respondent] saying he had "'messed up,' taken money from Ms. Mahoney, supposed to have given me $15,000 and wanted to give me the $10,000 but that he had gotten into a jam and he had used the money. . . " and later that [respondent said "[he] screwed up big time and that [he] got into a jam . . . ." It did not sound, when I listened to Mr. Fushetto's testimony, that he was saying that [respondent] used the money intentionally *because* he got into a "jam," as this could be read on the cold printed page, but rather than his having "messed up" and "screwed up big time" by invading through money *was* the "jam" he had gotten into. This was how I took it when I heard it.
>
> [SMR41.]

The special master conceded that, taken in combination, the circumstances could certainly indicate the existence of knowledge on respondent's part. He found, however, that they are "equally susceptible to the interpretation that Respondent simply lost track of what he was doing with his personal checking account." The special master also conceded that "[t]he case is close." But he ultimately concluded that, "when the facts Respondent was in poor mental health, was drinking and was stressed by harassment . . . are considered with all the other facts, after careful consideration I am not satisfied that the OAE has met its burden to show knowledge by clear and convincing evidence."

In sum, despite acknowledging that it was entirely possible and even likely that respondent knew that he was misappropriating Mahoney's funds, the special master found that the applicable standard of clear and convincing evidence had not been met. He concluded, thus, that respondent had engaged in a grossly negligent, but not knowing, misappropriation.

As to the forgery of driving credentials, the special master noted that "Respondent's admission simplified the issue as to whether there is an adequate factual basis to support an adverse finding on the Respondent's admission." Specifically, the special master found that respondent had violated (1)

N.J.S.A. 2C:21-2.1c (false government identification, a crime of the third degree), by presenting to Patrolman Kelly a "document" that "falsely purported to be a driver's license" and that "could be used as a means of verifying [his] . . . personal identifying information;" (2) N.J.S.A. 2C:21-2.1b (false government documents, a crime of the second degree), by manufacturing a driver's license; and (3) N.J.S.A. 2C:29-3b(1) (hindering apprehension), by exhibiting to Patrolman Kelly a false license in an effort to avoid detection that he was driving while on the suspended list.

The special master noted that "[s]imilar analysis would reflect that the conduct also violated other criminal statutes, but this suffices for the purposes of this attorney discipline matter to establish the requisite clear and convincing standard that Respondent violated RPC 8.4(b)."

The special master found that the above conduct also violated RPC 8.4(c), in that respondent attempted to misrepresent his identity to Patrolman Kelly and attempted to deceive him," and RPC 8.4(d), given that respondent's "very purpose of manufacturing false driving credentials, carrying them, and using them when stopped by the police was an effort to avoid detection of the fact that he was violating N.J.S.A. 39:3-40 [driving while license suspended], and also violating an

Order suspending his driving privilege."

The special master was unable to conclude to a clear and convincing standard, however, that respondent's conduct in connection with his March 6, 2003 affidavit was improper. The special master noted that there was neither an admission nor direct evidence that respondent "possessed the altered license *on* March 6, 2003." The special master remarked:

> Although there are circumstances recited in [the firm's memorandum to respondent, dated March 6, 2003] from which an inference could be drawn, there is not a sufficient residuum of nonhearsay evidence from which a finding by clear and *convincing* evidence can be made that the affidavit's representation [that] Respondent did not, on March 6, possess a false or altered license was false *on* March 6, as opposed to later on April 4.
>
> Similarly, the evidence does not suffice to establish by clear and convincing evidence that Respondent, whose only pertinent admission in the stipulation as to the affidavit is that he signed it, had on March 6, at the time he signed it, an intention to misrepresent his identity at a future time. The fact that on April 4 he presented the driver's license in his brother's name does not, in logic, compel the conclusion that this was intended or planned on March 6. It may be that Respondent did have such an intent – that may even be probable, but it is also quite possible that the intent was formed later or that he later backslid from a contrary intention consistent with that recited in the affidavit of March 6. Such would not make the expression of such an intention in the affidavit untrue or deceitful when it was made. Moreover, even on April 4, although Respondent presented

> the false documents, he did not, when asked his name, state that it was John Record. At first, he responded simply with his last name "Record," which, though evasive, was not a false representation. He then, when Ptl. Kelly asked his first name, responded that he was James Record, then candidly explained to the officer why he was using the false license . . . . Again, there is no tendency in reason that compels the conclusion that because he presented the false license on April 4, he either possessed it on March 6, intended to use it on March 6, or intended to represent himself as someone other than himself on March 6.
>
> [SMR15-SMR16.]

