SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-118
District Docket No. XIV-06-546E

IN THE MATTER OF	:
TERRANCE N. TONER	:
AN ATTORNEY AT LAW	:

Decision

Argued: September 17, 2009

Decided: December 16, 2009

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for discipline (disbarment) filed by Special Master Sherilyn Pastor. The amended complaint charged respondent with violating RPC 1.1(a) (gross neglect), RPC 1.2(a) (failure to abide by a client's decisions concerning the representation), RPC 1.3 (lack of diligence), RPC 1.4(a), now (b) (failure to communicate with the client), RPC 1.15(a) (failure to safeguard client property),

RPC 1.15(b) (failure to promptly deliver funds belonging to a client or third party), RPC 1.15(c) (failure to keep separate property in which the lawyer and another party claim an interest), RPC 8.1(a) (false statement of material fact in connection with a disciplinary matter), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985). We agree with the special master's recommendation for disbarment.

We originally reviewed this matter at our October 2006 session, at which time we remanded it for further proceedings. The District IX Ethics Committee ("DEC") had found, among other things, that respondent was guilty of knowing misappropriation. Respondent, however, had not been so charged and had no opportunity to defend himself against a knowing misappropriation allegation. We, therefore, vacated the DEC's findings and instructed the Office of Attorney Ethics ("OAE") to conduct an audit of respondent's attorney records to ascertain if client Patricia Henry's funds had remained intact. If not, the OAE was to determine whether to charge respondent with either knowing or negligent misappropriation. We also directed that, at a minimum, respondent should be charged with failure to safeguard

client funds, failure to supervise his secretary, and failure to promptly disburse funds to which his client was entitled.

Respondent was admitted to the New Jersey bar in 1988. He is also licensed to practice law in New York and Florida. He has been temporarily suspended since April 1, 2009. In re Toner, 198 N.J. 509 (2009).

Respondent was admonished in May 2003, following an $800 shortage in his trust account, resulting in the negligent misappropriation of client funds. The shortage was caused by the bank's improper transfer of $1,000 from respondent's trust account to his business account and by his failure to keep sufficient funds in his account to cover bank charges. In addition, respondent failed to maintain the attorney records required by R. 1:21-6. In the Matter of Terrance N. Toner, DRB 03-056 (May 23, 2003).

As of the date of the hearing before the special master, respondent was obtaining employment through an agency and was performing document review for large law firms.

The grievant, Patricia Henry, is respondent's first cousin. In 2000, New Century Financial Services, Inc. ("New Century"), obtained a judgment against Henry in the amount of $4,861.02. In April 2001, the law firm of Pressler & Pressler ("Pressler") served Henry with a notice of motion to enforce litigant's

rights on behalf of New Century, seeking $5,227.66 in judgment and costs. Before May 7, 2001, Henry and respondent agreed that he would attempt to negotiate a lower settlement amount with Pressler and that he would transmit the payment to Pressler. Respondent did not request a fee for his services.

On May 7, 2001, Henry gave respondent a check in the exact amount of the judgment against her. Henry made the check payable to respondent. Henry testified that respondent told her that it was "probably better to send [payment] with an attorney's check." Henry did not authorize the use of her funds for any purpose, other than satisfying the New Century judgment.

On May 7, 2001, respondent deposited the check in his attorney business account. He wrote "judgment satisfaction" on the memo line of the check. He admitted that it was improper to deposit Henry's funds in his business account and conceded that he should have deposited them in his trust account. He explained that he did not do so because he treated Henry "as a cousin, not as a client;" he was not charging her a fee and did not view himself as "taking on a case."[1]

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[1] Routinely, Pressler maintains detailed notes of all contacts, both written and oral with a debtor and/or counsel. All incoming correspondence is scanned and noted. All outgoing correspondence

(Footnote cont'd on next page)

On May 7, 2001, immediately before respondent deposited Henry's check ($5,227.66) in his business account, its balance was $1,267.79. After the deposit, the account balance rose to $6,795.45.[2] By close of business on May 8, 2001, one day after the deposit, the business account balance was $5,017.81, or $209.85 below the amount respondent should have been holding on Henry's behalf. By May 31, 2001, following a series of checks drawn on the account, the business account balance was -346.53. Henry's funds had been fully depleted.

