SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-379
District Docket No. XIV-07-032E

IN THE MATTER OF	
ROGER A. LEVY	
AN ATTORNEY AT LAW	

Decision

Argued: February 21, 2008

Decided: April 8, 2008

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear, despite proper notice.

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

These matters came before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics ("OAE") following respondent's three-year suspension in New York. We

determine that respondent should receive a prospective three-year suspension.

Respondent was admitted to the New Jersey bar in 1987. In 2000, he was suspended for three months for practicing law while ineligible, failing to maintain business and trust accounts, and failing to maintain a bona fide office in New Jersey. In re Levy, 155 N.J. 594 (1998). He was reinstated on January 11, 2000. In re Levy, 162 N.J. 189 (2000). On September 30, 2002, he again became ineligible for failure to pay the annual assessment to the New Jersey Lawyers' Fund for Client Protection. He remains ineligible to date.

On May 27, 2003, the Supreme Court of the State of New York, Appellate Division, First Department ("the court") suspended respondent for three years, finding that he had negligently misappropriated client funds. The facts are gleaned from the October 28, 2002 report of the referee, John J. Galban, before whom the case was heard, and from the May 27, 2003 court opinion.

Respondent and the disciplinary committee entered into a stipulation and, subsequently, an amended stipulation in which respondent admitted most of the allegations of the complaint.

On April 1, 1988, Herman Turner and respondent entered into a lease whereby Turner agreed to sublet office space from

respondent for $700 per month from April 1 through August 31, 1998. Turner gave respondent a $3,663.66 check, which represented payment of the rent for the five months, plus several additional days on a pro rated basis. Respondent deposited the check in his escrow account maintained as an Interest on Lawyer Account (IOLA).[1]

In July 1998, after Turner was arrested in Canada, transported to a federal prison in Alabama, and charged with engaging in a scheme to obtain federal tax refunds for fictitious corporations, he asked respondent to represent him or to retain an experienced criminal law attorney. In September 1998, Turner delivered a $69,923.33 check to respondent, which respondent agreed to hold in trust for Turner and to draw against for his legal representation, or to disburse as directed by Turner or his attorney-in-fact. On September 21, 1998, after respondent appeared in Alabama at Turner's arraignment, Turner

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[1] Pursuant to N.Y. Jud. Law §497 (Consol. 2007), an IOLA is an unsegregated interest-bearing deposit account with a banking institution for the deposit by an attorney of funds held in a fiduciary capacity that are too small or are expected to be held for too short a time to justify opening a segregated account.

directed respondent to release all of the escrow funds to Susan James, an Alabama lawyer.

On September 29, 1998, respondent sent to James a $25,000 check for her legal fees, leaving $44,923.22 in the IOLA account. After withdrawing $5,000 for his own legal fee, respondent retained $39,923.33 of Turner's funds. Respondent refused to comply with Turner's October 12, 1998 letter directing him to release the balance to Turner's mother, his attorney-in-fact. On October 23, 1998, Turner filed a grievance with the New York disciplinary committee. In his reply to the grievance, respondent claimed that Turner was entitled to only $31,975.75.

As seen below, respondent advanced two defenses: (1) a claim to the funds, stemming from his lease agreement with Turner and (2) a belief that he would have been subject to federal money-laundering charges if he had returned the funds to Turner.

On February 12, 1999, the balance in the IOLA account decreased to $31,561.33; on April 12, 1999, only $25,181.24 remained.

In December 2000, after Turner's release from prison, he demanded from respondent $38,000. On December 20, 2000,

respondent remitted only $28,128.87 to Turner, asserting that he was not entitled to any other funds.

Respondent admitted that, between July 16, 1998 and August 6, 1998, he withdrew $2,100 from his IOLA account on Turner's behalf, when he held no funds for Turner and thus, misappropriated other clients' funds. He also admitted that he failed to maintain proper bookkeeping records.

Referee Galban found that respondent failed to promptly disburse funds to a client; that such conduct adversely reflected on his fitness to practice law; that he failed to seek the lawful objectives of his client through reasonably available means permitted by law; and that he engaged in conduct prejudicial to the administration of justice by representing to the disciplinary committee, during the investigation, that he planned to seek judicial intervention over the release of Turner's funds, when he took no steps to do so.