Although the special master found no violation of RPC 8.4(c) with regard to respondent's execution of the affidavit, he concluded that

> the fact that [respondent] signed the affidavit less than a month before he possessed and used the false driver's license during the police encounter, coupled with the fact that [the firms' memorandum] signed by him extensively discusses the unethical nature of such conduct, is found by me to be clear and convincing evidence that his conduct in exhibiting the false credentials to the police officer on April 4 was knowing, intentional, knowingly deceitful and dishonest, for the purpose of avoiding, or attempting to avoid, detection while driving on the revoked [sic] list, and for the purpose of obstructing the administration of justice. He did this less than a month after these unethical qualities of such conduct were drawn specifically to his attention by the other members of the firm. His signing of the affidavit and of [the firm's memorandum], therefore, further buttress my conclusion that Respondent's

> conduct on April 4 violated RPC 8.4 (b), RPC 8.4(c), and RPC 8.4(d).
>
> [SMR16-SMR17.]

As previously indicated, the special master recommended a two-year suspension for respondent's conduct in the two counts of the complaint. He also recommended that, before reinstatement,

> Respondent provide a detailed report from an appropriate mental health professional satisfactory to the . . . [OAE] detailing treatment undertaken to address both his mental health conditions and his substance abuse diagnosis, prognosis, treatment and compliance therewith, and all other pertinent information, and establishing his fitness to resume the practice of law. And, if continued monitoring and/or treatment is deemed appropriate at that point Respondent should be required to furnish periodic reports confirming compliance and continued fitness to practice.
>
> [SMR52.]

Following a de novo review of the record, we find that the special master's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence. We will address the two counts of the complaint under separate headings.

1. The Knowing misappropriation Charge

Like the special master, we find that the $15,000 that

respondent deposited in his personal account constituted client trust funds. Mahoney gave the funds to respondent incidentally to his representation of her interests, that is, "the investigation and prosecution of burglary, theft, harassment, stalking and child endangerment," and "working with private investigator," as stated in the retainer agreement. The monies were trust funds in the truest sense of the word. Mahoney expected that they would be preserved inviolate for their intended purposes -- the payment of a private investigator's services. She entrusted them to respondent because he was her lawyer and because the private investigator's services were closely related to respondent's investigation and prosecution of the criminal offenses that she believed were being committed against her.

As trust funds, thus, the $15,000 had to be deposited in a trust account and kept intact for their specific purposes. By depositing them in his personal checking account, respondent failed to safeguard them in trust, a violation of RPC 1.15(a).

Respondent alleged that he had a subjective belief that he was merely doing a favor for Mahoney and that, therefore, the money did not have to be held in a trust account. As the special master properly pointed out, however, such subjective belief, even if found to be reasonable, is not dispositive of the true

character of the funds. It may be relevant to the issue of whether respondent placed them in his checking account because he intended to use them for himself from the outset, but it will not save him from a finding that he was obligated to place them in trust or that, by using them, he was guilty of misappropriation of client trust funds.

And misappropriate them he did. Four days after the deposit of the $15,000 in his checking account, respondent issued a $5,000 check to Fushetto -- despite having represented, in a letter to Fushetto, that he would be forwarding him the entire $15,000 retainer -- and, on the same day, wrote no fewer than seven checks to pay his bills. Those checks totaled $5,674.11. The opening balance in the account just before the $15,000 deposit was a mere $974.47. There were no other deposits into the account, save for $54.07, on August 12, 2002. Respondent used Mahoney's money to pay his bills.

The question is whether he did so knowingly or inadvertently. The distinction is crucial because, if knowingly, disbarment is mandated under In re Wilson, supra, 81 N.J. 451.

Respondent's defense was that he did not intentionally misuse Mahoney's funds because he was in the midst of a crisis caused by longstanding depression, severe alcoholism, extreme harassment by a former girlfriend, and abuse of antidepressants

and sleeping medication. These circumstances, he claimed, caused him either not to know what he was doing or not to notice that he was not spending monies of his own.