All checks drawn on respondent's business account in May 2001 bear his signature. Not all, however, were signed by him. Respondent was not in his office regularly, but only once or twice per week. He employed two part-time secretaries, Robin Mohr and Denise DeLeon. They wrote checks and signed respondent's name on them. They kept track of their own hours

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(Footnote cont'd)

is uploaded and noted. Pressler's file notes reveal that respondent held himself out as Henry's attorney.

[2] There was an additional $300 deposit that was unrelated to Henry's matter.

and wrote and signed checks to pay their salaries.[3] Respondent took the secretaries to his bank and introduced them to the bank manager to let the manager know that they were authorized to handle transactions on his behalf. Respondent did not keep track of his business account balance.

Included in the record is a September 2006 certification from Robin Mohr, produced at the 2006 hearing before the DEC. Unsuccessful attempts were made to subpoena Mohr to appear before the special master. Following the hearing before the special master, the record was left open to enable respondent to attempt to produce Mohr. Apparently, he was not successful.

In her certification, Mohr stated:

> Prior to Mr. Toner closing his practice, I often paid my own salary from checks drawn on the operating account which I signed. I also would, from time to time, withdraw money as needed and keep a record of same. Essentially, I borrowed money from the account if there were funds available, sometimes without telling Mr. Toner.
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> [Ex.OAE30.][4]

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[3] There are no checks in the record payable to Mohr, during the period from May 2001 to September 2003.

[4] The certification was marked as exhibit OAE30 in the prior proceeding.

Respondent testified at length about which business account checks issued in May 2001, including a number made payable to cash, he had signed, authorized or endorsed.[5] The following chart, prepared by the special master, sets forth that information.

Exhibit	Check No.	Check's Date	Payee	Amount	Comment
OAE-26	1246	05/08/2001	Cash	$360.00	Mr. Toner admitted writing the body of the check and endorsing it.
OAE-27	1239	05/02/2001	Marjorie Anderson	$125.00	Mr. Toner authorized a secretary to sign the check.
OAE-28	1230	04/30/2007[6]	National City Mortgage	$1,262.64	Mortgage payment; Mr. Toner signed the check.
OAE-29	1243	05/06/2001	Lucille Toner	$300.00	Issued to Mr. Toner's wife; Mr. Toner signed the check.
OAE-32	2000	05/11/2001	MBNA Marketing Systems	$218.00	Mr. Toner authorized the check.
OAE-34	1250	05/11/2001	Postmaster	$68.21	Mr. Toner signed the check.

[5] Because of his office arrangement with his secretaries, respondent was uncertain if he had authorized the issuance of certain checks.

[6] Although the year on this check appears as "2007," it was written in 2001.

Exhibit	Check No.	Check's Date	Payee	Amount	Comment
OAE-35	1248	05/11/2001	Denise DeLeon	$300.00	At first Mr. Toner said he did not sign check, and did not know if he authorized his secretary to sign the check. But later he admitted signing it.
OAE-37	1251	05/10/2001	Donna Marshall	$300.00	Mr. Toner did not sign the check but authorized it.
OAE-38	1258	05/18/2001	Denise DeLeon	$350.00	Mr. Toner at first testified that he did not think he signed the check; but he then admitted he was inclined to think he either signed the check or authorized one of his secretaries to sign it.
OAE-39	1241	05/04/2001	U.S. Bankruptcy Court	$200.00	Mr. Toner authorized his secretary to sign the check.
OAE-40	1253	05/14/2001	NCO Financial Systems	$51.13	Mr. Toner did not know if he signed check, [sic] but Mr. Toner believed that he probably authorized his secretary to sign it.
OAE-41	1256	05/18/2001	Louis Santisi	$150.00	Mr. Toner signed the check.
OAE-42	1261	05/24/2001	Treasurer of the State of NJ	$200.00	Mr. Toner signed the check.
OAE-43	1264	05/25/2001	Ryan Malloy	$500.00	Mr. Toner signed the check.
OAE-45	1262	05/30/2001	National City Mortgage	$3,798.79	Mortgage payment; Mr. Toner signed the check.

