SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 14-263
District Docket No. XIV-2008-0056E

IN THE MATTER OF	
DARYLL BOYD JONES	
AN ATTORNEY AT LAW	

Decision

Argued: November 20, 2014

Decided: March 10, 2015

Hillary K. Horton 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 motion for reciprocal discipline, filed by the Office of Attorney Ethics (OAE) pursuant to R. 1:20-14(a). The motion is based on New York's imposition of a five-year suspension on respondent. According to the OAE, respondent was found guilty of violating New York's disciplinary rules equivalent to New Jersey's RPC 1.5(c) (charging an unreasonable contingent fee), RPC 1.15(a) (commingling funds and knowing misappropriation of client funds), RPC 1.15(d) (recordkeeping

violations), RPC 8.1(a) (knowingly making a false statement of material fact in connection with a disciplinary matter), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

According to the special referee's report, the New York petition charged respondent with six counts of converting escrow funds from his Interest on Lawyers Account (IOLA), a violation of DR 9-102(A) (commingling and misappropriating funds) and DR 1-102(A)(7) (engaging in conduct that adversely reflects on the lawyer's fitness as a lawyer); commingling fiduciary and personal funds, repeatedly making electronic transfers into the IOLA account, and failing to promptly withdraw legal fees, a violation of DR 9-102(A) and DR 1-102(A)(7); failing to maintain required escrow account records, failing to show the source of the deposited funds, names of individuals for whom funds were held, amount of funds, charges or withdrawals from the account, and names of all persons to whom funds were disbursed, a violation of DR 9-102(D) (recordkeeping requirements); engaging in a pattern and practice of making ATM withdrawals from the IOLA account, a violation of DR 9-102(E) (making IOLA withdrawals to cash and failing to make withdrawals by check or with prior written approval from the party entitled to the proceeds by bank transfer); engaging in a pattern and practice of charging excessive fees in personal injury matters, a violation of

DR 2-106 (charging or collecting excessive fees); and lacking candor with ethics authorities, a violation of DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 1-102(A)(7).

The OAE seeks respondent's disbarment. For the reasons expressed below, we determine that a six-month suspension is warranted.

Respondent was admitted to the New Jersey bar in 1992 and the New York bar in 1993. At the relevant times, he maintained a law practice in New York. He has no history of discipline in New Jersey.[1]

On October 25, 2006, the Grievance Committee for the Second and Eleventh Judicial Districts filed an eleven-count petition, charging respondent with the above violations.

At the pre-hearing conference, the special referee informed respondent that intent was not a necessary element of conversion. The referee stated that "[m]aybe across the river

[1] Respondent's New York disciplinary record consists of (1) an October 2000 letter of caution for failing to register as an attorney; (2) a November 2001 letter of caution for failing to obtain a signed retainer agreement, prior to receiving payments from his client, failing to provide the client with a statement of client's rights and responsibilities, and failing to promptly reply to his client's telephone calls; and (3) a 2002 admonition for misrepresenting the status of his client's divorce matter and delaying the filing of a Qualified Domestic Relations Order for the client.

there's intent required, but not here." As a result, at that pre-hearing conference, respondent admitted many of the factual allegations of the petition, but denied that his conduct had been intentional. The special referee, however, precluded respondent from interposing a defense or providing an explanation for what had occurred and instructed him not to present his ultimate position. The special referee later informed respondent that, perhaps "down the road" it may be important for the referee to know why the improper conduct had occurred but, at that point, they were simply trying to determine "what facts have to be established."

The New York ethics hearing took place on April 10, 2007. On July 19, 2007, the special referee issued his report and findings. The report did little more than restate the charges contained in the petition, without thoroughly analyzing the evidence. According to the report, although respondent had been admitted to the bar in 1993, he acknowledged that he had very little knowledge of his "ethical responsibilities in dealing with client funds."

The special referee stated as follows, in his report:

> While [respondent's] answer sets forth a "general denial," between specific acknowledgments of the factual allegations supporting each charge in the answer verified February 12, 2007, and the admissions made by the respondent at the

> preliminary conference on March 6, 2007, the respondent has conceded the essential, factual allegations in the petition. The respondent questions that, but I find that is so. The respondent does not deny that certain facts occurred, i.e. that fiduciary funds were missing from escrow accounts, but that it was not done deliberately, however intent is not a necessary element of conversion.
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> [OAEb.Ex.C at 6.][2]

The special referee dismissed both of respondent's affirmative defenses. The first was that the committee lacked jurisdiction because it did not comply with procedures set forth in 22 N.Y.C.R.R. § 1022.20. Presumably, respondent objected to (1) the proceedings being conducted by a special referee, rather than by a panel and (2) the petition having been signed by the committee chairman, rather than chief counsel. The special referee found that those procedures were required only in the Fourth Judicial Department, not in the Second Judicial Department. Respondent's second affirmative defense was that he had remedied all of the charged misconduct and that the conduct was more than ten years old, which required the petition's dismissal. As in New Jersey, the special referee ruled that disciplinary proceedings are not barred by the statute of limitations.

