SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-157

IN THE MATTER OF

ROBERT E. RIVA

AN ATTORNEY AT LAW

Decision

Argued: July 19, 2001

Decided: February 7, 2002

Brian D. Gillet 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 based on a recommendation for discipline filed by Special Master Gage Andretta. The two-count complaint charged respondent with knowing misappropriation of client funds, in violation of *RPC* 1.15(a) and *RPC* 8.4(c), failure to

safeguard trust funds, in violation of *RPC* 1.15(a), and recordkeeping improprieties, in violation of *RPC* 1.15(d) and *R.*1:21-6.

Respondent was admitted to the New Jersey bar in 1979. In 1999 he was reprimanded for gross neglect, lack of diligence and misrepresentation to the client about the status of the matter.

On May 12, 1999 the Court denied a motion for respondent's temporary suspension, but ordered that all checks drawn on his trust account be signed by a co-signatory approved by the Office of Attorney Ethics ("OAE").

* * *

The central issue is whether respondent is guilty of knowing misappropriation, in that he withdrew for himself certain sums against client trust funds. Respondent's defense was that he thought that the withdrawals had been made against a $30,000 fee that he mistakenly believed he had deposited in his trust account.

Knowing Misappropriation

In June 1998 Zia and Rosemary Shey retained respondent to represent them in the sale of their property to Dennis and Lauren Irvin. The Irvins were represented by Marion Syracuse. Because no real estate agents were involved in the transaction, the attorneys

negotiated its terms. The June 18, 1998 real estate contract required respondent to hold the Irvins' $92,500 deposit in escrow in an interest-bearing account, until the anticipated December 6, 1998 closing date. According to the contract, at closing the interest was to be divided equally between the Sheys and the Irvins.

On June 13, 1998 the Sheys gave respondent a $500 retainer, which he deposited into his trust account. The retainer agreement provided that respondent's fee would be $150 per hour and that, because no real estate agents were involved, the amount of the fee could be higher than might be expected. According to the agreement, the fee would range between $1,250 and $1,750; if it were to exceed the range, respondent had to notify the Sheys, in writing.

On June 19, 1998 respondent deposited the Irvins' $92,500 deposit check into his trust account at Sovereign Bank, which was not an interest-bearing account. According to respondent, although he had applied to make the deposit into a "low-balance account," unbeknownst to him the bank failed to follow his instructions.

Beginning on June 24, 1998, five days after he deposited the escrow deposit, and until September 22, 1998, respondent periodically issued to himself thirty-three trust account checks bearing the notation "fees" in their memo columns. The checks did not identify a particular client matter. The dates and amounts of the checks were as follows:

Date	Amount	Date	Amount
June 24, 1998	250	August 10, 1998	250
June 26, 1998	150	August 11, 1998	250
July 1, 1998	3,000	August 13, 1998	3,000
July 2, 1998	150	August 14, 1998	250
July 7, 1998	150	August 17, 1998	500
July 9, 1998	625	August 19, 1998	250
July 10, 1998	125	August 21, 1998	500
July 10, 1998	100	August 25, 1998	500
July 16, 1998	500	August 27, 1998	500
July 21, 1998	250	August 27, 1998	500
July 22, 1998	500	September 3, 1998	250
July 25, 1998	250	September 3, 1998	250
July 29, 1998	250	September 5, 1998	250
July 31, 1998	500	September 8, 1998	250
August 3, 1998	2,000	September 11, 1998	250
August 5, 1998	375	September 22, 1998	250
August 7, 1998	625	Total	$17,800

By August 11, 1998 the balance in respondent's trust account had decreased to $78,196.15. As of September 23, 1998 respondent's trust account balance was $68,387.23, or $24,112.77 short of the $92,500 that he was obligated to hold for the *Shey/Irvin* transaction.