He presented the report of a doctor, Gooberman, who had a single interview with him five years after the events in question, a doctor whose report respondent himself considered unreliable and whose credentials were questionable. Respondent also presented a letter from his internist, Dr. Monastyrskyj, with notes of his visits attached to it. In that letter, Dr. Monastyrskyj noted that respondent suffered from anxiety disorder, panic attacks, depression, and alcohol addiction. She stated that, in late 2001 and 2002, respondent's anxiety and panic attacks had intensified to a "near crisis level."

We took into account the presenter's objections to the above two reports, namely, that Dr. Gooberman's resumé did not disclose a disciplinary action taken against him (a suspension) and that the doctors were not available for cross-examination. We have not, however, given weight to Dr. Gooberman's opinion that respondent's "professional life was affected only to the extent of negligent behavior as opposed to willful conduct with a purposeful malicious intent." Dr. Gooberman, who was not respondent's treating physician, saw respondent only once, for about half an hour, and five years after the events in question.

Even respondent deemed Dr. Gooberman's report unreliable.

On the other hand, we gave weight to Dr. Monastyrskyj's report, at least to the extent that she labeled respondent's problems as anxiety disorder, panic attacks, depression, and alcohol abuse. Dr. Monastyrskyj had been respondent's physician since 1997. As such, she was certainly capable of making the above diagnoses. She referred to respondent's situation, in late 2001 and 2002, as "near a crisis level." Respondent, too, testified extensively about his addictions and emotional ills and their effect on his life. The special master found that respondent's testimony was consistent with general life experience and common sense.

We gave all of the above the consideration that they deserve as proof of respondent's physical and mental state at the relevant time. We did not -- and could not -- find that respondent's problems caused or excused his conduct. Not even Dr. Monastyrskyj opined that respondent's formidable troubles had caused his unethical acts or excused them. We found solely that the serious conditions cited in Dr. Monastyrskyj's report and also advanced by respondent during his testimony constitute sufficient evidence of his mental state in 2002, the time of his use of Mahoney's funds.

Like the special master, however, we do not find that

respondent was unable to distinguish right from wrong. Respondent has not met his burden to show that he suffered "a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In re Jacob, 95 N.J. 132, 137 (1984). Respondent did not prove that his condition prevented him from knowing that misusing Mahoney's money was wrong. During the relevant period, he was functioning as a lawyer and as a member of a law firm; he was representing clients; he was appearing in court; and he was paying his bills.

As indicated previously, the special master found that respondent had the legal capacity to know that he was invading Mahoney's money, but he concluded, based on all of the evidence, that respondent had no factual knowledge that he was invading Mahoney's money. The special master found that respondent's "mental disease resulted factually in his not having the state of mind necessary to establish . . . knowledge that he was invading Ms. Mahoney's money." This issue of factual knowledge warrants close examination.

Attorneys who misappropriate client funds are spared from disbarment when the evidence clearly and convincingly establishes that they were not aware that the funds that they invaded belonged to clients, rather than to themselves.

Frequently, such a scenario occurs when attorneys claim that they believed that there were sufficient funds of their own in the trust account to fund the withdrawals for their benefit. More specifically, the attorneys contend that they left earned legal fees in their trust account -- in and of itself an improper act (commingling) -- and that, because they did not regularly reconcile their trust account records, they were unaware that the balance in their trust account was not what they thought they had. They ask that they be found negligent, but not thieves. When the circumstances are such that the evidence of actual knowledge is not clear and convincing, such attorneys are saved from the ultimate penalty of disbarment and, instead, are found guilty of negligent misappropriation.

Here, respondent did not --- and could not -- allege that his trust account bookkeeping failures caused him to lose track of the true balance in his trust account. That is so because he did not deposit Mahoney's money in his trust account. He claimed however, that his severe depression and anxiety, considerable stress from harassment by the former girlfriend, and extreme alcoholism caused him to pay no attention to his checking account balance, such that he reasonably believed that he had ample funds of his own to back his personal disbursements. In fact, respondent testified that he never balanced a checkbook.

And that was precisely the basis for the special master's finding that respondent had no factual knowledge that he was invading Mahoney's funds.

We agree with the special master's findings in this context. It is possible, even probable, that respondent, who testified that he would drink so much as to pass out and who admittedly did not balance his checkbook, believed, in the face of known balances of many thousands of dollars, that the checks that he wrote against Mahoney's funds were, in fact, funded by his own money.