Exhibit	Check No.	Check's Date	Payee	Amount	Comment
OAE-47	1257	05/15/2001	James C. Connors	$500.00	Mr. Toner authorized the check.
OAE-48	1260	05/20/2001	Thomas Buck	$500.00	Mr. Toner authorized the check.

[SMR¶86.][7,8]

None of the checks drawn on respondent's business account in May 2001 were related to Henry's matter. With the exception of brief periods of time in 2002 and 2003, respondent's business account did not again have sufficient funds for the satisfaction of the New Century judgment or for a refund to Henry.

Respondent testified that he thought that he had sufficient funds in his business account to pay the New Century judgment on Henry's behalf:

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[7] SMR refers to the special master's report, dated February 26, 2009.

[8] There was a dispute in the record as to whether respondent had signed all the checks that had been made payable to "cash." According to the OAE investigator, respondent admitted, during his interview, that he had signed all of them. Respondent denied having done so. The special master determined that a resolution of the issue was not essential to a finding of knowing misappropriation.

Q. All right. Now, what led you to believe that you had enough money in there to pay that judgment?

A. Because as far as I knew I didn't write checks for $5,000. I mean, I had $2,000. This is – a lot of this is just – this is just a review, based on my review after the fact, well after the fact. I mean, I didn't - you know, I didn't spend $5,000. The checks that are in there that showup [sic] after, there were checks written and cleared through the bank after May 7th. Which [sic] is the day that my cousin gave me her check.

You know, those checks – the way I kept a running balance or the way I know – I know – the reason I thought I had the mone [sic] in the bank is because I didn't write out $5,000 in checks, nor did I authorize $5,000 in checks to be written out. I had money –

Q. It wouldn't have taken $5,000 in checks to get below $5,000?

A. Correct. I had more money in the account before May 1st, 2001. There was $2,000 in there. The checks that came in after that, like, for my wife's – for my wife's mortgage and checks that I know I wrote, I'm not sure what was in the bank before.

Those checks came in after May 1st, they were written well before May 1st. I didn't write them saying I hope my cousin comes to my house, gives me a check for $5,000 so that I can deposit it into my operating account and cover with it. I had money in the account before hand. I had $2,000 in there. I had more before that.

I don't know what checks came in. I have no record of what checks came in April

> 30th or May – or April 29th, any time weeks before the records begin. I only know that on May 1st there was $2,000 and change in there.
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> It went down and I made another deposit, according to the records, of $1,600. So it went back up and then it went down from checks that were written before and from checks that were written, that I didn't even sign for and didn't know anything about.
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> Q. You sort of kept a running balance in your head?
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> A. Yeah, yeah, with a little cushion.
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> [3T21-15 to 3T23-13.][9]

Respondent claimed further that he did not intend to misappropriate Henry's funds. Rather, he negligently "spent it, but a lot of it was stolen from [him]." He testified that Mohr had told him that she had taken money from his account. No record of her withdrawals was provided to the special master.

Respondent closed his business account in September 2003. It is unclear from the record when he closed his law office.

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[9] 3T refers to the transcript of the hearing before the special master on September 12, 2008.

The $3,000 Settlement

According to Pressler's records, on May 14, 2001, one week after respondent received the funds from Henry, he telephoned Pressler and offered to settle the New Century matter. Respondent offered to pay $1,000 immediately and $1,000 in thirty days. Pressler counter-offered that it would accept a $2,000 payment by May 25, 2001, and a $1,000 payment thirty days later. Upon default of the payment, the entire judgment amount, $5,227.66 plus interest, less credit for any payment made, would be due. Respondent agreed to the settlement.

On May 15, 2001, Pressler sent respondent a consent order for the $3,000 settlement. Respondent did not sign it or make payments under it. He testified before the special master that he had not seen it before.