On September 24, 1998 Sovereign Bank improperly levied against respondent's trust account, in the amount of $66,209.33. The levy resulted from a default judgment obtained by Michael and Anthony Gesario against respondent, personally. On January 8, 1999, more than four months later, respondent obtained a consent order vacating the levy. After the $66,209.33 was returned to respondent's trust account, its balance was only $66,369.23.

The *Shey/Irvin* real estate closing was scheduled to take place on January 7, 1999, postponed from the original December 6, 1998 date. By January 7, 1999, however, respondent had not obtained the consent order vacating the levy and had not notified his clients, the Irvins or their attorney that he could not produce the $92,500 deposit. When respondent appeared at the January 7, 1999 closing at Syracuse's office, he had a private conversation with his clients, at which time he informed them that his trust account had been frozen and that, therefore, he could not disburse the deposit and accrued interest. Although respondent suggested that his clients proceed with the closing without the necessary funds, they declined. The closing was adjourned to the following day.

Once the Irvins learned of the levy on respondent's bank accounts, they retained another attorney, Lynn Ciolino, to represent them at a court proceeding to remove the levy. They continued with Syracuse's representation in the real estate transaction.

On January 8, 1999 respondent and Ciolino appeared at Judge Joseph Scancarella's courtroom, where the consent order was executed. The Sheys, the Irvins, Syracuse and respondent then met at Sovereign Bank so that respondent could obtain the escrowed deposit. They discovered at that time that respondent's trust account was short by $26,250. Respondent's explanation to them was that, although the funds were supposed to have been wired to his trust account, his wiring instructions apparently had not been followed. They proceeded to PNC Bank, where respondent obtained a cashier's check for $26,250 from his parents' bank account. The closing was then completed.

Because the funds had not been deposited in an interest-bearing account, there was no interest to be paid to the Sheys and the Irvins. As a result, the Sheys announced their intention not to pay the $1,100 balance of respondent's fee. At the closing, respondent handwrote an agreement providing that Syracuse would escrow $1,100 and that respondent would ascertain and pay the amount of interest that should have accrued. As of the date of the ethics hearing, because respondent had not yet determined the interest amount, his fee remained in escrow in Syracuse's trust account.

Syracuse testified that, in February 1999, she contacted respondent about the payment of the interest. According to Syracuse, respondent replied that he was still trying to ascertain the applicable interest rate. Syracuse sent respondent a letter on February 17, 1999, asking when her clients could expect payment. Respondent failed to reply to that letter. Although, on December 10, 1999, the OAE instructed respondent to contact Syracuse about the interest, he never did so.

Dennis Irvin, the buyer, testified that he had not given respondent consent to use the escrow deposit and that it was not until the closing that he learned that the deposit had not remained intact in respondent's trust account. Irvin confirmed that he had not received his portion of the interest from the escrow deposit, which he estimated to be $1,500.

Lynn Ciolino, the Irvins' attorney for the consent order proceeding, also testified at the ethics hearing. Ciolino related that, when the parties met at Sovereign Bank and learned that respondent's trust account was short by $26,250, respondent stated that he had

transferred the rest of the funds to an out-of-state bank to prevent further attachment of the money in his trust account. According to Ciolino, respondent claimed that the funds were in the process of being wired to his trust account and suggested that they wait for their arrival. After waiting about fifteen minutes, Ciolino explained to respondent that, because the Irvins had closed their mortgage loan the day before, it was crucial that the deposit be available that day. Respondent then stated that he had another source for the funds. They all proceeded to PNC Bank, where respondent obtained the additional $26,250 from his parents' bank account.

Zia Shey, too, denied at the ethics hearing that he had given respondent permission to use the escrow funds and denied any knowledge that the deposit had not remained in respondent's trust account. He also confirmed that respondent had not paid any of the interest required under the agreement. According to Shey, although he had several conversations with respondent before the closing, respondent never mentioned any problems with the escrow deposit. Shey stated that, at the closing, respondent had explained that, although the funds were in his trust account, they could not be accessed until a "freeze" was lifted.

