SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 08-389
District Docket No. XIV-04-579E

IN THE MATTER OF	
HORATIUS A. GREENE	
AN ATTORNEY AT LAW	

Decision

Argued: March 19, 2009

Decided: July 16, 2009

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

Respondent's counsel waived appearance for oral argument.

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) by Special Master Kenneth R. Stein, J.S.C. (retired on recall). The clear and convincing evidence establishes that respondent knowingly misappropriated client trust funds. Therefore, we, too, recommend disbarment.

Respondent was admitted to the New Jersey bar in 1974. He has no prior discipline.

This matter came to light as the result of a random audit of respondent's attorney books and records. A three-count complaint alleged that respondent's use of client trust funds for his own purposes violated RPC 1.15(a) (knowing misappropriation of client funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979).

I. The Johnnie Lawrence Matter

Respondent and the OAE entered into an undated stipulation of facts, prior to the hearing before the special master. According to the stipulation, respondent represented Johnnie Lawrence in a personal injury matter against Allstate Insurance Company, which settled for $100,000 on January 14, 2002. On February 13, 2002, respondent deposited the $100,000 settlement proceeds into his trust account. Respondent's legal fee and reimbursement for costs amounted to $33,955.89.

Respondent admitted that, between November 1, 2002 and February 13, 2003, he disbursed $72,522.99 to himself via fourteen trust account checks and issued a fifteenth check, in

the amount of $11,280.33, to satisfy a mortgage obligation of his cousin, Ella Lawrence. Respondent explained that he had intended to take the $11,280.33 payment out of his $33,955.89 legal fee.

The OAE senior auditor assigned to respondent's case, Mimi Lakind, testified about her review of respondent's trust and business account records. According to Lakind, respondent repeatedly used trust account funds to cure shortages in his business account. Between November 1, 2002 and February 10, 2003, respondent wrote only nine checks against the trust account. Seven of the nine checks totaled over $30,000, were made out to respondent, and referenced the Johnnie Lawrence matter, although he had already taken his entire fee by that time. Lakind calculated that, by May 2, 2003, respondent had misappropriated $54,682.12 of client funds in the trust account, having attributed the disbursements to fees owed in the Johnnie Lawrence matter.

At the ethics hearing, the presenter questioned respondent about his withdrawals:

> Q. Didn't the fact that you were substantially running your business on transfers from your trust account related to Lawrence, didn't that send up any red flags in your mind that: I ought to at least look

> at this file to make sure that all these checks I'm writing actually I have money in the account to back them up?
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> A. I mean, philosophically it may have. I'm sure I — I'm sure at some point I thought about it to do it, and I didn't get to it.
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> [T207-14 to 24.][1]

Respondent conceded that the excess funds over his legal fee invaded funds held for Johnnie Lawrence's medical providers, as well as funds belonging to other clients, including George and Olivia Glah and the estate of Milton Burns. Respondent denied only that he had knowingly invaded client or escrow funds. He contended that he had mistakenly thought that he had an additional $13,000 of his own monies in the trust account. According to respondent, unbeknownst to him, a $13,000 trust account check issued in connection with the Glah matter had never been negotiated. Therefore, he claimed, he assumed that the higher balance in his trust account consisted of funds "left over from the Johnnie Lawrence matter that were attorney's fees."

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[1] "T" refers to the transcript of the August 22, 2007 hearing before the special master.

II. The ATM Withdrawals

Respondent stipulated that, in addition to the Johnnie Lawrence trust account invasions, between March 2003 and February 2004, he made nine ATM cash withdrawals from his trust account, totaling $17,752.38. Those funds were used for his personal benefit. During all of this time, respondent was required to hold $11,788.95 for the Burns estate and $13,482.91 for the Glahs. Respondent conceded that each of the ATM withdrawals invaded client funds, including those of the Burns estate and the Glahs.

Respondent again denied that he had knowingly misappropriated the above funds. He claimed that, at the time of the transfers, he thought that he had additional funds on hand in the trust account, in particular, a $36,000 loan from an uncle, Calvin Spann.

According to Lakind, respondent's uncle, Calvin Spann, advised the OAE, during the audit process, that he had left a $36,000 real estate deposit in respondent's trust account and had allowed respondent to draw on the funds as respondent saw fit. Thus, for purposes of the audit, Lakind considered the remaining Spann funds (about $30,000) as if they belonged to respondent. In her words, "the only time I considered the

account short was when the shortages went beyond whatever [] Mr. Spann's money totaled at that point."

As of January 13, 2003, respondent had depleted funds belonging either to him or to his uncle and had begun to invade other clients' funds.