After receiving no payments by June 8, 2001, Pressler contacted respondent's office and left a message for him. Respondent's secretary returned the call and advised Pressler that respondent had not received the consent order. Pressler sent him another copy, this one calling for the first payment by June 25, 2001. Respondent did not recall seeing that order either. He did not sign the order or make payments under it.

The $4,200 Settlement

Respondent had no recollection of a $2,000 or a $3,000 settlement offer from Pressler. Rather, he testified that Pressler had agreed to accept $1,000 less than the amount of New Century's judgment against Henry.[10] It is unclear how many months it took respondent to negotiate that agreement. Respondent dictated a letter and asked Robin Mohr to send it to Pressler, along with a check. Respondent stated that he, therefore, thought that the matter had been resolved. There is no evidence in the record that respondent returned any money to Henry.

According to Mohr's September 2006 certification, respondent's letter to Pressler and the check had been mailed, but Pressler had returned the check. Mohr stated that she put the letter in the file and did not advise respondent of that development. According to the investigative report prepared by the original presenter in this matter, respondent learned, in 2003, that Pressler had not accepted the settlement. Respondent

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[10] The record contains various references to a $4,500 settlement. If, as respondent claims, the settlement was for $1,000 less than the judgment amount, then it would have been roughly $4,200, if costs were included. We, therefore, refer to the settlement as having been for $4,200.

testified that, after speaking with a secretary, presumably Mohr, he thought that the money had been "returned." He now thinks that the secretary took the money.

The OAE's review of respondent's records did not reveal any evidence of a $4,200 check to Pressler. Respondent did not produce proof of the $4,200 check, or his accompanying letter or Pressler's return of the check. Pressler had no record of (1) an offer to settle for $4,200; (2) the firm's receipt of a letter or a check in that amount; and (3) any correspondence about such an offer or any indication that it had returned a check.

As noted above, by the end of May 2001, well before any supposed $4,200 settlement was reached, Henry's funds were gone. Indeed, for nearly the entire period between respondent's receipt of Henry's money and the day he closed his practice, he lacked the funds to pay a $4,200 settlement. Moreover, the extra $1,000 did not remain inviolate in his business account.

According to respondent, Henry's file, which was stored in the basement of his office building, had been either lost or destroyed. Henry testified, however, that at a family function at respondent's house, he had showed her the file. Henry could not recall the date with specificity, but believed that it was

in May 2004. Respondent had already closed his practice by that time.

Pressler's Actions Against Henry

In July 2003, Pressler issued an information subpoena to Henry in connection with the New Century judgment. Henry provided it to respondent, who advised her not to be concerned. In September 2003, Pressler served Henry with a notice of motion to enforce litigant's rights. Henry gave it to respondent.

In October 2003, Pressler obtained an order for Henry's arrest, which was served on her in November 2003.[11] Henry advised respondent of these developments. Respondent assured Henry that her matter had been resolved, that Pressler must have made an error, and that he would look into it. In 2004, Henry made repeated attempts to reach respondent, without success.

Respondent admitted that he put Henry's matter "on the back burner." Pressler had no record that respondent had made a payment to that office.

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[11] Pressler's notes show that a letter from Pressler & Pressler was sent to respondent, in November 2003, advising him of the order for arrest. Respondent did not recall reading the letter.

In late 2004, Henry retained Robert Zullo to assist her in resolving the New Century matter. In December 2004 and January 2005, Zullo requested that respondent either send him a warrant of satisfaction of the judgment against Henry or return her funds. Respondent did neither. Respondent spoke with Zullo and assured him that he would resolve the matter. He failed to do so, however.

In June 2005, Henry filed a grievance against respondent. In his reply to the DEC, dated October 5, 2005, respondent stated that, after he learned, in mid-2003, that the New Century matter remained open and before he closed his practice, he sent a check to Pressler for an amount greater than the sum reflected in their initial letter of April 2001. The amount covered additional interest due on the judgment. Before the special master, respondent testified that he must have been referring to the check sent to Pressler in 2001.