* * *

Until November 1997, respondent had maintained both his trust and business accounts at Midlantic Bank. After PNC Bank acquired Midlantic Bank, it began charging fees for services that were previously free. As a result, respondent closed both of his attorney accounts at PNC Bank. He did not open a business account until June 16, 1998, about seven months later. In the interim, he used his wife's checking account, transferring fees from his trust account into that account. Respondent had previously maintained a joint checking account with his wife. During the demand audit, he told the OAE that he closed the joint account after the *Gesario* lawsuit was filed against him, because he wanted to divest himself of personal funds. Noting that respondent appeared to use his trust account for business account purposes, the special master questioned him as follows:

> Q. [D]id you essentially conduct most of your transactions through your trust account because of fear that creditors would levy upon your business account?
>
> A. I closed down my personal checking account with Midlantic Bank or PNC Bank sometime in the end of 1997. I think that's when I had become aware that there was litigation that had been instituted against me.

On March 17, 1998, about four months after respondent closed his attorney accounts, he opened a trust account at Sovereign Bank. At that time, he was representing Christine Winslow and Steven Vallispir in three real estate transactions. Respondent deposited $104,767.05 for the *Winslow/Vallispir* transaction when he opened the trust account. He claimed that he thought he had also deposited $30,000 on that same date. Respondent contended that, at about this time, he had had discussions with his wife about services that

he allegedly performed for his father, Humbert Riva, for which he had never been compensated. Dr. Riva was an obstetrician/gynecologist who also operated a cytology laboratory. According to respondent, his father had been sued for medical malpractice twice and was included as a defendant in a wrongful discharge lawsuit. Respondent asserted that, although Dr. Riva was represented in all three lawsuits by a lead attorney assigned by his malpractice carrier, he represented his father on a punitive damage claim. Respondent's role was passive; he filed an appearance, reviewed pleadings and attended the trials, but did not actively engage in discovery or examine witnesses. Respondent stated that he represented Dr. Riva in a fourth matter, in which he had been cited by the Department of Environmental Protection for failing to comply with medical waste statutes. Respondent remarked that, after he spent about 100 hours on this case, it was dismissed. Respondent never billed his father for these services.

Respondent claimed that his father gave him $30,000 in March 1998, representing his fee for the above representation and for future services, including the review of patient files to determine which were required to be maintained and which could be discarded. Dr. Riva had recently retired.

Respondent explained that he placed the $30,000 fee from his father in his trust account because he had not yet decided to keep it, hoping to be able to return it. He stated that, when it became apparent to him that he could not make "a good living" from his law practice, he began to draw against the fee.

Respondent claimed that, when he opened the Sovereign Bank trust account in March 1998, he gave the bank employee two checks, one for $104,767.05 for the *Winslow/Vallispir* real estate transaction and the other for the $30,000 fee. Respondent testified at first that the $30,000 check had been drawn on his parents' joint account at PNC. Asked to produce his parents' check stubs, respondent then remembered that the check had been written against his parents' investment account. Respondent added that there were no records of this withdrawal.

It is undisputed that the $30,000 was never deposited in respondent's trust account. Respondent was unable to explain its whereabouts. He could not produce a deposit slip, a canceled check or any other record of its existence.

Respondent conceded that he had not detected the absence of the $30,000 sooner because he never reviewed his bank statements. He also admitted that he failed to perform quarterly reconciliations of his trust account and failed to maintain a running balance in his trust account checkbook.

According to respondent, when he learned of the levy on his trust account, he went to the bank, asked to review his account and saw on the computer screen that the $30,000 deposit had not been made. Although the bank's attorney sent respondent a September 24, 1998 letter notifying him of the levy, respondent claimed that he did not receive the letter until October 12, 1998, almost three weeks later. As noted earlier, by September 22, 1998 respondent had withdrawn $17,800 from his trust account.