The referee rejected respondent's defense that he had not returned the funds to Turner because he believed, in good faith, that, if he had, he would have been subject to a federal money-laundering charge. Referee Galban reasoned that (1) respondent had no evidence that the funds had been the proceeds of a crime; (2) during the two-year period that respondent retained the

funds, he did not seek an opinion from an ethics attorney or a bar association about his concerns; (3) the only research that respondent produced was one page of notes dated March 2, 1999, months after he had refused to return Turner's funds; (4) although respondent repeatedly assured the disciplinary committee that he was taking steps to turn over Turner's funds to a court, he had not; and (5) despite respondent's purported concerns about potential money-laundering charges, he transferred more than $8,000 of Turner's funds to himself, and ultimately released the balance to a third party in December 2000.

Although respondent did not dispute that he had withdrawn from his IOLA account about $11,000 of Turner's funds and used them for personal or business expenses, the referee did not sustain the charge that respondent had intentionally converted Turner's funds. The referee accepted respondent's claim that he believed that he was entitled to deduct (1) additional rental payments upon the extension of the original lease term; (2) the amount of a returned check, even though Turner had replaced that check; (3) the cost of advertising for the office space rental; (4) the value of a computer that respondent had allowed Turner to use that was later confiscated during the criminal investigation of Turner; and (5) damages to the office caused by

Turner. Referee Galban determined that the evidence about the lease extension was inconclusive and that respondent's withdrawals from Turner's funds resulted from confusion about the type of damages to which respondent was entitled and from incorrect accountings. The referee conditioned this finding on respondent's refund of $9,510.02 that he had withdrawn, in error, from Turner's funds. Respondent complied with this condition.

The referee further found, and respondent admitted, that he failed to keep proper bookkeeping records of the funds held in his IOLA account and failed to maintain his IOLA account under his or his firm's name.

Respondent also admitted negligently misappropriating client funds in two other matters. In one case, between January and March 1, 2000, respondent disbursed $3,000 in funds from his IOLA account, purportedly on behalf of a client, Dr. Zinovy Beider, at a time when only $175.71 stood to that client's credit. Respondent admitted that, by making these disbursements, he misappropriated other clients' funds. He also admitted that he improperly issued an IOLA check payable to "cash" and failed to maintain proper bookkeeping records. In the second matter, between June 24, 1998, and June 30, 2000, respondent withdrew a

total of $11,205 from his IOLA account in five transactions, allegedly on behalf of a client, Michael Koltun, who was also respondent's tenant and accountant, at a time when Koltun did not have adequate funds in that account. The shortage that respondent created was as extensive as $4,880. Respondent admitted that he misappropriated other clients' funds when he made these disbursements.

The referee did not sustain the charge that respondent had converted clients' funds, finding instead that the IOLA account invasions resulted from his recordkeeping deficiencies. Referee Galban reasoned that respondent would not have intentionally converted funds, particularly during the time that the Turner investigation was pending, when he had sufficient resources at hand, such as insurance policies, a pension plan, and real estate.

In mitigation, the referee considered that respondent had made restitution of about $9,500 to Turner, re-organized his bookkeeping procedures, admitted his wrongful conduct, presented two "character witnesses," who testified about his honesty and integrity, and submitted letters from two attorneys attesting to his good character. In aggravation, the referee considered respondent's prior admonition and reciprocal three-month

suspension resulting from his three-month suspension in New Jersey.

Although both the referee and the hearing panel recommended a two-year suspension, the court suspended respondent for three years. The court noted that, although a two-year suspension is generally imposed for "nonintentional conversion of funds" resulting from failure to keep appropriate records and for failure to promptly return client funds,

> this case involves a pervasive pattern of commingling of escrow funds. We consider his continued mishandling of his finances very serious and, although there is not evidence that any client lost money as a result of respondent's conduct or that there was an intent to profit personally, respondent fails to offer a credible explanation for his conduct.
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> [OAEaAtt.2 at 6.][2]

The OAE asserted that the ethics violations charged in New York are comparable to New Jersey RPC 1.2 (failure to abide by client's decision concerning the scope and objectives of the representation), RPC 1.3 (lack of diligence), RPC 1.15 (failure to safeguard funds), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The OAE argued

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[2] OAEa refers to the appendix of the OAE's September 4, 2007 brief in support of its motion for reciprocal discipline.

that respondent's conduct warrants a prospective three-year suspension, citing In re Chidiac, 120 N.J. 32 (1990), In re Simmons, 185 N.J. 466 (2006), In re Lockard, 174 N.J. 373 (2002), and In re Rogers, 126 N.J. 345 (1991).