[2] "OAEb" refers to the OAE's brief, dated May 7, 2014.

The special referee listed respondent's admissions and "errors" set forth in respondent's answer to the petition:

> All transactions of every nature must be promptly recorded.
>
> No inter-account transfers should be used to balance the Escrow Account.
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> Only checks can be used to alter the account.
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> No ATM withdrawals are permissible.
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> Escrow checks should be clearly distinguishable from operating account checks.
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> Earned fees should be extracted immediately upon clearing settlement checks.
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> All contingency fees must be in strict accordance with the schedule.
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> [OAEb.Ex.C at 7.]

According to the special referee, charges one through six alleged that respondent converted to his own use funds entrusted to him as a fiduciary. Respondent maintained IOLA account 6274 as an escrow account. In each of the six counts, respondent represented clients in relatively small negligence cases, for which he achieved settlements.

Charge one asserted that, on or about August 17, 2000, respondent deposited $25,000 into IOLA account 6274 for client

Delois Boyd.[3] In October 2000, the balance in the account was only $615.42. Respondent admitted the charges. The special referee, thus, determined that "[c]learly respondent was guilty of conversion" of Boyd's settlement.

Charge two related to client Felicia Sutton, for whom, on October 19, 2000, respondent deposited a $5,000 personal injury settlement into the same account. The special referee found that Sutton "was not paid until November 2006 and on February 6, 2002, the balance in that IOLA account was only $125.00."

The third charge alleged that, between January and November 2003, respondent made "debit purchases" from the same IOLA account for The Wiz, BMW, and All Own Parts. The special referee pointed out that those businesses did not have "money to their own credit in respondent's escrow account. Nor did they have any right to any of that money." According to the special referee, respondent asserted that those purchases had been made with his own money left in the account, thereby ignoring the requirements of DR 9-102(A), which prohibits commingling. The special referee did not address the conversion aspect of this count, in his analysis.

[3] The client's name was misspelled in the record.

Charge four alleged that, on or about February 4, 1998, respondent issued a check from the IOLA account for tuition for his son's nursery school, but there was no money in that account for tuition and respondent did not establish "that his money was used for that check."

Charge five alleged that, on or about May 16, 2001, respondent issued a $70 check from the same account for a room at a resort, that there was no money in that account that belonged to the resort, and that respondent did not establish "that his money was used for that check."

Charge six alleged that

> in or about February, 1995 and 2003, respondent engaged in a pattern and practice of writing checks to clients from his IOLA account 6274 before he deposited their settlement checks. Obviously those checks were paid with funds rightly belonging to other clients. Respondent admitted to doing this at least three (3) times and the evidence indicates that this happened on three (3) more occasions.
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> [OAEb.Ex.C at 11.]

As to these charges, the special referee concluded that "[t]he preponderance of the evidence establishes that the respondent is guilty of the six (6) charges of conversion."

The special referee also found that respondent was guilty of commingling, as alleged in charge seven. According to the special referee,

> respondent improperly commingled funds entrusted to him as a fiduciary, incident to his practice of the law, with his personal funds. Between October 2000 and March 2003 respondent made numerous electronic transfers from his operating account . . . into his IOLA account 6274. He admitted this in his answer and also in testimony at the hearing. Insofar as respondent deposited money transferred from his operating account with the balance of clients in escrow account [sic], he was guilty of commingling. Similarly, by failing to allow his fees to accumulate in the escrow account, after withdrawing the client's share, is [sic] also commingling.
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> [OAEb.Ex.C at 12.]

Charge eight alleged that respondent failed to maintain a ledger book for all escrow accounts, as required by New York rules. The special referee stated that, based on respondent's exhibit,[4] "[i]t is obvious that he did not enter all of the required items. It is not possible to determine what balance, if any, remained payable to the client. That is a major purpose of such a ledger."

As to charge nine, between November 1998 and March 2003, respondent used an ATM to make approximately twenty-seven withdrawals from his escrow account. The special referee stated that "[t]he use of an ATM card is forbidden."

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[4] Petitioner's exhibit 9 is a photocopy of respondent's "ledger of escrow account" from June 9, 1998 to May 11, 2005.