On October 12, 1998 respondent "faxed" a letter to the attorney who had obtained the levy, notifying him that the funds in his trust account belonged to a client and urging him to take the necessary action to remove the levy. The letter also stated respondent's understanding that a consent order to set aside the default judgment had been filed with the court. Respondent, however, failed to follow up to ensure that the default judgment had been vacated. The attorney then obtained a writ of execution and the levy on respondent's trust account.

On November 4, 1998 respondent forwarded a consent order to the attorney to have the levy lifted and the default judgment vacated. Again, he failed to follow up on this matter. The levy was not removed until January 8, 1999, necessitating the postponement of the *Shey-Irvin* real estate closing.

According to respondent, when he discovered that $30,000 was missing from his trust account, he was reluctant to redeposit the funds because he feared another levy against his trust account. He stated that there was another lawsuit against him related to the *Gesario* complaint.

Respondent testified that the replacement funds were originally going to be wired from his parents' First Fidelity account, which was out of state. Later, because of a problem with the routing number, he obtained a check from his parents' joint checking account at PNC Bank, as mentioned above.

In sum, respondent asserted that (1) because he did not review his bank statements, he believed, from March through October 1998, that $30,000 had been deposited in his trust account; (2) he made the thirty-three withdrawals, totaling $17,800, against those funds; (3) he did not learn that $30,000 was missing until October 1998, when he discovered that a judgment-creditor had levied on his trust account; (4) the $30,000 represented payment of fees for services that he had performed for his father; and (5) he was reluctant to deposit funds in his trust account for fear of an additional levy. As to this last argument, however, the presenter pointed out that respondent had continued to deposit funds in his trust account after he learned of the levy. Indeed, from October 15 through December 28, 1998, respondent made six deposits to his trust account.

In turn, the presenter introduced evidence to rebut respondent's contentions. During an unrelated October 2, 1996 audit, the OAE notified respondent that he had improperly commingled personal and client funds in his trust account and had failed to perform quarterly trust account reconciliations. The audit had been prompted by a letter from the New Jersey Lawyers' Fund for Client Protection, reporting to the OAE that respondent had used a trust account check to pay his annual attorney assessment. Although the OAE ultimately disposed of that matter in respondent's favor, on February 7, 1997 it notified respondent that he had commingled personal and client funds and had failed to reconcile his trust account quarterly. The OAE warned him that future noncompliance with the recordkeeping rules could lead to disciplinary action. The presenter, thus, argued that

respondent was on notice that he should not place personal funds, such as legal fees, in his trust account and that he was required to perform quarterly trust account reconciliations. The presenter pointed out that, despite respondent's awareness of these rules, he continued to violate them. In fact, with respect to the commingling issue, respondent testified at the ethics hearing that "I did not understand their position. I believed and I still do to this day, that there is nothing wrong with using or placing certain funds in to the trust account for accountability in transactions where one might represent themselves [sic]." Respondent also stated that he placed all earned legal fees in his trust account, not his business account. This practice reached an extreme degree when respondent closed his business account in November 1997 and waited until June 1998 to open another business account, operating out of his trust account throughout that seven-month period.

More significantly, respondent's father, Dr. Riva, testified at the ethics hearing and contradicted respondent's version of events, as follows: (1) he did not recall owing respondent fees for services; (2) he did not recall giving respondent $30,000 in March 1998; (3) he lent respondent $26,250 on January 8, 1999, when respondent told him that he needed the funds for an "obligation" and (4) respondent signed a promissory note on January 8, 1999, evidencing his intent to return the $26,250. According to Dr. Riva, because his wife had access to his business checkbook and to their personal accounts, it was possible that she had given respondent $30,000 without his knowledge. Also, during a June 20, 2000 interview by investigative auditor Raymond Kaminski, Dr. Riva stated that, because

respondent had been on his payroll for a number of years, although not recently, there would have been no need to pay him a $30,000 fee.