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline.

Pursuant to R. 1:20-14(a)(5), another jurisdiction's finding of misconduct shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state. We, therefore, adopt the findings of the Supreme Court of the State of New York, Appellate Division, First Department.

Reciprocal disciplinary proceedings in New Jersey are governed by R. 1:20-14(a)(4), which states that

> [t]he Board shall recommend the imposition of the identical action or discipline unless the respondent demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in

> full force and effect as the result of appellate proceedings;
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> (D) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
>
> (E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E). New Jersey attorneys who negligently misappropriate client funds are usually reprimanded. See, e.g., In re Philpitt, 193 N.J. 597 (2008) (attorney negligently misappropriated $103,750.61 of trust funds as a result of his failure to reconcile his trust account; the attorney was also found guilty of recordkeeping violations); 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); In re Winkler, 175 N.J. 438 (2003) (attorney 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).

In more egregious cases, however, lengthy suspensions have been imposed. The attorney in In re Simmons, 186 N.J. 466 (2006), was suspended for three years. Although, in 1996, Simmons settled a personal injury claim of a minor, Malik Thompson, for $11,5000, he failed to remit Thompson's share of the funds, $8,278, to the surrogate, as required. In the Matter of Anthony J. Simmons, DRB 05-248 (December 8, 2005) (slip op. at 2-3). He blamed his failure on his lack of familiarity with that procedure. Id. at 4. In June 1999, Simmons left the law firm in which he had been a partner and transferred the Thompson funds to a new trust account. Id. at 3. After notifying Thompson's guardian, Donna Thompson, of the transfer, he lost contact with her. Ibid. In November 2000, four years after settling the case, Simmons invaded Thompson's funds by issuing a $4,775 trust account check to Luis Reyes. Ibid. Although he was not sure, he believed that Reyes was a former client who had requested reimbursement of his retainer. Ibid. According to Simmons, because he had moved his law practice several times, he had lost client files, including Reyes' file. Ibid.

In June 2001, Simmons relocated to Minnesota to seek treatment for drug addiction. Id. at 4. He claimed that, because he had lost the Thompson file, he could not notify Donna Thompson that he was leaving the practice of law. Ibid.

Simmons denied that he had knowingly misappropriated the Thompson funds, as the complaint charged. Id. at 5. According to Simmons, he thought that he had issued the check to Reyes from his business account. Ibid. He attributed his misconduct to depression, which he claimed began in June 1999, and to his oxycontin addiction, which arose after he had been injured in an automobile accident. Ibid.

Although the special master determined that Simmons had knowingly misappropriated Thompson's funds, we disagreed. Id. at 6-7. We rejected Simmons' assertion that he was so impaired that he issued the check to Reyes from the wrong bank account. Id. at 10. Instead, we concluded that he probably had forgotten that Thompson's funds were in his trust account. Ibid. Simmons had received the funds in 1996, and, because he did not maintain contact with Donna Thompson, she could not remind him of his retention of those monies. Ibid. When Reyes requested a refund, Simmons used the Thompson funds because they were on hand. Ibid. We found that he had displayed recklessness by issuing the check

to Reyes without first determining the ownership of the monies in his trust account. Id. at 11.

For his reckless disregard of his trust account responsibilities, gross neglect, lack of diligence, failure to communicate with a client, and failure to promptly turn over client property, Simmons received a three-year suspension, retroactive to his temporary suspension. In re Simmons, supra, 186 N.J. at 466-467.

In In re Rogers, 126 N.J. 345 (1991), the attorney's mistaken belief that he could use escrow funds saved him from disbarment. After Rogers disbursed funds following a real estate closing, American Express improperly levied on his trust account to satisfy his personal debt to American Express. Id. at 348. As a result, the attorney's check issued to pay off a prior mortgage against the property was returned for insufficient funds. Ibid. Rogers thereafter paid most of the mortgage and obtained the consent of the mortgagee to repay the balance after the resolution of his financial difficulties. Ibid. When American Express returned the monies to Rogers, however, he deposited them into his business account, instead of his trust account, and did not pay off the mortgage. Id. at 349. Although the attorney paid some of the mortgage balance, he used the

remainder to pay business and personal debts. Ibid. Rogers testified that, because he believed that he had assumed the obligation to pay the mortgagee, it was his understanding that the loan from the mortgagee had converted the nature of the monies returned by American Express from escrow funds to personal funds, available for his personal use. Id. at 350.