Charge ten alleged that respondent engaged in a pattern and practice of charging excessive fees (forty percent) in contingent fee matters. Respondent admitted that he charged that amount, if the client settled the case without his assistance, reasoning that, if the plaintiff had negotiated his own settlement, the recovery would have been much less and, hence, his fee would have been reduced. The special referee pointed out, however, that New York regulations limit contingent fee rates in negligence cases to either a sliding scale or a flat thirty-three and one-third percent of the recovery. According to the special referee, the forty percent that respondent charged was greater than either and, therefore, excessive.

Finally, charge eleven asserted that, during an earlier ethics investigation of a returned check on respondent's IOLA account number 6274, respondent had represented, in his answer to the grievance committee, that his Citibank account number 8004 was his IOLA account. Thereafter, in a May 2005 investigative appearance in the current case, respondent testified that account number 8004 was never an IOLA account and that he did not have any checks for that account until 2003. According to the special referee,

> [w]hen viewed in the light of respondent's earlier misstatements of the applicable law of jurisdiction in this case, that since none of his clients suffered serious monetary losses through his misconduct, and that he didn't learn how to handle an escrow account while he was still in law school it appears that he has

> a persistent lack of candor when confronted by the grievance committee.
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> [OAEb.Ex.C at 13-14.]

The special referee found that each of the eleven charges "met the requisite standard of proof [a fair preponderance of the evidence] and have been completely sustained."

On February 1, 2008, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, affirmed the findings of the special referee, denied respondent's cross-motion to set aside the special referee's findings and, upon a de novo review, granted respondent's motion to consider the mitigation he submitted but, nevertheless, determined to disbar him.

Thereafter, respondent filed a motion for leave to reargue the matter. On April 1, 2008, the Appellate Division "recalled and vacated" its disbarment order and imposed a five-year suspension. The court mentioned that respondent had raised both procedural and substantive arguments, as follows: (1) the grievance committee failed to offer any admissible evidence to establish the charges against him; (2) the deposition transcripts were never given to him for authentication and correction and were improperly used at the hearing to establish the truth of matters to which he had testified at his deposition, notwithstanding his availability at the hearing; (3) uncertified bank records were inadmissible; and (4) the grievance committee had misled and coerced his limited admissions.

The court pointed out that the special referee had denied similar objections, at the ethics hearing.

The court found that respondent had been shown the relevant bank documents, during his earlier appearance before the grievance committee, and he had been in possession of the transcripts since the time he was served with the petition and order to show cause, seeking his interim suspension. The court determined that respondent's claims of being misled and coerced to make limited admissions were totally unsubstantiated.

The court considered respondent's numerous character letters; the remedial and preventative measures that he had taken in his practice; his claim of a lack of evidence by either admission or proof that his misconduct was knowing and willful; his assertion that he was never properly taught the ethics rules and that he had no role model to follow; and the devastating effect that the loss of his license would have on his family.

Notwithstanding respondent's mitigation and claimed lack of venality, the court found him guilty of serious professional misconduct, noting that his arguments evidenced a fundamental ignorance of the rules regarding the proper maintenance of an escrow account. The court also noted that, throughout his testimony, respondent claimed confusion or a faulty memory with respect to dates. The court, thus, found that the special referee was led to

conclude that "respondent had a persistent lack of candor when confronted by the Grievance Committee."

The court concluded that, in light of respondent's remorse, his acceptance of responsibility for his misconduct, and the comprehensive remedial measures that he had undertaken to insure that the escrow violations would not be repeated, a five-year suspension was warranted.

Respondent's defenses and explanations to the charges were culled from the investigation transcripts, the prehearing transcript, and the ethics hearing transcript.

Respondent maintained two accounts for his law practice: a Citibank IOLA account number 6274 and an operating business account number 6266. In 1995, he opened another account, number 8004, which he claimed was a separate operating account. According to respondent, however, the bank had mistakenly designated it as an escrow account/IOLA account. Respondent denied ever depositing client funds into that account or using it as an escrow account. He claimed that he did not begin using the account or obtain checks for it to pay for office-related expenses until August or September 2003. He explained that there was no reason for him to have two separate escrow accounts and that he did not realize that the account had been designated an IOLA account, until the bank notified him of a "bounced" check. He used account number 6266 for his

attorney's fees and account number 8004 to pay office expenses. In January 2004, after he learned about the ethics investigation, he contacted the bank to change the designation on account number 8004.