In October 2005, respondent sent Pressler two checks, totaling $6,713.98, in satisfaction of the New Century judgment against Henry. On October 10, 2005, Pressler sent Henry a warrant of satisfaction.

In October 2007, respondent appeared at the OAE offices, pursuant to a demand audit notice. He did not have with him

Henry's file or his bank account records. During the meeting, respondent was given a copy of the complaint and a consent to disbarment form.

Respondent testified that, when he received the audit notice, he did not know that "there was a formal charge of misappropriation." The OAE's September 13, 2007 demand audit letter stated, however, that respondent was to produce: "[a]ny and all documentation to defend himself against the allegation that he knowing [sic] misappropriated client funds in the Patricia Henry matter."

Respondent had been granted an adjournment of the audit to enable him to learn if his prior counsel was still representing him. He appeared at the audit without counsel, but advised the OAE that he had counsel.

The special master found that an attorney/client relationship existed between Henry and respondent and that respondent held himself out to Pressler as Henry's attorney. The fact that Henry did not pay him a fee was not a "defense." Payment of a fee is not a necessary element of an attorney/client relationship.

The special master found that respondent had commingled his and Henry's property, when he intentionally deposited her money

in his attorney business account, rather than in his trust account, and that such conduct had violated RPC 1.15(a).

Moreover, the special master continued, within days of Henry's funds being deposited in respondent's business account, the funds in the account were depleted. Subsequent checks began to draw on Henry's funds. The checks issued were unrelated to the judgment against Henry, who had not authorized the use of her funds for any purpose, other than satisfying the judgment against her.

The special master concluded that, considering only the checks that respondent admitted that he signed, authorized or endorsed, he had invaded Henry's funds by the end of May 2001. In the special master's view, "[t]he heart of this dispute" was whether respondent knowingly misappropriated Ms. Henry's funds:

> Mr. Toner's defense is that he made errors and was perhaps negligent, but he did not *knowingly* misappropriate funds. He claims that he was often absent from his office, and delegated responsibility to secretaries who failed him. One supposedly failed to tell him that Pressler rejected his settlement payment, and filed it away. One or both 'borrowed' or stole from him without his knowledge. He also claimed he was unaware of the status and balance of his operating account, and did not realize that checks being drawn on his business account invaded and depleted Ms. Henry's funds.
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> [SMR26-SMR27.]

The special master found two checks particularly noteworthy. In April and May 2001, respondent wrote checks for the mortgage loan on his marital home, totaling $5,061.43. Both checks were presented in May 2001. The second check bounced. Respondent testified that he kept track of his business account balance, when checks were returned for insufficient funds. Therefore, the special master concluded, respondent "knew or had very strong reason to know" that Henry's funds had been invaded, when the check for the mortgage was returned for insufficient funds. In addition, respondent authorized, signed or endorsed over a dozen more checks, in May 2001. Therefore, the special master determined, even if he did not keep a running tally of the checks, he knew that the checks, including the two mortgage checks, would deplete his own funds in the account and invade Henry's funds. The special master found that the evidence, "albeit circumstantial," was clear and convincing that respondent had knowingly misappropriated Henry's funds.

The special master noted that

> [respondent's] conduct *after* the mortgage payment bounced is telling. He did not immediately replenish Ms. Henry's funds, and then promptly resolve the New Century matter. He instead continued to negotiate a reduced settlement to be paid over time. When he succeeded in reaching a settlement

> with Pressler in 2001, he returned no money to Ms. Henry. He then failed to pay the reduced settlement to Pressler. It was not until years later, upon the filing of an ethics grievance, that [respondent] paid the New Century judgment and interest on it. But [respondent] has never paid Ms. Henry for the amount 'saved' by virtue of the 2001 settlement.
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> [SMR29.]

The special master found that respondent had reached a $3,000 settlement with Pressler, that he had failed to pay the amount due, and that he had failed to return the balance of Henry's funds to her. The special master remarked that, even crediting respondent's version of events - that he reached a $4,200 settlement with Pressler - the difference between the settlement amount and the amount Henry entrusted to respondent should have been promptly returned and it was not.