We do not discount the possibility that respondent needed Mahoney's funds to pay his bills. His account balance, before the deposit of the $15,000, was only $900.[11] He testified, however, that he had no need for Mahoney's money; his parents, who purportedly are wealthy, would have given him whatever funds he needed. Indeed, the record shows that, in March 2002, his parents gave him $27,000 to deposit in his account. They also gave him the $10,000 for Fushetto.

That respondent's disbursements against Mahoney's funds amounted to a considerable sum against a $900 balance is certainly a factor that must be taken into account, but it is

[11] Although the statement for July/August 2002 shows a $31 charge for insufficient funds on July 26, 2002, the record does not reveal if the charge related to the month of July or to a prior month.

not, in and of itself, damning. A review of respondent's bank statements for 2002 shows that he did carry account balances in the thousands. For instance, in January/February 2002, the account's opening balance was $10,213.63 and the average balance was $8,901.48; in February/March 2002, the opening balance was 8,095.03 and the average balance was $10,235.26; and in March/April 2002, the opening balance was $11,445.29 and the average balance was $7,912. Deposits were as high as $36,000.

All in all, we, like the special master, find this to be a "close case." But we cannot say that the proofs clearly and convincingly establish that respondent deliberately, intentionally, knowingly availed himself of Mahoney's money. As the Court stated in In re Konopka, 126 N.J. 225, 234 (1991),

> [w]e insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. . . . If all we have is proof from the records or elsewhere that trust funds were *invaded* without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.

The clear and convincing standard was described in In re James, 112 N.J 580, 585 (1988), as

> [t]hat which "produces[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established," evidence "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction,

> without hesitancy, of the truth of the precise facts in issue."

Applying the above principles to the present case, it may not be said that the proofs are so clear, direct, weighty, and convincing to sustain a finding, without any hesitancy, that respondent intended to pilfer Mahoney's funds. It is true that respondent's statement to Fushetto that he had "gotten into a jam and had used Mahoney's money" sounds fatal. Nevertheless, it is possible that Fushetto's statement meant that respondent had "gotten into a jam" because he had used Mahoney's money. The special master interpreted Fushetto's testimony in this fashion. The special master stated that "[t]his is how I took the testimony when I heard it." Fushetto's tone and demeanor obviously convinced the special master of the meaning of his testimony in this regard.

Also significant was the special master's statement that respondent's testimony sounded credible, unscripted, unrehearsed, and sincere. Because the special master had the opportunity to observe the demeanor of the witnesses, he was in a better position to assess their credibility. We must, therefore, defer to the special master with respect to "those intangible aspects of the case not transmitted by the written record, such as witness credibility . . . ." Dolson v. Anastasia, 55 N.J. 2, 7 (1969). Having heard the case, seen and

observed the witnesses, and heard them testify, the special master had "a better perspective than a reviewing [tribunal] in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

Altogether, thus, the record does not afford a finding, to a clear and convincing standard, that respondent knowingly misappropriated the funds. That he was reckless in his actions, however, is unquestionable. Not to keep track of one's balance when some of the funds in the account do not belong to the account holder -- and, even more seriously, when they belong to a client -- obviously places the other person's funds at great risk. As respondent testified, he did not balance his checkbook; he just wrote checks. We find that his conduct vis-à-vis Mahoney's funds was not merely negligent, but extremely reckless.

There is also the false date on the $10,000 check to consider. Although the record makes it clear that Fushetto, not respondent, was the mastermind behind that impropriety, it is irrefutable that respondent willingly participated in that deception. To be sure, Fushetto's intentions were altruistic: he wanted to help respondent out of a difficult situation. The record conveys a strong sense that Fushetto did not realize

that, in this instance, backdating the check was all that irregular. After all, no one could be hurt by backdating the check. But respondent had to know better. He had to know that inserting a much earlier date on the check would be a cover-up of his transgressions. His conduct in this context was clearly deceitful.

In sum, respondent failed to safeguard in trust his client's funds, recklessly misused the client's funds, and engaged in deception through a cover-up of his misdeeds. An aggravating factor was his failure to withdraw from the representation, when his mental condition materially impaired his ability to represent clients. RPC 1.16(a).

2. The Forgery and Use of False Driving Credentials

Respondent stipulated all of the factual allegations of the complaint. He admitted that, in April 2003, he was driving on a suspended license; that the car was registered in his brother's name and that he had bought the car using his brother's identification information; that he had manufactured a driver's license with his brother's information, save for his own photograph; that, in April 2003, in the parking lot of his law firm, he was approached by a police officer and, at the officer's request, produced the phony driver's license,

insurance card, and registration.