According to respondent, to the best of his ability, he contemporaneously recorded every transaction that occurred on his IOLA account. He made ninety-five percent of the entries himself. Once he received a client's settlement check, he deposited it into the escrow account and the funds due to his office were transferred to his operating account.

Respondent admitted that, on February 4, 1998, he mistakenly wrote a check for his son's tuition from his IOLA account, because the checks for his escrow and operating accounts were similar in design. He has since changed the appearance of the checks to avoid similar mistakes. Nevertheless, some of his own funds remained in the escrow account. "[A]t least a third" of the funds were his and had not yet been transferred to the operating account.

Respondent asserted that settlement checks from his personal injury practice cleared at different times. He kept a running balance of his own amounts in his mind and in his computer. Even though he insisted that the funds used from his IOLA account were his and even though his money and the client's money were together in the same account, he denied the commingling charge. He asserted

that his funds remained in there "[o]nly until the time that they were transferred."

Respondent claimed that, when he wrote the check to a resort from his IOLA account, the check may have been the only one he had available at the time and that, nevertheless, he knew that he had his own funds in that account.

As to making payments to clients before their settlement checks were deposited (count six), respondent was adamant that those payments had not been made from other clients' funds. At the ethics hearing, he did not dispute that the conduct occurred, but only to the characterization of his actions as constituting "a pattern of practice." In one of the matters (the Tugwell matter), he asserted that he had mistakenly issued a check to the client before the settlement check had been deposited; his clerk simply had forgotten to deposit it. He maintained that there was no incentive to give the client a check in advance of depositing the settlement check; rather, it was an administrative error.

At the ethics hearing, respondent blamed his improper withdrawals from the escrow account on the fact that, at the time, his escrow and operating accounts were "mistakenly and inadvertently linked". He also claimed that he had been unaware that making withdrawals from the escrow account was a violation of the ethics

rules. The special referee, deeming the conduct unethical, was not interested in respondent's explanation.[5]

According to respondent, he attempted to separate the accounts several times. He had made a number of inquiries with the bank's branch manager, who assured him that the accounts were "de-linked." He relied on the bank's representations that they had rectified the problem. He added, however, that the accounts would remain separated for several months until he used his ATM card on his operating account, at which time they would become linked again.

In November 2006, respondent opened a new escrow account to ensure that the accounts had been "de-linked." His escrow account could no longer be accessed with an ATM card.

Respondent maintained that he had replaced any funds erroneously taken from his escrow account with transfers from his operating account. He asserted that the monies that had

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[5] The special referee stated further:

> There seems to be a great many errors and mistakes and accidents that have affected you. You're almost like the little guy in the Joe Palooka comics years ago, Joe Bifflestick or something, the little guy with the cloud over his head and it rained on him all the time.
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> [OAEb.Ex.B at 38.]

improperly come from the escrow account were his own funds, not client funds. This was so because personal injury settlement checks that he had deposited into the escrow account cleared in stages; it took between one to three weeks for the checks to clear, depending on their amount. According to respondent, this process was the bank's security precaution to prevent insurance fraud. Respondent reconciled the account every month to determine how much money had cleared and how much could be transferred. He pointed out that the petitioner had presented no evidence to establish that the monies taken from the escrow account were not respondent's.

Respondent also claimed that any purchases made from his escrow account had been made mistakenly and, that, in any event, he had several thousands of dollars of his own funds in the account to cover the purchases.

As to the Boyd matter, respondent's records revealed that, on August 16, 2000, he deposited her $25,000 settlement into his IOLA account 6274. Boyd was entitled to $5,559.58 from the settlement. On September 8, 2000, respondent issued a check to Boyd that "bounced." At one point, the balance fell to negative $4,944.04. On October 3, 2000, respondent electronically transferred $5,100 into the escrow account.

Initially, respondent claimed that the shortfall in his escrow account was due to a double payment to Boyd. His records, however, did not support his contention. At the ethics hearing, he asserted that the shortage was created by an incorrect transfer from his escrow account to his operating account. Based on a September 2000 "log" [ledger], he noted that he had received a $12,000 settlement for client Ben Hickman. On the same day, he issued a check to Hickman for $6,601, but then mistakenly transferred $12,000, the full amount of the deposit, into his business account. The transfer depleted the escrow account of funds that belonged to Boyd. When he discovered the mistake, he immediately transferred the funds back into his escrow account. According to respondent, there was no intent; it was an error.[6] Boyd was made whole in September 2000. Respondent claimed that any contradictory statements he had made earlier were a result of his not having the proper documentation before him.