Respondent did not challenge his father's testimony. In fact, he did not cross-examine his father at all.

The presenter argued that the timing of the fee disbursements was suspect, because respondent claimed that he deposited the $30,000 on March 17, 1998, but did not begin disbursing those funds until June, when he received the *Shey-Irvin* escrow deposit. Although respondent pointed out that he had issued some checks before he received the deposit, the record reveals that he issued only four checks before that event (totaling $775) and forty-two checks afterward (totaling about $23,000).

By September 23, 1998, the day before the levy, respondent had disbursed $17,800 against the alleged $30,000. At the April 12, 1999 demand audit, respondent stated that he kept a ledger card for his parents, on which he had recorded the checks to himself against the $30,000. According to that ledger, by October 1, 1998 respondent had disbursed all but $4,523.04 of the $30,000. That card, however, was a reconstruction of respondent's records on that account activity. Although respondent did not disclose that fact at the demand audit, at the ethics hearing he stated that he had "made it a little neater."

The presenter argued that, even if respondent were given the benefit of the doubt concerning the missing $30,000 deposit, he still knowingly misappropriated escrow funds because he invaded the escrow deposit. This argument, however, overlooks the fact that, if

respondent were credited with the $30,000, he would never have invaded the escrow deposit. If respondent had deposited the $30,000 into his trust account, he would have had a balance of at least $122,500 ($92,500 plus $30,000). By disbursing about $25,000 of the $30,000, respondent still would have maintained a balance of $97,500 and would not have been out-of-trust.

In addition to respondent's failure to maintain the *Shey-Irvin* deposit intact, the presenter contended, respondent used his trust account to pay personal expenses. For instance, on April 14, 1998 respondent deposited $394.46 into his trust account, which he disbursed four days later in the form of a car lease payment. On May 12, 1998 he made another car payment from his trust account, even though he had not made a prior corresponding deposit into that account. On September 1, 1998 respondent issued a $600 check to a bankruptcy court clerk to cover the fee for his personal bankruptcy filing. On September 25, 1998 he paid his wife's credit card bill of $500 with a trust account check. Respondent contended that these checks had been covered by his own funds in his trust account.

Significant doubts about respondent's credibility surfaced at the ethics hearing. In his January 20, 1999 reply to the grievance, respondent contended that, after he discovered the levy on his trust account, he transferred funds from his trust account to safeguard them. That was untrue. He further claimed that

> [t]he balance of the funds that had previously been transferred out of Sovereign Bank after the Writ of Execution, were to have been wired

> transferred [sic] back, but they had not arrived and it was later learned that the wire instructions were incorrect (routing number was wrong). I learned that I could obtain same from a local branch of the same bank and I proceeded to that bank and obtained the balance of the funds. . . . It just so happens that this bank (PNC Bank) was also the bank where my father did his banking and where I had previously had my attorney accounts. Another bank check was obtained.

Respondent never mentioned in his reply to the grievance that he had failed to deposit the $30,000. At the April 12, 1999 audit, when asked why he had omitted that information, respondent answered that he had become afraid when he realized that he had a shortage in his trust account and that he was hoping this problem "would go away." In his April 14, 1999 reply to the OAE's motion for his temporary suspension, respondent also neglected to disclose the problem with the $30,000 deposit, finally referring to it in a May 3, 1999 supplemental certification, after the OAE raised the issue.

Similarly, respondent did not disclose that the $26,250 that he received from his father on January 8, 1999, the day of the *Shey-Irvin* closing, was a loan, not a replacement for the missing $30,000 check. The OAE learned that information upon interviewing Dr. Riva on June 20, 2000.

At the October 13, 2000 ethics hearing, respondent stated, for the first time, that the $30,000 fee had been paid by his mother, without Dr. Riva's knowledge. By this time, however, his statement could not be verified because his mother had passed away.