According to the special master, respondent was charged with identity theft (N.J.S.A. 2C:21-17(a)(4)); hindering apprehension (N.J.S.A. 2C:29-3(b)(1)); forgery (N.J.S.A. 2C:21-1(a)(2)); uttering a forgery (N.J.S.A. 2C:21-1(a)(3)); false government documentation (N.J.S.A. 2C:21-2.1(c)); falsifying or tampering with records (N.J.S.A. 2C:21-4(a)); and unsworn falsification to authorities (N.J.S.A. 2C:28-3(b)(3)). The OAE informed us that, following respondent's admission into and successful completion of PTI, the charges against respondent were dismissed.

As found by the special master, however, the facts stipulated by respondent support a finding that he violated (1) N.J.S.A. 2C:21-2.1(c) (false government identification, a crime of the third degree), by presenting to Patrolman Kelly a "document" that "falsely purported to be a driver's license" and that "could be used as a means of verifying [his] . . . personal identifying information;" (2) N.J.S.A. 2C:21-2.1(b) (false government documents, a crime of the second degree), by manufacturing a driver's license; and (3) N.J.S.A. 2C:29-3(b)(1) (hindering apprehension), by exhibiting to Patrolman Kelly a false license in an effort to avoid detection that he was driving while on the suspended list.

These criminal offenses were serious. By committing them, respondent violated RPC 8.4(b), RPC 8.4(c), and RPC 8.4(d). They strike at the heart of the administration of justice. They were also the product of forethought and dishonesty. Moreover, they were aimed at self-benefit.

There remains the question of the appropriate degree of discipline for the totality of respondent's conduct: failure to keep Mahoney's funds in trust, reckless use of those funds, participation in a cover-up of his misuse of the funds by agreeing to the backdating of a check, and forgery and use of false driving credentials.

Generally, a reprimand is the discipline when the misappropriation of client's funds is the result of negligence. See, e.g., In re Weinberg, 198 N.J. 380 (2009) (motion for discipline by consent granted; attorney negligently misappropriated client funds as a result of an unrecorded wire transfer out of his trust account; because the attorney did not regularly reconcile his trust account records, his mistake went undetected until an overdraft occurred; the attorney had no prior final discipline); In re Conner, 193 N.J. 25 (2007) (in two matters, the attorney inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of clients'

funds; the attorney also failed to promptly disburse funds to which both clients were entitled); and In re Winkler, 175 N.J. 438 (2003) (reprimand for attorney who commingled personal and trust funds, negligently invaded clients' funds, and did not comply with the recordkeeping rules; the attorney withdrew from his trust account $4,100 in legal fees before the deposit of corresponding settlement funds, believing that he was withdrawing against a "cushion" of his own funds left in the trust account).

When the misappropriation is the result of more than mere negligence, harsher discipline is imposed. In In re Simmons, 186 N.J. 466 (2006), the attorney received a three-year suspension for reckless failure to safeguard funds. In the Matter of Anthony J. Simmons, DRB 05-248 (December 8, 2005) (slip op. at 11). After settling a personal injury claim on behalf of a minor for $11,500 (id. at 2), Simmons failed to remit the minor's share of the funds, $8,278, to the surrogate, as required. Id. at 3. Simmons blamed his failure to do so on his lack of familiarity with that procedure. Id. at 4.

At one point, Simmons switched law firms and deposited the minor's funds in a new trust account. After notifying the minor's guardian of the transfer, Simmons lost contact with the guardian. Id. at 3. Four years after settling the case, Simmons

invaded the minor's funds by issuing a fee refund to an individual whom he believed to be a former client who had asked for the return of his retainer. Ibid.

One year later, Simmons left the practice of law and moved to another state to seek treatment for drug addiction. Id. at 4. He did not notify the guardian that he was no longer practicing law because, he claimed, he had lost the minor's file. Ibid.

Simmons attributed his conduct at the time of the refund to depression and oxycontin addiction, claiming a belief that the fee refund had come out of his business account. Id. at 5.