On October 19, 2000, respondent made a $5,000 deposit into his IOLA account on behalf of Felicia Sutton, another personal injury client. Respondent's records did not reveal any payment to her. At the ethics hearing, respondent explained that he had

[6] The special referee reiterated that intent was not relevant.

delayed paying her because of an outstanding doctor's "claim" against her settlement. He asserted further that the claim had since expired and that he had "discharged and . . . paid her those monies."

As to the commingling charge relating to the electronic transfers from respondent's operating account to his IOLA account, between October 2000 and March 2003, respondent maintained that, because of the ATM withdrawals that had improperly come from his escrow account, he had transferred the money back from his operating account. He claimed, nevertheless, that he had his own funds in the escrow account and that, as a result, no client funds were affected. According to respondent, he reviewed the accounts monthly and, if he detected any errors, he would transfer the funds back. He pointed out the absence of proof that he had taken any client money -- only that he had transferred money back into the escrow account.

As to the recordkeeping charges, respondent conceded that he had omitted some information from his ledgers, but explained that the omissions resulted from inadvertence.

With regard to charging excessive fees in personal injury cases, respondent contended that the form of retainer agreement that he used had been given to him by an attorney with thirty

years' of experience. He assumed that the fees charged were permissible.[7]

With respect to the last charge (lack of candor), in a prior investigation respondent had referred to his account 8004 as his escrow account. At the ethics hearing, he claimed that the account had been opened as a solution to the problem with "erroneous transfers."[8] Because the account was not compatible with his MacIntosh office system, it sat dormant for many years. Respondent began using it, in 2003, as an operating account, even though it had been opened as an escrow account. He explained that the discrepancy in his explanation arose because he never used the account as an escrow account.

Respondent objected to the admission of his subpoenaed bank records into evidence, because he could not verify their "completeness" and accuracy and because Citibank had not certified the records.

Respondent testified that he was twenty-four years old when he opened his solo practice and did not have a tutor or mentor

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[7] In respondent's brief to us, he asserted that the fees he had charged were not excessive and were permitted under the Appellate Division's sliding scale retainer, which allowed fees in excess of forty percent for cases that settled for less than $15,000.

[8] However, at the initial investigation, on January 26, 2004, respondent stated that the account had been opened in 1995.

to direct him in the nuances of private practice.[9] He noted that, during the investigation, he had admitted making mistakes in his practice, but denied that he had willfully done anything improper. He had since changed his practice from primarily personal injury and family law matters to international advocacy. According to respondent, his lack of understanding of the "nuances of the escrow procedure" created his problems. None of his actions were with an intent to "steal, rob or misrepresent." All of his clients received their funds. When there were "bank imbalances," he transferred funds from his operating account to his escrow account. He did not try to hide anything, but small errors occurred. He had since retained an accounting firm to oversee his escrow account.

The OAE argued that, under R. 1:20-14(a)(4)(E), respondent's misconduct warranted substantially different discipline from that imposed in New York. The OAE's position was that, because respondent was found guilty of six charges of "knowing misapplication of client funds," disbarment under In re Wilson, 81 N.J. 451 (1979) is the only appropriate sanction. The

[9] At oral argument before us, respondent admitted that he was twenty-nine, when he opened his practice. The New York presenter had earlier underscored respondent's pervasive lack of candor throughout the proceedings, pointing out that he was not even truthful about his age.

OAE pointed to the fact that respondent's trust account balance dropped below the amounts he should have been holding in both the Boyd and Sutton matters, even, at one point, dropping to negative $4,944.48. The OAE added that respondent should not be able to raise his poor accounting practices as a defense to the Wilson rule.

The OAE cited, as aggravating factors, that respondent (1) was found guilty of misconduct that occurred over a long period of time (1998 through 2003); (2) commingled funds; (3) failed to maintain proper financial records; (4) made numerous blatant cash withdrawals from his IOLA account; (5) charged excessive fees; (6) lacked candor with New York disciplinary authorities; and (7) failed to notify the OAE of his New York suspension.

In his brief to us, respondent raised certain constitutional issues. He requested that we either (1) credit him for "time served," because he has not practiced law in either New York or New Jersey since 2008, when he was disciplined; (2) conduct an independent investigation on the merits of the case; or (3) dismiss the case.

Among other things, respondent asserted that there was no proof of any willful violations of the Rules of Professional Conduct, that all of his clients received the moneys that they were due, that none of his violations occurred in New Jersey,

and that the discipline imposed by the Appellate Division was in contravention of the Equal Protection clause, because attorneys from the Third Judicial Department, who are primarily Caucasian, have received less severe discipline than attorneys from the Second Judicial Department, who are primarily "non-white."