The Court found that knowing misappropriation had not been established:

> [W]e are unable to conclude that under the totality of circumstances the record clearly and convincingly demonstrates that respondent knowingly misappropriated the escrow funds. The evidence indicates that respondent may have had a good faith belief that the character of the returned American Express check had been converted from "escrow funds" to his own funds, subject of course to his debt to [the mortgagee]. Although respondent's belief was incorrect, we cannot conclude from this record that his misappropriation was "knowing."
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> [Id. at 357.]

The Court suspended Rogers for two years. Id. at 360.

In In re Chidiac, 120 N.J. 32 (1990), for six years, the attorney represented a religious charitable organization that provided housing to low-income families. Id. at 33. Thereafter, Chidiac also assumed the role of property manager for the client. Ibid. He failed to keep any records of his management of

the property and commingled income from the client's property and income that he received from managing his own property. Id. at 34. Those funds were not placed in his attorney trust account. Ibid. After requesting an accounting, the client concluded that Chidiac owed additional funds, which he paid. Id. at 35.

Although the district ethics committee determined that the attorney had knowingly misappropriated client funds, we disagreed. Id. at 36. The Court adopted our finding that Chidiac was guilty of flagrant recordkeeping violations and that he had a good faith belief that his client had authorized him to use the funds. Id. at 38.

Finding that the violations had been the product of "neglect and inattentiveness, not venality or greed," the Court nevertheless determined that a three-year suspension was warranted for Chidiac's serious misconduct. Id. at 39.

Finally, in In re Johnson, 105 N.J. 249 (1987), an attorney admitted that he misused clients' funds, but contended that the misuse was entirely unknown because he was inexcusably inattentive to his recordkeeping responsibilities. Id. at 255. The attorney claimed that he was so busy building a law practice, working more than ninety hours a week, that he lost

control of his office, improperly relying on his staff to maintain his attorney records. Ibid.

Noting that Johnson's version of the events was not contradicted, the Court found that his misappropriation was not knowing. Id. at 258. The Court rejected the OAE's argument that the attorney had to know that he was out of trust and that he was invading clients' funds. Ibid. The Court concluded that this case showed much more than shoddy bookkeeping, in that the attorney was "spectacularly misguided in his all-consuming effort to build a practice at the expense of other considerations . . . ." Id. at 259.

The Court found no evidence of "defensive ignorance" or "intentional and purposeful avoidance of knowing what is going on in one's trust account." Id. at 260. The attorney was suspended for four years (time-served). Ibid.

Here, the New York court determined that respondent had a good faith, albeit mistaken, belief that he was entitled to apply a portion of Turner's escrow funds to the rental damages and other costs. That finding removes this case from the knowing misappropriation arena.

Respondent's recordkeeping was beyond shoddy and his misappropriations were beyond negligent, however. As a result of

his recklessness, he not only invaded Turner's funds, but also the funds of unidentified clients when he made disbursements for Turner, as well as two other clients, Beider and Koltun, without having sufficient funds to their credit in his IOLA account.

Respondent's misconduct most closely resembles that of Chidiac and Simmons. We, thus, determine that a three-year prospective suspension, the same discipline imposed in New York, is the appropriate sanction.

Members Baugh, Lolla, and Neuwirth 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 these matters, as provided in R. 1:20-17.

Disciplinary Review Board
William J. O'Shaughnessy, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Roger A. Levy
Docket No. DRB 07-379

Argued: February 21, 2008

Decided: April 8, 2008

Disposition: Three-year suspension

Members	Disbar	Three-year Suspension	Reprimand	Dismiss	Disqualified	Did not participate
O'Shaughnessy		X				
Pashman		X				
Baugh						X
Boylan		X				
Frost		X				
Lolla						X
Neuwirth						X
Stanton		X				
Wissinger		X				
Total:		6				3

Julianne K. DeCore
Chief Counsel