Recordkeeping Violations

The complaint charged respondent with the following recordkeeping violations:

(1) failure to maintain a running balance in his attorney trust account checkbook;

(2) failure to maintain receipts and disbursements journals for his attorney trust account;

(3) failure to maintain quarterly reconciliations for his attorney trust account;

(4) failure to maintain all attorney trust account deposit slips;

(5) commingling of client and personal funds in his attorney trust account.

Although respondent admitted the deficiencies listed above, with the exception of commingling, he contended that the violations were *de minimis* and did not warrant discipline.

* * *

The special master found that respondent failed to safeguard client funds and failed to maintain proper records. Although the special master believed it "more probable than not" that respondent knowingly misappropriated client funds, he determined that the presenter had not proven that violation by clear and convincing evidence. The special master suggested that, after the June 20, 2000 interview by the OAE, in which Dr. Riva mentioned

that he had no knowledge of whether his wife had given respondent the $30,000, respondent's mother should have been questioned on this issue. The special master recommended a four-year suspension, based on respondent's prior reprimand, the egregious nature of the recordkeeping violations and the prior notice of deficiencies that he had received from the OAE.

* * *

Following a *de novo* review of the record, we found that the special master's findings that respondent's conduct was unethical are fully supported by clear and convincing evidence. We are unable to agree, however, with the special master's conclusion that respondent's misappropriation of part of the $92,500 deposit was not established by clear and convincing evidence.

On June 19, 1998 respondent deposited a $92,500 deposit for the *Shey-Irvin* real estate transaction into his trust account. He was obligated, as a fiduciary, to retain those funds intact. Instead, within five days of the deposit he began to invade those funds. Respondent claimed that, because he thought that he had deposited a $30,000 fee into his trust account, he did not realize that he had invaded the escrow deposit and, therefore, cannot be charged with knowing misappropriation. Because there is no support in the record for the existence of the $30,000, we rejected respondent's contention. We found that the

evidence points to the conclusion that respondent never had the claimed $30,000. Respondent's father denied that he owed him any fees, as alleged by respondent, denied having given him the $30,000 and produced a promissory note for the funds that, respondent claimed, had been given to him to replace the lost $30,000 check. According to Dr. Riva, respondent had previously been on his payroll and there was no need to pay him additional monies.

Respondent was not able to produce a deposit slip, canceled check or any indicia that the $30,000 payment was ever made.

After the presenter establishes a *prima facie* case of knowing misappropriation, if an attorney asserts a defense, the burden of proof shifts to the attorney to show that he or she has not committed that infraction. Here, respondent did not discharge that burden. Although he contended that he had not knowingly misappropriated escrow funds, because he believed that he had an additional $30,000 in his trust account, he failed to sustain his burden of proof on that issue.

At times, as in this matter, an attorney will rely on an asserted belief to defend against a knowing misappropriation charge. We must then determine whether that belief is reasonable. A reasonable, albeit erroneous or mistaken, belief may succeed in proving that a misappropriation was negligent, not knowing. In *In re Rogers*, 126 *N.J.* 345 (1991), the attorney's mistaken belief that he could use escrow funds saved him from disbarment. In *Rogers*, after the attorney disbursed funds following a real estate closing, American Express

improperly levied on his trust account to satisfy his personal debt to American Express. As a result, the attorney's check issued to pay off a prior mortgage against the property was returned for insufficient funds. The attorney thereafter paid most of the mortgage and obtained the consent of the mortgagee to repay the balance after the resolution of his financial difficulties. When American Express returned the monies to respondent, however, he deposited them into his business account, instead of his trust account, and did not pay off the mortgage. Although the attorney paid some of the mortgage balance, he used the remainder to pay business and personal debts. The attorney 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 converted the nature of the monies returned by American Express from escrow funds to personal funds, available for his personal use. 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 347]

The Court imposed a two-year suspension.

Unlike the attorney in *Rogers*, respondent failed to produce evidence of the reasonableness of his belief that he had made a $30,000 deposit to his trust account in March 1998.