Respondent also contended that his due process rights were violated because of the absence of "civil procedure" in the New York proceedings. According to respondent, those proceedings were contrary to the Model Rules of Professional Conduct, because the disciplinary matter, which resulted in a restriction of his license, should not have been heard by a single hearing committee member.

Respondent further maintained that the petitioner had failed to establish any of the counts in the petition through competent admissible evidence, failed to proffer admissible documents into evidence, failed to call any witnesses in support of the case-in-chief, failed to offer expert testimony, failed to offer evidence on every count in the petition, and failed to "secure untainted and unqualified admissions of fact." Respondent also accused the special referee of collusion and engaging in ex parte communications with the petitioner.

Respondent again objected to the use of the pre-hearing and deposition transcripts as evidence, asserting that the documents

were not provided to him for authentication and correction, as required by the rules, and objected to the use of subpoenaed bank records as hearsay, because there was no certification or bank personnel offered to authenticate the records. He further objected to the special referee's and the court's reliance on the allegations of the petition, which they deemed him to have admitted. He asserted that he admitted only certain facts, which in and of themselves could not be considered violations.

Respondent argued that he provided credible testimony that the petitioner failed to rebut and that, under the Model Rules, the petitioner had the ultimate burden of persuasion. Respondent, therefore, asked that we dismiss this matter.

Following a full 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 that determination rests for purposes of disciplinary proceedings.

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

> The Board shall recommend imposition of the identical action or discipline unless the Respondent demonstrates, or the Board finds on the face of the record upon which the discipline in another jurisdiction was predicated that it clearly appears that:

> (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 matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

The only subsections of R. 1:20-14(a)(4) that could apply here would be (D) and (E). Although respondent asserted that his constitutional rights were violated, his claims do not fall within the subsection (D) exception. Respondent had notice of the hearing and was given ample opportunity to be heard. In addition, under R. 1:20-15(h), respondent's constitutional challenges are reserved for Supreme Court consideration.

As to subsection (E), although the OAE properly determined that it is applicable here, we disagree with the OAE's rationale for its disbarment recommendation. Respondent was found guilty, in New York, of "conversion" of trust funds. The OAE seeks respondent's disbarment for his knowing misappropriation of client funds. Contrary to the OAE's assertion, the conversion of

escrow funds in this case is not analogous to the knowing misappropriation of client funds. In New York, "conversion" does not necessarily equate to knowingly misappropriating or stealing.

In In re White, 192 N.J. 443 (2007), the attorney was disbarred in New York for conversion of trust funds. Our review of the New York record led to the conclusion that, like here, there was no clear and convincing evidence that the conversion was tantamount to what is viewed as knowing misappropriation in New Jersey. The White decision noted that, in New York, conversion is not the same as knowing misappropriation. Furthermore, the White decision observed that, when New York disciplinary authorities charge knowing misappropriation, the petition alleges, and the court finds, a violation of DR 9-102(A) (failure to safeguard funds) and a violation of DR 1-102(A)(4), equivalent to New Jersey RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The failure to safeguard funds covers a wide spectrum of improprieties, some as minor as failure to deposit client funds in the trust account within a reasonable time.

In White, the dishonesty DR was not charged. We found, and the Supreme Court agreed, that the New York record had not established a case of knowing misappropriation. White was found

guilty of negligent misappropriation. He received a six-month suspension, as opposed to the typical discipline for negligent misappropriation, a reprimand, because of his other serious violations.

In another reciprocal discipline case, the attorney was disbarred in New York for "conversion" of trust funds and only reprimanded in New Jersey for what we and the Court found to be negligent misappropriation of trust funds. In re Duke, 174 N.J. 371 (2002). There, the attorney was found guilty in New York of "converting" trust funds, commingling trust and personal funds, improperly drawing an escrow check to cash, failing to maintain required bookkeeping records, and failing to timely cooperate with the grievance committee. In re Duke, 705 N.Y.S.2d 674 (2000). As in White, Duke was not charged with the dishonesty DR. In re Duke, supra, 705 N.Y.S.2d 674.

In yet another case, In re Vogel, 724 N.Y.S.2d 166 (2001), the attorney had consented to disbarment in New Jersey. The First Judicial Department Disciplinary Committee sought the attorney's disbarment. The Supreme Court of New York, Appellate Division, First Department, discussed the difference between the intentional and non-intentional conversion of funds in New York cases:

> The code provisions that formed the basis of respondent's disbarment in New Jersey are

> analogous to Code of Professional Responsibility DR 9-102 and DR 1-102 (a) (4) (22 NYCRR 1200.46, 1200.3). With regard to these provisions, we have consistently held that the intentional conversion of client funds is grave misconduct warranting the sanction of disbarment (*see, Matter of Britton,* 232 AD2d 17; *Matter of Rivera,* 230 AD2d 74). While we have noted that a lesser sanction may, under certain circumstances, be authorized where the conversion of funds was attributable to carelessness (*Matter of Britton, supra,* at 19), a lesser sanction would not be appropriate here since in the New Jersey proceedings respondent admitted that he knowingly misappropriated client funds. [emphasis added].
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> [In re Vogel, supra, 724 N.Y.S.2d at 167.]