The special master found that respondent was responsible for the working environment of his office and also that he knew when checks drawn on his business account, where he maintained client funds, were returned for insufficient funds. Quoting In re Irizarry, 141 N.J. 189, 193 (1995), the special master reasoned that

> [l]awyers may not absolve themselves of the misappropriation of client funds by delegating to employees the authority to complete signed checks and then failing to

> supervise those employees. The intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a "knowing misappropriation." [Citations omitted.]
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> [SMR30.]

The special master went on to conclude that

> [respondent] was willfully blind even under his own version of events. It was his duty to preserve Mr. [sic] Henry's funds. Yet, he allowed his staff to write checks and sign his name, without supervision. He introduced his staff to bank representatives to facilitate the practice that he established. He left his staff blank, signed checks to use. Like the attorney in Skevin,[12] [respondent] – at best for him – was "willfully blind" and "had to know" that his practices would result in invasion of Ms. Henry's funds even before he deposited them into his operating account. After they were deposited, [respondent], himself, signed, authorized and/or endorsed checks that invaded Ms. Henry's funds. [Respondent] knew this when his home's May 2001 mortgage payment bounced before he settled Ms. Henry's case. Yet, he did nothing to restore Ms. Henry's funds, and he did not return the balance of the money entrusted to him when he ultimately reached a settlement of New Century's matter.
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> [SMR31.]

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[12] The reference is to In re Skevin, 104 N.J. 476 (1986), discussed below.

The special master found that, although respondent had reached a settlement with Pressler, he had failed to sign the consent order or make payments under it. Yet, he had led Henry to believe that he was attempting to settle the matter on her behalf, when, in fact, he had misappropriated her funds.

In addition, the special master found, respondent misled disciplinary authorities when he claimed that he had sent a check for roughly $4,200 to Pressler to satisfy the judgment against Henry. He did not pay the judgment and did not have Henry's funds available to pay it. He also claimed, when replying to the grievance, in October 2005, that, before closing his practice, he had learned that his first payment to Pressler had been rejected and that he had sent a check in a greater amount to Pressler, reflecting additional interest on the judgment. Respondent knew that his statement was untrue.

Finally, the special master found that respondent had violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(a), and RPC 1.15(b) by allegedly negotiating a reduced settlement with Pressler and then failing to turn over any funds to Pressler; by failing to attend to the Pressler subpoena and subsequent motion, causing a warrant to be issued for Henry's arrest; and by ignoring Henry's and her new lawyer's requests for

information about the case and/or a refund of her money; and by ultimately failing to resolve Henry's case.

The special master found not credible respondent's assertion that he did not know, at the audit, that the OAE was claiming that he had knowingly misappropriated funds. Equally incredible was respondent's contention that the OAE had sought his consent to disbarment when he was without counsel. Respondent was told to review the form and consider whether to consent to disbarment with counsel, noting that the form itself states, "I have consulted with counsel prior to completing this form."

The special master determined that, altogether, respondent violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(a), RPC 1.15(a), RPC 1.15(b), RPC 8.1(a), and RPC 8.4(c). The special master did not find a violation of RPC 1.15(c).

In respondent's answer to the amended complaint, he raised the defenses of res judicata, issue and claim preclusion, and double jeopardy. As to the first two defenses, the special master noted that they each require a "valid and final judgment," which did not exist in this case. Rather, we vacated the DEC's decision on respondent's motion. As to double jeopardy, the special master remarked that respondent had not

provided a brief explaining how the principles of double jeopardy applied to these proceedings. Moreover, the protection against double jeopardy is not violated by retrial after a reversal for trial errors, rather than insufficiency of the evidence. The DEC's finding was vacated because respondent had no notice of an allegation of knowing misappropriation, a trial error. Thus, the special master concluded that the principle of double jeopardy did not prevent the second hearing to determine if respondent had knowingly misappropriated Henry's funds.