Moreover, respondent's differing versions of the events surrounding the $30,000 raised serious doubts about the existence of those funds. He never mentioned the $30,000 deposit in his January 20, 1999 reply to the grievance. Instead, he maintained that he had transferred funds from his trust account because he was concerned that another improper levy would occur. During the April 12, 1999 audit, respondent acknowledged that he had not been forthright in his reply to the grievance, claiming that he was concerned about the shortage in his trust account and was hoping the problem "would go away."[1] Respondent also failed to disclose the purported $30,000 deposit to the Court in his reply to the OAE's motion for his temporary suspension, mentioning it only after the OAE referred to it first.

Respondent's general lack of credibility also called into question his account of the $30,000 deposit. Although aware of the shortage in his trust account, respondent waited until the day of the closing to notify his clients and others involved in the *Shey-Irvin* real estate transaction that he was unable to produce the escrow deposit.

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[1] Although we could have found that the falsehood in respondent's reply to the grievance constituted a violation of *RPC* 8.1(a) (false statement of material fact to a disciplinary authority) and deemed the complaint amended to conform to the proofs under *R.* 4:9-2 and *In re Logan*, 70 *N.J.* 222, 232 (1976), we thought it unnecessary to do so, in light of our finding of knowing misappropriation.

Respondent's numerous alleged "misunderstandings" and difficulties also raised issues about his truthfulness. For example, because of a misunderstanding with Sovereign Bank, the Irvins' escrow deposit failed to earn interest. Although the bank's attorney sent respondent a September 24, 1998 letter notifying him about the levy, respondent claimed that he did not receive the letter until October 12, 1998, almost three weeks later. Despite respondent's belief that the default judgment entered against him had been set aside, it had not. Respondent thought the levy had been vacated in November by the entry of a consent order, but it had not, resulting in a one-day postponement of the *Shey-Irvin* real estate closing.

Respondent's practice of placing fees in his trust account must be viewed critically, in light of the 1996 audit and the OAE's warning about commingling. Respondent continued to deposit fees in his trust account. At the ethics hearing, respondent implied that he used his trust account for business account purposes because he was concerned that his creditors would levy against the funds in his business account. Respondent conceded that he closed his personal bank account when he learned that a lawsuit had been filed against him.

The special master determined that, although it was more likely than not that respondent had knowingly misappropriated escrow funds, the evidence did not rise to a clear and convincing standard. Apparently, the special master considered the possibility that respondent's mother had given him the $30,000. The special master remarked that an interview with respondent's mother might have disposed of this issue.

The record, however, contains the following proofs that establish by clear and convincing evidence that there never was a $30,000 payment to respondent: (1) Dr. Riva's unequivocal testimony that he did not owe respondent a fee, that he had not paid respondent $30,000 and that the $26,250 given to respondent in January 1999 was a loan, as documented by the promissory note signed by respondent; (2) the absence of any documentation of the $30,000 payment, such as a deposit slip, canceled check or ledger entry; (3) respondent's failure to mention the $30,000 in his reply to the grievance; and (4) respondent's lack of credibility, as evidenced by his differing accounts of various matters and by his admission at the April 12, 1999 audit that, because of his concern about his trust account shortage, he had been less than candid in his reply to the grievance, when he stated that the missing funds had been transferred out of his trust account.

Based on the foregoing, we find that respondent knowingly misappropriated a portion of the escrow deposit from the *Shey-Irvin* real estate transaction.