The Vogel court, thus, held that intentional conversion (the equivalent of knowing misappropriation) implicates both DR 9-102 and DR 1-102(A)(4).

As in White, this respondent was not charged with a violation of DR 1-102(A)(4) (with regard to his conversion of funds), the equivalent of RPC 8.4(c). As in White, the record is deficient in establishing that the misappropriation/conversion that took place was knowing, as opposed to negligent. In fact, the special referee told respondent, on several occasions, that intent was irrelevant, that is, that conversion could be found even in the absence of intent. That important statement bolsters the conclusion that, in New York, conversion does not always equate to knowing misappropriation.

In In re Konopka, 126 N.J. 225, 234 (1991), the Court discussed the knowing misappropriation standard of proof:

> We 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."[10]

In addition, attorneys who misappropriate client funds are spared from disbarment when the evidence establishes that they were not aware that the funds that they invaded belonged to clients, rather than to themselves. Often this occurs when attorneys believe that there were sufficient funds of their own (earned legal fees) in the trust account to fund the withdrawals for their benefit. When there is no clear and convincing

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[10] To be sure, this commingling of personal and client funds is an ethics violation (RPC 1.15(a)).

evidence of actual knowledge of the invasion of client funds, attorneys are saved from disbarment and, instead, are found guilty of negligent misappropriation.

In sum, because (1) nothing in this record amply supports a finding that respondent was guilty of knowing misappropriation; (2) research reveals that, in New York, a charge of knowing misappropriation is accompanied by the dishonesty DR, which did not happen in this case; (3) the referee made a statement that intent to invade the funds is not required for a finding of conversion; and, (4) New Jersey's firm, longstanding policy, as articulated above in Konopka, holds that knowing misappropriation will not be found unless there is a showing that the attorney "intended it, knew it, and did it," we cannot find respondent guilty of knowing misappropriation in this case.

The discipline imposed in cases involving recordkeeping deficiencies and negligent misappropriation of client funds varies, depending on the attorney's ethics history, other aggravating or mitigating factors, or whether the misappropriation was a result of more than mere negligence. See, e.g., In re Arrechea, 208 N.J. 430 (2011) (reprimand imposed for negligent misappropriation of client funds in a default matter; the attorney also failed to promptly deliver funds that a client was entitled to receive and ran afoul of the recordkeeping rules

by writing trust account checks to himself and making cash withdrawals from his trust account, practices prohibited by R. 1:21-6; although the baseline discipline for negligent misappropriation is a reprimand and, in a default matter, the otherwise appropriate level of discipline is enhanced, a reprimand was viewed as adequate in this case because of the attorney's unblemished professional record of thirty-six years and his cardiac and serious cognitive problems (mild dementia)); In re Gleason, 206 N.J. 139 (2011) (reprimand for attorney who negligently misappropriated clients' funds by disbursing more than he had collected in five real estate transactions in which he represented a client; the excess disbursements, which were the result of the attorney's poor recordkeeping practices, were solely for the benefit of the client; the attorney also failed to memorialize the basis or rate of his fee); In re Kasdan, N.J. 195 N.J. 181 (2008) (censure for attorney who negligently misappropriated client trust funds in one matter, improperly issued trust account checks made payable to cash, and committed a number of recordkeeping violations; the OAE stipulated that the negligent misappropriation was the result of a mistake on the attorney's part, due to her recordkeeping deficiencies; prior three-month suspension for, among other things, recordkeeping improprieties, and three-year suspension); In re