We disbelieved Simmons's contention that he was so impaired at the time of the refund. Instead, we found it possible that he had forgotten that he had the minor's funds in his trust account. Id. at 10. We found Simmons guilty of recklessness by losing track of the funds that he was holding for his client and issuing the fee refund without first determining the ownership of the monies in his trust account. Id. at 11. We also found him guilty of gross neglect, lack of diligence, failure to communicate with the client, and failure to promptly turn over the minor's funds. Ibid. Simmons had received an admonition in 2005. Id. at 2.

In In re Bevacqua, 180 N.J. 21 (2004), the Court imposed a six-month suspension on an attorney who misappropriated a

client's funds. Specifically, Bevacqua wire-transferred an earned legal fee of $5,000 from his trust account to his business account. In the Matter of Vincent E. Bevacqua, DRB 03-396 (March 4, 2004) (slip op. at 6). When Bevacqua's attempts to withdraw monies from his business account were unsuccessful, he assumed that the transfer had not gone through. In effect, it had. Ibid. Bevacqua then used $5,000 from his trust account for personal and business expenses, thereby invading a client's funds. Ibid. Bevacqua had a practice of leaving earned fees in his trust account to satisfy his personal and office bills. Id. at 4.

Bevacqua's conduct toward his recordkeeping responsibilities was found to have been reckless. Id. at 20. He testified that he did not even know where to look for the recordkeeping rules (id. at 3), and that he had only a "ballpark idea" of his trust account balance. Id. at 5.

Bevacqua also engaged in a conflict of interest situation by representing clients with adverse interests. Id. at 22. His disciplinary record included a prior reprimand. Id. at 2.

In In re Ichel, 126 N.J. 217 (1991), a case that led to a six-month suspended suspension, the attorney was found guilty of reckless handling of his trust account funds. In the Matter of Albert L. Ichel, DRB 90-311 (March 1, 1991) (slip op. at 31;33).

Specifically, on ninety occasions, Ichel withdrew legal fees from his trust account before either a recovery in personal injury cases or settlement in real estate or estate matters. The above practice caused an overdraft in the account. Id. at 6.

Ichel contended that a $27,000 deposit had not been credited until the next day, that he had erroneously believed that he had an $18,000 to $22,000 "cushion" of his own funds in his trust account at the relevant times, and that he had inadvertently overdisbursed $10,000 to the seller in a real estate transaction, an error that was not discovered until the following year. Id. at 7-9.

Ichel also advanced a $5,000 loan to a client, believing that he had a "cushion" of his own funds in the trust account. Id. at 18.

The passage of nine years since the conduct and the imposition of discipline justified a six-month suspended suspension. Id. at 36. Ichel had no prior discipline.

In In re Gallo, 117 N.J. 365 (1989), the attorney was suspended for three months for poor recordkeeping practices. Gallo left earned legal fees in his trust account, paid all of his operating expenses from his trust account, never kept a running balance of the account, and never used client ledger cards. As a result, Gallo never knew how much money was in his

trust account or to whom the funds belonged. Id. at 368. Gallo had taken over another attorney's practice, inheriting over 200 files in a completely disorganized state. Ibid. In addition, he had adopted the same improper practice utilized by the attorney for whom he had previously worked. Id. at 371;373. Gallo's inadequate bookkeeping practices led to the invasion of clients' funds on numerous occasions. Id. at 369-370.

The Court's opinion emphasized the seriousness of Gallo's inadequate accounting methodology. Id. at 373. Gallo had no prior discipline.

In In re James, supra, 112 N.J. 580, the attorney was given a three-month suspension for poor accounting procedures that caused the invasion of clients' funds. James had a practice of leaving substantial fees in his trust account. He used his trust account to pay employee payroll taxes (id. at 584), at times making disbursements in excess of funds deposited in the trust account for that purpose. Id. at 582-583.

James followed the same business practices and accounting procedures learned from his legal mentors for twenty-four years. Id. at 587. He was found to have been seriously and inexcusably inattentive to the accounting and bookkeeping details of his practice. Ibid. He had no prior discipline.

Here, respondent's conduct was not as serious as that of

attorney Simmons. Unlike Simmons, he did not fail to remit client's funds for years and did not fail to notify his client of his new address, conduct that, in Simmons, essentially amounted to abandonment. Moreover, Simmons was found guilty of other violations as well.