Following a de novo review of the record, we are satisfied that the conclusion of the special master that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

It is undisputed that respondent misappropriated client funds that he had placed in his business account. The question is whether the misappropriation was negligent or knowing. Respondent asserted two defenses to the allegation of knowing misappropriation: (1) he did not review his business account balance and was unaware of the balance in the account and (2) his secretary improperly withdrew money from his business account, without his knowledge or authorization.

The special master found that respondent's conduct was knowing. That conclusion is inescapable. Even if we were to ignore the numerous smaller checks written on respondent's business account while he held Henry's funds, the evidence established that he wrote two checks, totaling $5,061.43, to pay his mortgage. Both checks were presented for payment in May 2001. If we disregard the first, which was written prior to the receipt of Henry's funds, and consider only the second check, for $3,798.79, it is clear that respondent knowingly drew on Henry's funds because he did not have enough of his own money in the account to cover that check. As noted above, respondent testified, "I only know that on May 1st there was $2,000 and change in there. It went down and I made another deposit, according to the records, of $1,600." Thus, setting aside for one moment the checks that had been written against the account, in respondent's mind he had approximately $3,600 in his business account. The second mortgage check was for $3,798.79, almost $200 more than respondent thought he had in his account. Now, let us consider the additional checks that respondent had authorized and/or signed that were drawn on the account. More money was being disbursed than had been deposited. Therefore, respondent had to know that his own funds were being depleted

and that he could not cover the mortgage check without invading Henry's funds.

In fact, prior to respondent's deposit of Henry's money, he had $1,267.79 in his account. He deposited additional funds in his account, but those funds amounted to $1,575, increasing his total to $2,842.79, well below the amount of the second mortgage check.[13] The second mortgage check bounced.[14] Again, respondent cannot be heard to contend that, at this juncture, he was unaware that he was drawing against Henry's funds.

Even if we assume for a moment that respondent was so oblivious about his finances that he was unaware that he had invaded Henry's funds, we find that he is still guilty of knowing misappropriation by way of willful blindness, as the special master found. In In re Skevin, supra, 104 N.J. 476, the attorney had a practice of advancing to himself fees in personal injury cases, before the receipt of the settlement proceeds. During a six-month period, the attorney was out of trust in amounts ranging from $12,000 to $133,000. The attorney claimed

[13] $1,575 includes the $300 deposited on the same day as Henry's funds.

[14] The $3,798.79 check was returned on May 31, 2001. The record does not reveal when respondent learned that the check had bounced.

that he had relied on substantial personal funds left in his trust account.

The special master concluded that Skevin knew that he was withdrawing clients' funds from commingled accounts each time that he drew his own fee or made disbursements in advance of receiving settlement checks. The time periods were sometimes significant – as long as months between the advance and the receipt of the check. Also, the amounts withdrawn were substantial, ranging from hundreds of dollars to thousands. The special master reasoned that these two facts led to the unavoidable inference that the attorney knew that he was endangering other clients' funds that were in the commingled accounts. The Court agreed.

The Court found that, because the attorney did not maintain an accounting or running balance of his own funds in the trust account, each fee advance "posed an at least realistic likelihood of invading the accounts of another client since respondent had no way of knowing what the balances were." Id. at 485. Characterizing the attorney's conduct as willful blindness, the Court stated:

> While such evidence might not sustain a finding of criminal intent to deprive others of their funds, the evidence clearly and convincingly demonstrates that [respondent]

> knew the invasion was a likely result of his conduct, a state of mind consistent with the definition of knowledge in our statute law. N.J.S.A. 2C:2-2b(2). The concept arises in a situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist. "Such cases should be viewed as acting knowingly and not merely as recklessly. The proposition that willful blindness satisfies for a requirement of knowledge is established in our cases" (Citations omitted).
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> [In re Skevin, supra, 104 N.J. at 486.]

The Court ordered the attorney's disbarment.

In another case, In re Riva, 172 N.J. 232 (2002), disbarment also resulted for an attorney who, five days after placing a $92,500 real estate deposit in his trust account, began to invade those funds by disbursing "fees" to himself. During a three-month period, the attorney made thirty-three "fee" withdrawals, causing a $24,000 shortage in his trust account. The attorney's defense was that he mistakenly believed that he had deposited $30,000 in his account, a fee for performing legal services for his father. The attorney claimed that, because of his deficient bookkeeping practices, he was unable to detect his mistake promptly.