In addition, we find that respondent's conduct amounted to the "willful blindness" found in *In re Skevin*, 104 *N.J.* 476 (1986). There, the attorney commingled personal and client funds in his trust account, failed to maintain a running balance of personal funds in the trust account, misused client trust funds and failed to maintain contemporaneous trust account records. Although the attorney conceded that client funds had been used, he denied knowingly misappropriating client funds, pointing out that he had deposited almost $1 million of his own money into the account to cover his personal withdrawals. Some of the

shortages resulted from the attorney's practice of withdrawing his fees for personal injury cases from the trust account before settlement proceeds were received. The Court characterized the attorney's conduct as "willful blindness," reasoning that, when an attorney acts without satisfying himself or herself that he or she is not misappropriating funds, such a state of mind goes beyond recklessness and satisfies the requisite of knowledge. In other words, wilful blindness occurs when, although an attorney knows that he or she does not know whether there are sufficient funds to cover the checks issued or withdrawals made, the attorney proceeds anyway. Simply put, willful blindness is "knowing that you do not know."

In *In re Pomerantz*, 155 *N.J.* 122 (1998), the Court disbarred an attorney who claimed that she was not aware that she was out-of-trust because she had deposited her own funds in her trust account and used the trust account to fund personal expenses. The Court ruled that, even if the attorney's contention of ignorance of the state of her trust account were to be accepted, her willful blindness was sufficient to constitute knowing misappropriation of client funds.

Here, respondent failed to keep a running trust account checkbook balance, failed to reconcile his trust account and failed to even look at his trust account bank statements. When he issued a trust account check, he did not know with any certainty whether he had sufficient funds to cover the disbursement. As the Court stated in *In re Fleischer*, 102 *N.J.* 440, 447 (1986), "[l]awyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds."

Furthermore, in October 1998, respondent learned of the $30,000 shortage in his trust account. Yet, he failed to replenish the missing funds. An attorney's failure to replenish a trust account within a reasonable period of time after learning of the shortage may constitute knowing misappropriation. *See In re Devlin*, 109 *N.J.* 135 (1988) and *In re Brown*, 102 *N.J.* 512 (1986). Here, under respondent's version of events, he learned in October 1998 that his trust account was short by $30,000. He took no steps to replenish the deficiency, claiming that he was concerned that another levy would be placed on his trust account funds. The six deposits that respondent made to his trust account, after he learned of the levy, belie this contention. Moreover, respondent could have obtained the funds and safeguarded them in another account, for example, an account in his clients' names. He obviously had the ability to secure the funds, since he obtained them from his father immediately after requesting them on January 8, 1999 for the *Shey-Irvin* closing.

With respect to the recordkeeping violations, respondent admitted that he failed to maintain (1) a running balance in his attorney trust account checkbook; (2) receipts and disbursements journals for his attorney trust account; (3) quarterly reconciliations for his attorney trust account; and (4) all attorney trust account deposit slips. Although he denied that he commingled personal and client funds, he obviously did so when he deposited earned legal fees into his trust account. He also deposited his own money into his trust account, which he used to pay personal bills, such as his car lease and his wife's credit card bill. Respondent's recordkeeping violations were particularly serious, in light of the 1996 audit

and the 1997 OAE letter cautioning him to reconcile his trust account quarterly and to refrain from commingling funds. Moreover, respondent neglected his trust account to the point where he failed to look at even one of his bank statements until he was notified about the levy.

Because respondent knowingly misappropriated escrow funds and engaged in willful blindness, he must be disbarred pursuant to *In re Wilson*, 81 *N.J.* 451 (1979), *In re Hollendonner*, 102 *N.J.* 21 (1985) and *In re Skevin, supra*, 104 *N.J.* 476 (1986). We unanimously so recommend. Two members did not participate.

We further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

By: _____
ROCKY L. PETERSON
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Robert E. Riva
Docket No. DRB 01-157

Argued: July 19, 2001

Decided: January 29, 2002

Disposition: Disbar

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Peterson	X						
Maudsley	X						
Boylan	X						
Brody	X						
Lolla							X
O'Shaughnessy	X						
Pashman	X						
Schwartz							X
Wissinger	X						
Total:	7						2

By Robyn M. Hill 2/27/02
Robyn M. Hill
Chief Counsel