On the other hand, respondent's conduct was more serious than Gallo's and James's. Although it is true that those attorneys' accounting improprieties and invasions of clients' funds were widespread and that respondent's misappropriation was limited to one client, Gallo's and James's infractions were explainable by their unwitting perpetuation of an improper accounting system used by either a former employer (Gallo) or by legal mentors of longstanding (James). Like his immigrant parents, Gallo never had a personal checking account "from which he might have learned basic accounting skills." He did not "seek out any knowledgeable mentor or professional accountant to educate him." He "simply and regrettably followed the bad practices of the only attorney for whom he ever worked." In the Matter of James Gallo, DRB 87-287 (March 20, 1989) (slip op. at 1,13). James, too, did not know how to manage his attorney accounts appropriately because no one had ever shown him. "The record clearly disclose[d] an utter lack of comprehension of what constitutes the proper operation of an attorney's

accounts." In re James, supra, 112 N.J. at 587-88.

Here, the "unhealthy ignorance" of proper accounting procedures that mitigated Gallo's and James's use of clients' funds will not serve to help respondent. Although he might not have had actual knowledge that he was invading Mahoney's money, his failure to ensure that Mahoney's funds remain segregated from his own showed an utter disregard for their sanctity.

Respondent's invasion of client's funds was also more serious than that of attorney Bevacqua, in that Bevacqua's misappropriation was caused by a mistaken belief that the transfer of $5,000 of his own money from his trust account to his business account had not gone through. He, therefore, made withdrawals against the $5,000 that he believed was still in the trust account. In the process, he invaded a client's funds.

Respondent's misuse of Mahoney's funds was seriously aggravated by his attempt to cover up his infractions. It is true that he was not the orchestrator of the deception. But he did willingly acquiesce in the ploy to backdate the check, thereby giving the impression that he had timely given the $10,000 to Fushetto and had not invaded Mahoney's funds.

Backdating documents is a serious ethics offense. See, e.g., In re Hall, 195 N.J. 187 (2007) (motion for reciprocal discipline; retroactive eighteen-month suspension for attorney

who backdated an appeal to cover up his failure to file it timely; the attorney also made misrepresentations to the client, the adversary, and to a referee); In re Ginsberg, 174 N.J. 349 (2002) (attorney reprimanded for backdating estate planning documents to avoid possible adverse consequences by newly proposed legislation; had the legislation been passed, the attorney's conduct would have constituted tax fraud; in mitigation, it was considered that the attorney was forthright and contrite in his admission of wrongdoing, was not motivated by self-gain, caused no harm to the clients, and had a spotless disciplinary record until the incident; the passage of thirteen years since the misconduct was also a mitigating factor); and In re Marshall, 165 N.J. 27 (2000) (attorney suspended for one year for backdating a stock transfer agreement and stock certificate to assist the client in avoiding the satisfaction of a $500,000 judgment; the attorney claimed a belief that he was memorializing a transaction that had taken place four years before; the attorney also stood silent at the client's deposition, when the client falsely testified that the documents had been signed four years before; the attorney did not disclose the backdating to the court and to his adversary in a lawsuit to set aside the transfer of the stock).

Here, respondent's conduct was less serious than

Ginsberg's, whose impropriety remained at the attempt level, when the legislation whose effects he was trying to avoid for his client did not become law. Ginsberg also presented strong mitigation for his conduct, including the absence of self-benefit.

On the other hand, Marshall's actions were more serious than respondent's. Marshall backdated stock transfer documents to avoid the collection of a $500,000 judgment against his client, did not correct his client's statement, at a deposition, that the dates on the documents were legitimate, and did not disclose the backdating to the court and to opposing counsel.

Respondent's conduct was more similar, although not as serious, as that displayed by attorney Hall. Hall backdated an appeal to give the impression that he had filed it on time; respondent acquiesced in the backdating of his check to avoid the detection of his invasion of Mahoney's funds. Both attorneys' conduct was aimed at self-benefit. Hall, however, also made a misrepresentation to his client, to his adversary, and to a tribunal.

An attorney who used his brother's driver's license to "misidentify himself" to avoid prosecution received a reprimand. In re Murphy, 188 N.J. 584 (2006). There, the attorney was twice stopped by the police in Connecticut and charged with the

offense of driving under the influence ("DUI"). In the Matter of Vincent J. Murphy, Jr., DRB 06-176 (October 31, 2006 (slip op. at 2). On both occasions, the attorney gave the officer his New Jersey brother's license. The attorney's New Jersey driver's license was suspended at the time. Id. at 2-3.