McDonnell, 202 N.J. 142 (2010) (motion for discipline by consent; three-month suspension imposed on attorney who allowed two clients to deposit funds in, and disburse funds from, his trust account for loans to third parties and personal expenses; the attorney failed to carefully monitor and control his trust account at the time, causing one of the clients to disburse funds in excess of his deposits; as a result, funds belonging to the attorney's clients were invaded; numerous mitigating factors considered); In re Gallo, 117 N.J. 365 (1989) (three-month suspension for attorney who exhibited poor recordkeeping practices by leaving earned legal fees in his trust account, paying all of his operating expenses from his trust account, failing to keep a running balance of the account, and never using client ledger cards; the attorney, thus, never knew how much money was in his trust account or to whom the funds belonged; the attorney had taken over another attorney's practice, inheriting over 200 files in a completely disorganized state and adopted the same improper practice utilized by the attorney for whom he had previously worked; the inadequate bookkeeping practices led to the invasion of clients' funds on numerous occasions; no prior discipline); In re James, supra, 112 N.J. 580 (three-month suspension for poor accounting procedures that caused the invasion of clients' funds; the

attorney left substantial fees in his trust account and used the trust account to pay employee payroll taxes, at times making disbursements in excess of funds deposited in the trust account for that purpose; the attorney followed the same business practices and accounting procedures learned from his legal mentors; no prior discipline); In re Bevacqua, 180 N.J. 21 (2004) (six-month suspension for attorney who misappropriated a client's funds; he wire-transferred an earned legal fee of $5,000 from his trust account to his business account; when his attempts to withdraw monies from the business account were unsuccessful, he assumed that the transfer had not gone through, when in fact it had; he then used $5,000 from his trust account for personal and business expenses, thereby invading a client's funds; the attorney had a practice of leaving earned fees in his trust account to satisfy his personal and office bills; the attorney's conduct toward his recordkeeping responsibilities was found to have been reckless; he also engaged in a conflict of interest by representing clients with adverse interests; prior reprimand); and In re White, supra, 192 N.J. 443 (six-month suspension, on a motion for reciprocal discipline for attorney disbarred in New York, who failed to report his disbarment to New Jersey disciplinary authorities; the attorney was found guilty in New York of converting client funds, commingling trust

and personal funds, making twenty-seven ATM withdrawals, negligently misappropriating at least $2,752.98 in trust funds during a nine-month period, and engaging in recordkeeping violations; the attorney admitted the facts in the petition but claimed that his "mistakes" were due to carelessness; he made no attempt to maintain adequate records or to review recordkeeping rules, even after disciplinary proceedings were instituted against him; his refusal to review, learn, or implement the recordkeeping requirements caused the misuse of escrow funds; his recordkeeping was found to be not merely "'totally inadequate,' but virtually nonexistent;" the record, however, did not clearly and convincingly support a finding of knowing misappropriation; we considered as significant aggravating factors that the attorney never reviewed the recordkeeping rules, even after disciplinary proceedings were instituted against him and made no attempt at adequate trust account recordkeeping).

This case is similar to White. Like White, respondent's recordkeeping was virtually non-existent and he displayed a "fundamental ignorance" of the recordkeeping rules. Notwithstanding his ignorance of the rules, it does not appear that respondent made any effort to familiarize himself with them. As a result, he negligently invaded client funds.

In addition, respondent's testimony in New York was less than candid. He had excuses for each of his ethics improprieties and, at times, those excuses changed. He blamed his conflicting testimony on the lack of access to records, during his pre-hearing conference statement. The New York courts simply found, however, that respondent engaged in a persistent lack of candor with the New York ethics authorities. One striking example that put respondent's testimony into question was his explanation regarding the linking of his escrow and operating accounts. His testimony in that regard (that, although the bank had "de-linked" the accounts, they became "re-linked" on several occasions) was highly suspect. Moreover, even if there were some truth to his explanation, it is difficult to understand why he waited until November 2006 to open a new escrow account to ensure that the accounts were no longer linked.

In view of the foregoing, we determine that, like White, respondent should be suspended for six months.

We further determine to require respondent to take fifteen hours of CLE accounting courses and, prior to reinstatement, to provide proof to the OAE that he has satisfactorily completed the courses. Upon reinstatement, for a two-year period, respondent is to submit monthly reconciliations of his trust

account to the OAE, on a quarterly basis, prepared by an OAE-approved accountant.

We also determine that respondent's suspension should be prospective because of his failure to notify the OAE of his New York discipline, as required by R. 1:20-14(a)(1).

Members Gallipoli and Yamner voted to disbar respondent. Vice-Chair 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
Bonnie C. Frost, Chair

By: _____
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Daryll B. Jones
Docket No. DRB 14-263

Argued: November 20, 2014

Decided: March 10, 2015

Disposition: Six-month prospective suspension

Members	Disbar	Six-month Prospective Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Frost		X				
Baugh						X
Clark		X				
Gallipoli	X					
Hoberman		X				
Rivera		X				
Singer		X				
Yamner	X	X				
Zmirich		X				
Total:	2	6				1

Ellen A. Brodsky
Chief Counsel