According to the attorney, after his trust account was the subject of a levy arising from a default judgment against him,

he reviewed his records and learned about the missing $30,000 deposit. He explained that he did not redeposit the money because he feared another levy. As pointed out by the presenter in that case, however, the attorney had made six other deposits after the levy.

We found a general lack of credibility on the attorney's part, particularly because his father had no recollection of having given him $30,000 for legal services and because the attorney himself had presented conflicting versions of the events surrounding the $30,000 deposit. We concluded that the attorney had knowingly misappropriated the deposit monies. The Court agreed. The attorney was also found guilty of willful blindness because, as a result of his shoddy recordkeeping, he did not know with certainty whether there were sufficient funds to cover any trust account disbursements.

It is clear, however, that "shoddy bookkeeping alone does not suffice for a finding of knowing misappropriation." In re Davis, 127 N.J. 118, 127 (1992). "Although an attorney's records may reveal repeated and frequent instances of being out of trust, that circumstance does not necessarily constitute knowing misappropriation." Id. at 127. See, e.g., In re Konopka, 126 N.J. 225 (1991) (six-month suspension where the

Court found that the invasion of clients' funds was the product of the attorney's serious inattention to his recordkeeping responsibilities); In re Gallo, 117 N.J. 365 (1989) (three-month suspension where the Court found no clear and convincing evidence of knowing misappropriation or of willful blindness, despite the attorney's poor accounting procedures; the attorney followed the practices of a former employer, was unfamiliar with basic principles concerning the management of trust accounts, and apparently had no knowledge of the current balance in his trust account, as a result of which he invaded clients' funds on numerous occasions); and In re James, 112 N.J. 580 (1988) (three-month suspension for an attorney whose poor accounting procedures, learned from his legal mentors, caused him to use his trust account as a second business account and led him to be out of trust on numerous occasions, for as long as four years; the Court found that the attorney had "in good faith perpetuated an inadequate system that led to negative balances in his trust account," id. at 591, and that any misappropriation of clients' funds was negligent).

This respondent is not Gallo, James or Konopka. He had to know that his conduct "posed an at least realistic likelihood of invading the accounts of another client . . . ." In re Skevin,

supra, 104 N.J. at 485. The attorney "was aware of the highly probable existence of a material fact but [did] not satisfy himself that it [did] not in fact exist." Id. at 486. Respondent was unaware of the balance in his business account to which he allowed his office staff access. Moreover, he deposited funds in the account and wrote a check for more than the sum he had deposited. Simple math would have told him that he was utilizing Henry's money.

Respondent also contended, as a defense, that his secretary had taken funds from his business account without his knowledge, thereby depleting his account balance. Respondent, however, did not corroborate his testimony with evidence that Mohr had improperly used funds contained in his business account. "The burden of going forward regarding defenses . . . to charges of unethical conduct shall be on the respondent." R. 1:20-6(c)(2)(C).

In sum, we find that the evidence clearly and convincingly demonstrates that respondent knowingly misappropriated client funds, a violation of RPC 1.15(a), RPC 8.4(c), and the Wilson rule. In addition, for the reasons expressed by the special master, we agree that respondent violated RPC 1.1(a), RPC 1.2(a), RPC 1.3, RPC 1.4(b), RPC 1.15(b), and RPC 8.1(a).

For knowingly misappropriating client trust funds alone, under In re Wilson, 81 N.J. 451 (1979), and its progeny, respondent must be disbarred. We, therefore, do not reach the issue of the appropriate discipline for respondent's other ethics offenses.

Member Baugh 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 Terrance Toner
Docket No. DRB 09-118

Argued: September 17, 2009

Decided: December 16, 2009

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost	X					
Baugh						X
Clark	X					
Doremus	X					
Stanton	X					
Wissinger	X					
Yamner	X					
Zmirich	X					
Total:	8					1

Julianne K. DeCore
Chief Counsel