III. The Bank Counter-Check

Respondent stipulated that, in an earlier August 13, 1999 incident, he went to his bank, ordered and signed a trust account "counter-check" for $3,320, made payable to cash, and cashed it. On that date, his trust account held no funds belonging to him. By cashing the check, respondent invaded client funds, including those belonging to clients Perry Hunter, Sheronda Carroll, and Thomas Sutton.

Immediately upon cashing that check, respondent deposited $3,320 into his business account to cure overdrafts related to outstanding business account checks totaling almost $3,000.

Respondent testified that he thought that the counter-check had been drawn on either his business account or an unspecified personal account. He suggested that the bank clerk might have mistakenly placed his trust account number on that counter-check. Respondent recalled having reviewed the check, including

the account number that had been placed on it, and signing the check. He also stated that he had just deposited about $13,000 from the sale of some real estate into an account, which account he could not recall, and that "out of those monies and other monies that I had . . . I had more than sufficient [sic] to pay for the check itself."

On August 13, 1999, however, respondent's business account was overdrawn, as it had been for the preceding several days. Respondent signed the counter-check, which bore the trust account number, and deposited the $3,320 in his business account that same day. Only then were several checks honored, including a $2,600 check for an office printer, and several associated bank overdraft charges were paid.

Respondent provided no documentation, such as a contemporaneous bank statement from a personal checking or savings account, as proof that a personal account was supposed to have been used for the counter-check – an account holding sufficient funds to cover the counter-check on the date in question.

Moreover, when pressed at the ethics hearing about his handling of the trust and business account, respondent acknowledged that he had regularly transferred funds from the

trust account to his business account, as necessary, in order to cure or prevent overdrafts in his business account.

Respondent stipulated that none of the clients whose funds were invaded had authorized him to use their funds for his own personal purposes. He maintained, however, that his actions had been negligent, as opposed to knowing, because of his poor recordkeeping practices. He stated that he never maintained proper attorney books and records, that, between 1999 and 2004, he had no accountant or bookkeeper, and that he kept no client ledgers, relying instead on "mental notes" to determine whether he had sufficient funds of his own in the trust account, before making withdrawals for himself.

Respondent testified that, upon receiving his trust account bank statements, he "usually" opened them. He also recalled Lakind having told him that some of the envelopes that he provided to her looked unopened.

Lakind took issue with respondent's version of events. She stated that all bank statements that respondent had turned over to her had been opened. She was certain of it because she sometimes encounters attorneys who provide her with unopened bank statements in conjunction with an audit. In those cases, she always marks the envelope "unopened" and places her initials

on it. She then has the attorney open the statements in her presence, "because he's got to look at what's in there." According to Lakind, that was not the case in this matter.

Lakind stated that, whenever respondent took account funds, he was careful to use only what he needed to keep the business account afloat. He was also careful to never overdraw the trust account. When Lakind added up all of the balances that should have been held in the trust account for all of respondent's clients, it totaled $341,015.13. Yet, the actual account balance as of May 2, 2003 was only $286,333. Thus, respondent had a total shortage in the trust account of $54,682.13.

Respondent conceded that, between May 10, 2002 and April 2004, he was required to hold client/escrow funds of about $25,000 on behalf of the Burns and Glah matters alone. Yet, by way of example, on May 19, 2003, he made an ATM transfer of $2,387 from his trust account to his business account, lowering the trust account balance to $8,671. When he was asked if he had looked at the balance in the account, presumably on the ATM receipt, he replied that he had not noticed it. When asked if he had noticed an out-of-trust daily balance that appeared later that month on his bank statement, he answered that, when he

reviewed his May 2003 statement, he had not looked for that transaction.

Respondent's other trust account bank statements showed that, beginning on March 28, 2003, his trust account dipped to $21,035, some $4,000 below the $25,000 required to be held for clients Burns and Glah. On April 16, 2003, the balance was $14,964.69. The closing balance on the May 30, 2003 statement was $6,359.98. The June 30, 2003 statement-ending balance was a mere $4,503.81. Again, in July, August, and September 2003, respondent's trust account was well below the funds required to be held for just these two clients.

On June 8, 2004, during the course of the OAE audit, respondent deposited $41,191.99 into his trust account "to partially cover the shortage in his trust account."

Respondent conceded that he alone was responsible for the maintenance of his trust and business account records and that he had allowed that aspect of his law practice to get away from him:

> I fell into a problem because I was trying to do more than I really could. I thought I could do it, but I got to a point where I wasn't doing it. My family went through a period of personal tragedies and loss.
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> [T149-7 to 11.]

Respondent claimed that a number of events at around the time of the misappropriations negatively affected his ability to keep up with his practice and rendered his misappropriations less than knowing in nature.[2] The special master summarized these events in his report:

> These factors cited included matters personal to respondent, including: his father was ill in 1999 at a time when his mother was debilitated with polio; his father died in 2000; his mother-in-law was diagnosed with breast cancer in 2000; in or about 2000 both the uncle and surrogate father of his wife died; he was partially responsible for the transportation of his mother-in-law for weekly medical appointments and treatments; [respondent] was diagnosed as having an ulcer; he was experiencing stress because of his mother-in-law's hospitalization and his wife "was having problems and falling apart," and; [sic] the stress and anxiety associated with the events of September 11, 2001 caused an emotional breakdown of respondent out of fear for the people of Jersey City, the city in which he was born and raised.
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> [SMR11.][3]

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[2] During the time of the misappropriations, respondent held the position of municipal judge for the City of Orange. He denied having had any problems fulfilling his duties as judge and stated that no problems with his performance were ever brought to his attention by anyone.

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

Respondent and the OAE entered into a January 28, 2008 Stipulation of Expert Reports, whereby each introduced into evidence a mental health evaluation of respondent.

Respondent's expert, Paul M. Brala, Ph.D., a clinical psychologist, evaluated respondent on April 23, 2007. His report chronicled respondent's life through the period during which he began using client funds held in his trust account. Although Dr. Brala found respondent to be "anxious and depressed," he also found him "well oriented to person, place and time . . . his memory for most remote and recent events is intact and clear . . . his thought processes appeared to be logical and well ordered despite his occasional tangentiality and circumlocutiousness, and [he] shows no evidence of disordered thought process or content." According to Dr. Brala, due to respondent's "evident and long standing avoidance and struggle with mathematics, it is my professional opinion that [he] engaged in the behaviors that resulted in professional errors by means that were not intentional."

The OAE introduced the report of psychiatrist Daniel P. Greenfield, MD, MPH, MS. Dr. Greenfield reviewed Dr. Brala's report and conducted his own May 2, 2007 interview/examination of respondent. He noted that respondent had no history of

psychological or psychiatric problems or treatment, prior to his defense to the OAE complaint. Dr. Greenfield agreed that respondent suffered from stressors in his personal and professional life, but found that his "reported mismanagement of the several accounts in question were not part of a pattern of behaviors driven by some sort of underlying symptomology associated with some type of psychiatric disorder."

According to Dr. Greenfield, respondent

> acknowledged (to me during my interview/examination of him as well as to Dr. Brala) that he had made mistakes in connection with the reported misappropriation of funds; that he should not have done what he reportedly did in that regard; that what he had done was wrong; and that he accepted responsibility for what he had done.
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> [Ex.P-67 at 28.]

After examining respondent and all of the documentation available to both experts about the case, Dr. Greenfield concluded:

> In summary, it is my psychiatric/ neuropsychiatric/addiction medicine opinion — held with a degree of reasonable medical probability — that inferences about [respondent's] underlying mental state and psychiatric/neuropsychiatric/addiction medicine condition during the periods of time surrounding his alleged misappropriation of client funds in question is [sic] that he <u>did</u> have the cognitive capacity and mental

> ability to have handled the client funds in question properly and appropriately (as he did during that same time frame for his other clients and their financial dealings with him), so that these inferences do not support a responsibility-reducing defense . . . such as "Legal Insanity," "Diminished Capacity," and/or "Intoxication," all according to applicable State of New Jersey law, as I understand that law.
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> [Ex.P-67 at 27.]

The special master concluded that respondent did not suffer from a mental condition so severe that it would spare him from a finding of knowing misappropriation. In particular, he found no evidence in Dr. Brala's report that respondent was incapable of properly handling his trust account. The special master specifically concluded that respondent had not "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, 138 (1984). The special master noted that the OAE's expert drew a similar conclusion and that respondent had not sought help from a mental health professional or suffered from any mental deficiency during the time of the misappropriations that allegedly rendered him incapable of properly handling the funds in his trust account.

The special master also noted that respondent had no apparent problems handling other aspects of his law practice or his duties as a municipal court judge during the time of the defalcations. The special master rejected respondent's argument that his misappropriations were either negligent or the result of a mental condition. He found respondent guilty of knowing misappropriation, in violation of RPC 1.15(a) and In re Wilson, 81 N.J. 451 (1979).[4]

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

It is clear from the record, including respondent's stipulated facts, that, between November 2002 and February 2004, he misappropriated client and escrow funds from his trust account. The funds were to be held for medical providers in the Johnnie Lawrence matter, as well as for several other clients.

Respondent admittedly used the funds for purposes unrelated to the clients' matters, such as his cousin's mortgage reinstatement and for business expenses to keep his law firm

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[4] Apparently not realizing that an RPC 8.4(c) charge generally accompanies charges of knowing misappropriation, the special master dismissed this charge for lack of clear and convincing evidence.

afloat. He claimed, however, that his actions had been negligent, not knowing in nature, because he did not know how much of his own money was on hand in the trust account because of his inadequate recordkeeping. He professed a belief that his withdrawals had been backed by his fee in the Lawrence matter and his uncle's loan.

Respondent could not, however, have reasonably thought that his $33,000 fee and the $30,000 loan from his uncle would have been sufficient to justify his numerous withdrawals. All told, respondent took from the trust account, for his own purposes, about $72,000 for legal fees, $11,000 for his cousin's mortgage, $17,000 in ATM withdrawals, and $3,000 in a bank counter-check. These disbursements totaled roughly $103,000. When respondent did so, he had only $63,000 (the $33,000 Johnnie Lawrence fee and the $30,000 Spann funds) of his own or his uncle's funds in the account. Thus, he was out of trust by about $40,000. And he had to know that he was out of trust. Notwithstanding his claim of poor recordkeeping, his trust account bank statements alone made him aware of the shortage. He specifically recalled reviewing the May 2003 statement, which showed a balance of only $6,359.98. At that time, he was required to hold $25,000 for the Burns estate and the Glahs.

Respondent tried to temper his testimony with a recollection that the OAE investigator, Lakind, had told him that some bank statements looked unopened when he gave them to ethics authorities. Lakind, however, flatly denied that she received any unopened statements. She described a detailed audit protocol for such situations. She was certain that all of the bank statements that respondent had turned over to her had been opened.

Based on (1) Lakind's clear recollection that the statements had been opened prior to the audit, (2) respondent's recollection that he "usually" reviewed his bank statements, and (3) his review of the May 2003 statement, we find that respondent opened and reviewed his trust account bank statements, was aware that he was out of trust, and continued to make withdrawals for his own purposes, thereby invading trust funds.

With regard to the much earlier, August 13, 1999 invasion, respondent stipulated that he had no personal funds or fees in the trust account, when he cashed a $3,320 counter-check drawn on the trust account and placed the funds in his business account. He speculated that the bank clerk may have mistakenly placed his trust account number on that counter-check and that

the funds should have been drawn on either his business or a personal checking account. Obviously, it could not have been the business account, because it was overdrawn that day. Only after that deposit were several outstanding business account checks honored and were associated bank overdraft fees paid. Importantly, respondent provided no evidence to support his assertion that the funds should have been drawn from a personal account. The only logical conclusion, the same one drawn by the special master, is that respondent intended to cover a shortage in his business account with the funds transferred from his trust account, as apposed to a personal account.

Respondent argued that he was distracted from his bookkeeping duties by a number of difficult circumstances in his personal life, testifying about myriad personal troubles, including his own health problems and those of his wife and close relatives.

Those personal problems certainly must have created a great deal of stress for respondent. Nevertheless, both respondent's and the OAE's mental health experts determined that respondent had not suffered from a serious loss of competency that rendered him incapable of knowing what he was doing with regard to the

trust account withdrawals. In other words, respondent did not satisfy the Jacob standard.

In New Jersey, no amount of mitigation will suffice to overcome the disbarment sanction in knowing misappropriation cases:

> The misappropriation that will trigger automatic disbarment that is 'almost invariable' . . . consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money was used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of Wilson is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' — all are irrelevant.
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> [In re Noonan, 102 N.J. 157, 160 (1986).]

Unfortunately for respondent, his decision to take funds from his trust account on little more than the hope that the

account held funds to which he was entitled proved to be fatal. We find that he knowingly misappropriated client funds, a violation of RPC 1.15(a) and RPC 8.4(c). Under the principles of In re Wilson, 81 N.J. 451 (1979), respondent must be disbarred. We so recommend to the Court.

Chair Pashman and Vice Chair Frost 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
Edna Y. Baugh, Acting Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Horatius A. Greene, II
Docket No. DRB 08-389

Argued: March 19, 2009

Decided: July 16, 2009

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman						X
Frost						X
Baugh	X					
Clark	X					
Doremus	X					
Lolla	X					
Stanton	X					
Wissinger	X					
Total:	6					2

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Chief Counsel