At the ensuing ethics proceeding, the attorney revealed that he was a recovering alcoholic, that his wife had left him and his two young daughters, and that he suffered from severe depression. After his DUI arrests, he realized that he had hit "rock bottom" and decided to seek help. He participated in intensive long-term treatment program and was remaining sober. Id. at 3-4.

In imposing only a reprimand, we considered the attorney's "travails combating his alcoholism, his self-reporting to authorities, and his admission of wrongdoing in the disciplinary matter." Id. at 7.

Another attorney who presented another individual's driver's license to the police also received a reprimand. In re Gonzalez, 142 N.J. 482 (1995). In that case, the attorney, who was stopped by the police for speeding, gave the officer his cousin's driver's license. In the Matter of Ralph A. Gonzalez, DRB 94-315 (July 7, 1995) (slip op. at 1-2). The attorney admitted to the officer that he had been using his cousin's

license for several weeks because he feared losing his driving privileges due to the number of points on his license. Ibid. The attorney pleaded guilty to obstructing the administration of law or other governmental function and to speeding. Ibid.

In a more serious case, In re Poreda, 139 N.J. 435 (1994), the attorney was suspended for three months. When pulled over by Pennsylvania police for failure to stop at a traffic light, the attorney did not yet have a valid insurance card for his new car. The police issued a summons for driving an uninsured vehicle. In the Matter of Benjamin A. Poreda, DRB 94-135 (September 27, 1994) (slip op. at 2).

At the hearing on that citation, the attorney, prior to being heard, approached the officer who had given him the citation and produced an insurance identification card showing that his car was insured on the day that he had been stopped. The officer then represented to the court that the attorney had produced what seemed to be a valid insurance card for the date in question and announced his intention to verify the existence of the insurance. The attorney remained silent during the officer's statements to the court. It appears that, at that point, the charge was dismissed. Ibid.

The officer's subsequent investigation revealed that the attorney's car had not been insured on the date that he had been

pulled over. Ibid. Moreover, neither the broker nor the insurance company identified on the card had issued the policy and, in addition, the number on the card was not the sort of number that would be issued to a legitimate insured. Id. at 3.

The attorney was charged with forgery and/or possession of a forged insurance card. He pleaded guilty to those charges. Ibid.

At the disciplinary hearing, the attorney testified that he had prepared the insurance card immediately prior to his court appearance. He had obtained a blank card from a friend, after his insurance broker had refused to issue him a card. Id. at 4.

In recommending the imposition of only a three-month suspension, we took into account numerous compelling circumstances, such as, a multitude of personal problems that culminated in his involuntary commitment at a hospital for a twenty-eight-day period, an unblemished lengthy legal career, his legal services to a community that might otherwise not be serviced, his admission of wrongdoing, and the aberrant nature of his conduct. Id. at 12.

Respondent's conduct more closely approaches that of Poreda, given that neither Murphy nor Gonzalez fabricated motor vehicle documents, unlike respondent and Poreda. In fact, respondent's conduct was more egregious than Poreda's because not only did he

manufacture a driver's license, but he also bought a car using his brother's identity, was driving on a suspended license, and produced the false driver's license, insurance card, and registration to a police officer. None of the mitigation considered in Poreda is present here. Respondent did not advance his depression, alcoholism, and the former girlfriend's harassment in mitigation of his conduct. Accordingly, discipline more severe than the one imposed in Poreda is required for respondent's conduct in this count of the complaint.

After considering the troubling, egregious violations committed by respondent, the aggravating factors, and the absence of mitigation -- save for his lack of prior discipline -- a four-member majority of this Board determines that the appropriate quantum of discipline for respondent's overall conduct is a two-year suspension, with conditions. Before reinstatement, respondent must provide proof of fitness to practice law, as attested by a psychiatrist and an alcohol counselor approved by the OAE. Following reinstatement, he must continue with psychiatric treatment and alcohol counseling, until discharged, and periodically provide to the OAE proof of such treatment and counseling.

Vice-Chair Frost and members Stanton and Doremus found that the evidence clearly and convincingly demonstrated that

respondent knowingly misappropriated Mahoney's funds, for which disbarment is required. Members Wissinger and Zmirich did not participate.

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

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of James K. Record
Docket No. DRB 09-363

Argued: March 18, 2010

Decided: May 17, 2010

Disposition: Two-year suspension

Members	Disbar	Two-year 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:	3	4				2

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel