SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 01-097

IN THE MATTER OF

R. WESLEY AGEE

AN ATTORNEY AT LAW

Decision

Argued: July 19, 2001

Decided: January 11, 2002

John J. Janasie 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 Patrick M. Callahan. The Office of Attorney Ethics ("OAE") filed a complaint charging respondent with knowing misappropriation of client funds, in violation of *RPC* 1.15(a), *RPC* 8.4(c) and *In re Wilson*, 81 *N.J.* 451 (1979); failure to safeguard funds, in violation of *RPC* 1.15(a) and *RPC* 8.4(c); failure to promptly notify a third party of the receipt

of funds and failure to promptly deliver funds to a third party, in violation of *RPC* 1.15(b) and *RPC* 8.4(c); false statement of material fact in connection with a disciplinary investigation, in violation of *RPC* 8.1(a) and *RPC* 8.4(c); and failure to maintain proper records, in violation of *RPC* 1.15(d) and *R*.1:21-6.

Respondent was admitted to the New Jersey bar in 1976. In 1998 he was suspended for two years for violations of *RPC* 1.3 (lack of diligence), *RPC* 1.7(c)(1) (conflict of interest), *RPC* 1.15(b) (failure to deliver funds to a third person), *RPC* 3.1 (asserting a frivolous claim), *RPC* 3.3(a) (false statements to a tribunal), *RPC* 8.1(a) (false statement of material fact in connection with a disciplinary action), *RPC* 8.4(c) (conduct involving misrepresentation) and *RPC* 8.4(d) (conduct prejudicial to the administration of justice). *In re Agee*, 152 *N.J.* 223 (1998). He has not filed a petition for reinstatement.

* * *

On June 17, 1996 Broad National Bank notified the OAE of an overdraft in respondent's trust account. Not satisfied with respondent's explanation about the overdraft, the OAE conducted an audit of his books and records. The audit, which covered the period from June 1995 through July 1996, resulted in the filing of an ethics complaint against respondent.

COUNT ONE - The Davis and Mungin Matters (Knowing Misappropriation)

Respondent represented Catherine Davis and Kathy Mungin in connection with injuries sustained in an automobile accident, while they worked for the New Jersey Division of Youth and Family Services. On September 23, 1994 respondent settled each personal injury claim for $9,000 plus interest of $810. Each client signed a release on that date. Because the settlements were funded by the Market Transition Facility ("MTF"), the payments were subject to an eighteen-month delay.

Pursuant to fee agreements with the clients, respondent was entitled to one-third of each recovery, or $3,270 for each case. About one year after the matters were settled, on September 21, 1995, respondent assigned his right to his fees in both *Davis* and *Mungin* to Emerald Funding Corp. ("EFC"), in return for $2,580 per case. EFC was engaged in the business of factoring — buying for a discounted price — settlements payable by the MTF. EFC accepted full assignments, in which both the attorney and the client sold their interests in settlements, and partial assignments, in which either the attorney's or the client's rights were sold. Because the MTF would not recognize partial assignments, EFC prepared agreements whereby respondent would receive the entire settlement from the MTF as an escrow agent. Respondent would be responsible for distributing the proceeds to the client and to EFC, having already received his discounted fee from EFC. The agreement provided that respondent would act as a fiduciary with respect to these payments, until the funds were disbursed to EFC.

In *Davis*, *Mungin* and other factored cases, EFC prepared and respondent signed the following documents: (1) letter of purchase, (2) statement of settlement and (3) assignment and warranty agreement.[1] The statement of settlement listed the gross amount of the settlement, as well as the amount of costs and attorney's fee. It also contained the following provision: "[Respondent] warrants and represents that the above Statement of Settlement is a complete and accurate list of all charges, liens and encumbrances relating to this settlement." In the assignment and warranty agreement, respondent represented that he would notify EFC within one business day of his receipt of settlement proceeds, would issue a check to EFC within one business day of the funds' availability for disbursement from his trust account and would act as a fiduciary to EFC with regard to the fee amounts.

Respondent also prepared his own version of a statement of settlement, which he gave to EFC. The statements for both cases were unsigned and dated September 15, 1995. Both provided that there were no costs or unpaid medical bills associated with the cases. The client's share of the $9,000 settlement, thus, was $6,540 (two-thirds of $9,000 is $6,000 plus $540 in interest) and respondent's portion was $3,000 plus $270 in interest.

On February 29, 1996 MTF issued two $9,810 checks, one payable to respondent and Mungin and the other to respondent and Davis, which respondent deposited in his trust account on March 5, 1996. On March 15, 1996 respondent issued two $3,270 checks to EFC,

---

[1] As seen below, instead of signing the letters of purchase, respondent directed his staff to sign his name and to acknowledge his "signature."

representing his assignment to EFC. Also on March 15, 1996 respondent issued two $4,540 checks, one to Davis and one to Mungin, and withheld $2,000 from Davis' and Mungin's settlement funds.

As seen below, between the date of the deposit and the date of disbursements, the settlement funds did not remain intact in respondent's trust account. Indeed, respondent admitted that he did not have the entire share of the client's settlements in his trust account even when he wrote each of the $4,540 checks to them.

According to respondent, he retained the $2,000 sums to pay any outstanding medical bills due to Glenwood Medical, a chiropractic office that treated Davis and Mungin and often referred clients to him. Respondent testified that it was his office practice to withhold $2,000 for any liens due to Glenwood Medical. He did not, however, produce a "letter of protection," a bill or any other proof that Davis and Mungin owed any sums to Glenwood Medical. Respondent claimed that he could not find his client files for those cases.

Respondent offered no explanation for the ultimate disposition of the $4,000 that he withheld from the *Davis* and *Mungin* settlements. It is undisputed that he never disbursed the funds to the clients, never forwarded them to Glenwood Medical and did not keep them untouched in his trust account.

As noted earlier, respondent did not dispute that, on March 15, 1996, when he issued the $4,540 checks to Davis and Mungin, he did not have sufficient funds in his trust account to cover the $4,000 withheld from both clients. Obviously, respondent could not dispute that

the funds did not remain inviolate in his trust account. Respondent's only explanation — indeed, speculation — was that the $4,000 must have served to replenish a deficiency in his trust account, caused by a mistake on his part. Although respondent was unable to trace this "mistake," he testified that "[t]hat's the only logical explanation I could give, when you don't see any funds not [sic] disbursed, is that there was a prior existing negative balance that's been offset against a positive balance."

At the ethics hearing, respondent was asked why he had not listed the $4,000 in his trust account reconciliations for March 1996 and subsequent months, if he was holding them in trust. Respondent attributed that omission to his office manager, Phyllis Williams. Respondent explained that all files and client ledger cards relating to funds that were to be kept in escrow had to be placed in a separate cabinet drawer. He would then review such files when he performed his trust account reconciliations. In this case, he claimed, the *Davis* and *Mungin* files were still in Williams' possession when he reconciled his trust records.

Respondent's client, Davis, testified that she did not know that respondent was withholding $2,000 from her settlement funds. She stated that, when she questioned respondent about the amount of her settlement check, he replied that he had retained the money for medical bills. According to Davis, although she received physical therapy from Dr. Papel of Glenwood Medical for three to four months, she never received any bills from him. She believed that her medical bills were covered by a third party. Davis confirmed that she never received the additional $2,000 and denied any consent to respondent's use of the

funds. Her understanding was that respondent would notify her when he determined whether she or Glenwood Medical was entitled to the $2,000. She asserted that, although respondent knew where she lived and worked and later represented her in another automobile accident case, she never received any additional communication from him in this matter.

* * *

Mungin testified that respondent indicated to her that he had retained $2,000 for medical bills. She also had been treated by Dr. Papel for three to four months. Mungin confirmed that she never received the $2,000 from respondent, that she did not consent to his use of the funds, that he knew where she lived and worked and that she never heard from him after March 1996.

While testifying about the *Davis/Mungin* matter, respondent casually mentioned that he had not signed the assignment and warranty agreements, but had authorized his staff to sign his name and acknowledge the "signature." The following exchange took place between respondent and the special master:

> A. I run a busy office. If I'm in court or I'm out of my office they don't hold up these documents waiting for me to come back and sign. In other words, we have procedures involved. . . . You ask me did I review this? Not necessarily. No.
>
> Q. May I see those two documents please? Mr. Agee, would you look at [the *Davis* letter of purchase]. There is a line there that says Attorney's Signature. Is that a copy of your signature, sir?

1. For the firm. No this is [my employee's – my employee] would sign it.

17. Would you look at [the *Mungin* letter of purchase] please, where it has the line on Page 2 that says Attorney's Signature. Is that your signature, sir?

1. No. It's authorized by me.

17. Was it your office policy at the time that you were factoring these to have someone in your office sign your name to these documents and then have somebody else sign the acknowledgment certifying that you had signed it?

1. That was my procedure because I would not be in the office a lot of times when these matters -- It should be -- That's why I say it's for the firm. I did authorize [my employee] to sign for me because I would not be in the office sir.

Despite respondent's testimony that the signature was "for the firm," the documents bore no such indication. They gave the appearance that respondent had signed them. Based on the above testimony, the presenter made a motion to amend the complaint to charge respondent with a violation of *RPC* 8.4(c), arguing that it was dishonest conduct for him to instruct his staff to sign his name and acknowledge the "signature." The special master denied the motion, unpersuaded that respondent's testimony constituted an admission of dishonesty. He recommended, however, that an investigation be instituted to determine whether ethics infractions took place.

COUNT TWO –The Williams Matter (Knowing Misappropriation)

Respondent represented Steven Williams in a personal injury matter that was settled for $6,000. On December 19, 1994 respondent deposited in his trust account a $6,000 check

payable to Williams and himself. The record is silent on whether Williams himself endorsed the check, since he was in jail at the time.

On October 3, 1995, more than nine months after respondent received the settlement funds, he issued a $2,750 trust account check to Williams,[2] after allegedly verifying from his records that he had not already disbursed funds to Williams. According to respondent, he did not disburse the funds sooner because Williams had been incarcerated.

Because the OAE audit period did not begin until mid-1995, no trust account records from December 1994 through June 1995 were reviewed. Respondent's own reconciliations, however, show that there were no funds held in trust for Williams during July, August and September 1995. In fact, according to the OAE's reconciliations for those three months, respondent was out-of-trust in the *Williams* matter by $1,801.71 in July, $1,342.91 in August and $2,515.91 in September. Clearly, thus, Williams' funds were not kept intact for those months.

Despite the OAE's request, respondent did not produce his client ledger card for the *Williams* matter. OAE investigative auditor Tulloch found no entry in respondent's cash receipts journal for the *Williams* funds.

Respondent claimed that, although Tulloch indicated that the deposit of the $6,000 had been made on December 19, 1994 and that $2,750 should have remained untouched in

---

[2] The record does not reveal why Williams received only $2,750 out of the $6,000 settlement.

the trust account until its disbursement on October 3, 1995, Tulloch's accounting methods were wrong. As in the *Davis/Mungin* matter, respondent contended that Tulloch's reliance on his trust account balance was misplaced, claiming that Tulloch should have reviewed his records from the "point of origin." Respondent never identified this "point of origin." In short, he had no explanation for the missing funds.

This count of the complaint also alleges that, when respondent issued the $2,750 check to Williams, he invaded other clients' funds. Specifically, the complaint charges that "[p]er the OAE's reconstructive reconciliation of [respondent's] trust account as of October 30, 1995, respondent's disbursement of check # 4088 left him out-of-trust by $2,568.19 for Williams." The OAE's reconciliation and finding of the $2,568.19 deficiency, however, related to an October 30, 1995 date. There is nothing in the record indicating the balance in the trust account as of October 3, 1995, the date that respondent issued the $2,750 check to Williams.

COUNT THREE – The EFC Matter (Failure to Safeguard Funds and Knowing Misappropriation)

As mentioned in the *Davis/Mungin* matter, respondent sold his rights to attorneys' fees to EFC, in exchange for the payment of an immediate discounted fee. Robert Michelini, counsel for EFC, testified that, between September 1994 and September 1995, respondent assigned, or "factored," thirty to forty cases with EFC, including a bulk sale on September 21, 1995 for twelve cases. Respondent assigned to EFC his right to receive fees from the

following clients: Mark Boyd, Dana Rone and Michael Parris. As in the *Davis/Mungin* matters, respondent signed an assignment and warranty agreement for each of the cases factored. Under the terms of the agreement, respondent was obligated to (1) notify EFC of the settlement, within one business day of his receipt of the settlement funds; (2) disburse the sums due EFC within one business day of the funds' availability for disbursement; and (3) act as a fiduciary for EFC and hold payments in trust until remitted to EFC.

Respondent was entitled to receive $3,742.05 in *Boyd*, $2,542.97 in *Rone* and $2,725 in *Parris* for fees, costs and interest. He assigned his interest in those sums to EFC for $2,974.09, $1,973.03 and $2,125, respectively. On September 21, 1995, as part of the bulk sale, EFC gave respondent a $26,476.77 check for his fees in these and other matters. Respondent deposited the check in his business account.

On October 3, 1995, fewer than two weeks after factoring his fee, respondent received $10,900 in funds, representing the settlement proceeds and interest in the *Boyd* matter.[3] Based on his agreement with EFC, respondent should have disbursed $3,742.05 to EFC within one business day of those funds clearing his trust account. Instead, he issued two checks for $3,333 and $300 to himself (one-third of the settlement amounts) and deposited

---

[3] When respondent was asked why he had sold his interest in a settlement that was scheduled to be paid in such a short time, he replied that, after he learned that his mother had cancer and needed money for medical bills, he instructed his office manager, Williams, to assign about one-half of the fees to which he was entitled at the time. He did not specifically instruct Williams to consider the scheduled date of payment, when choosing which fees to factor.

them in his business account. On October 31, 1995 respondent also disbursed costs of $149 to himself. If not for this deposit, respondent's business account would have been overdrawn.

Similarly, on December 6 and December 7, 1995 respondent deposited $7,630 and $8,175 in his trust account from the *Rone* and *Parris* settlements. Respondent should have disbursed to EFC $2,542.97 from *Rone* and $2,725 from *Parris*. Instead, on December 27, 1995 he issued two trust account checks to himself in the amounts of $2,543 and $2,725 (one-third of the settlement amounts) and deposited them in his business account. If he had remitted the funds to EFC for *Rone* and *Parris*, his business account would have been overdrawn.

Respondent, thus, used for his own purposes the *Boyd, Rone and Parris* funds belonging to EFC, without EFC's consent.

In an October 16, 1995 "fax," EFC reminded respondent that the *Boyd* settlement had been scheduled for payment on October 1, 1995 and that $3,742.05 had to be remitted to EFC. After EFC received no reply from respondent, on November 15, 1995 Michelini telephoned respondent's office and received assurances from his office manager, Williams, that respondent would return his telephone call. Again, respondent ignored EFC's contact. After placing three more telephone calls and not reaching respondent or Williams, Michelini sent a December 19, 1995 letter to respondent requesting that he immediately issue a check for the *Boyd* matter. Because, by that time, settlements from *Rone, Parris* and another client,

Martha Sinoe, were due, Michelini also requested the remittance of those funds, totaling more than $10,000.[4]

Having heard nothing from respondent, on January 5, 1996 Michelini called respondent's office, at which time respondent promised to send the overdue amounts. On January 22, 1996 respondent mailed to EFC an attorney business account check for $5,178.01, representing the funds due in *Boyd* and *Sinoe* only. Because the check had been issued from respondent's business account, instead of the trust account, as required by the assignment and warranty agreement, and because of the delay in payment, EFC contacted Broad National Bank and learned that respondent did not have sufficient funds in his business account to cover the check. The January 31, 1996 bank statement revealed that, as of January 22, 1996, respondent's business account was overdrawn by $1,319.37. After EFC notified respondent of the insufficient funds on deposit, on January 26, 1996 respondent sent EFC a $5,178.01 bank check to replace the business account check. EFC, thus, was paid almost four months after respondent received the settlement funds.

The funds that respondent used for the bank check to EFC came out of his trust account. The January 1996 trust account bank statement indicated a $5,178.01 debit memo on January 26, 1996. On that date, however, respondent did not have any funds in his trust account to the credit of *Boyd* or *Sinoe,* having already disbursed those sums to his clients and

---

[4] **There was no indication in the record that respondent had taken a second fee in *Sinoe* as he had in *Boyd, Rone* and *Parris.***

to himself. On that same date, respondent had deposited in his trust account a $3,000 insurance settlement check for a client named Yvonne Hall and a $1,892.85 check for another client, Sharon Gibbs. After making those deposits, respondent's trust account balance on that date, January 26, 1996, rose to $30,142.15. Because, however, there were $25,052.95 in outstanding checks at that time, the available balance in respondent's trust account was $5,089.20. He should have been holding a total of $9,948.75, however, for the following clients:

Lawrence Jones	$893.00
Joanne Harvey	2,000.00
Benjamin Garrettson	2,000.00
Ali Harvey	2,000.00
Sharon Gibbs	1,055.75
Yvonne Hall	2,000.00
Total	$9,948.75

Accordingly, respondent was out-of-trust by $4,859.55 ($9,948.75 minus $5,089.20) and invaded other clients' funds when he obtained the $5,178.01 bank check for EFC.

As mentioned above, respondent represented to EFC, on January 5, 1996, that he would send the overdue amounts in *Boyd, Rone, Parris* and *Sinoe*. Having already forwarded the *Boyd* and *Sinoe* payments — albeit three weeks after January 5, 1996 — on January 30, 1996 respondent assured EFC that he would remit the sums for *Parris* and *Rone* ($2,725 and $2,542.97, respectively) on February 1, 1996. On February 6, 1996, two months after respondent received those settlement funds, he finally forwarded to EFC a $5,267.97 bank check for *Parris* and *Rone*.

For his part, respondent contended that he had instructed staff to place the assignment and warranty agreement in the files, whenever he factored his fees. This was the only procedure respondent used to identify such cases. According to respondent, when he received the *Boyd* settlement check, he did not find a copy of those documents in the file. In addition, respondent claimed, he had no reason to suspect that he had assigned the *Boyd* fee in a case whose settlement check was supposed to arrive in two weeks from the assignment date. Moreover, respondent argued, the day that he received the *Boyd* settlement check, October 3, 1995, he was distracted by certain events, that is, Steven Williams had requested his settlement funds on that same day and respondent was scheduled to start classes at NYU film school. For the above reasons, respondent claimed, he was not aware that he had assigned his *Boyd* fee to EFC and, therefore, mistakenly issued a check to himself for one-third of the settlement amount.

Respondent stated that, after he received the *Rone* and *Parris* settlement proceeds, he reviewed those files and, once again, because there was no copy of the assignment agreement in the files, he did not realize that he had sold his interest in the fee. According to respondent, he issued the checks to himself on the day after Christmas, when his staff was out of the office.[5]

Respondent testified that, when he discovered that he had erroneously disbursed fees to himself in those cases, he issued checks to EFC. According to the following exchange

---

[5] **The checks are dated December 27, 1995.**

between respondent and the presenter, respondent did not learn until January 1996 that the *Boyd* fee, received on October 3, 1995, was owed to EFC:

> Q. When did you learn that the legal fee in Boyd had, in fact, been factored?
>
> A. I think it was sometime -- sometime in January that I finally acknowledged it.
>
> Q. Meaning that you knew that you didn't acknowledge it. What do you mean by finally acknowledging?
>
> A. When I say that, there was a letter. That letter was among many things on my desk. In other words, because I was filing the answer I was -- My time was spent in December -- from November to December filing an answer to the OAE complaint . . . . because of the time constraint there were many matters I did not tend to until January because of the urgent matter of filing an answer to the complaint against me by the OAE . . . .
>
> Special Master Callahan. Let me just interject for a moment. I thought that the other OAE complaint was served on you for the first time sometime in mid-November of that year. 1995.
>
> 1. It was November 14th, 1995. That's my birthday, but I'm saying I had 45 days to file an answer.
>
> Special Master Callahan. I understand that, but this letter is dated October [16th], approximately one month before you were served with the complaint. . . .
>
> 1. Even -- I'm still maintaining my position that I didn't become -- that I don't know whatever is going on in my office -- I still had a heavy calendar in that sense that I did. There were many matters that I did not attend to during that period of time for many different -- for other reasons as well.

With respect to the January 22, 1996 insufficient check that he issued to EFC for *Boyd* and *Sinoe*, respondent claimed that it would have been paid, if presented, because (1) his bank's practice was to call him if he had an overdraft and (2) he anticipated transferring to his business accounts

Month	OAE's Balance	Respondent's Balance
September 1995	(2,515.91)	264.59
October 1995	(2,568.19)	146.03
November 1995	(2,485.44)	149.69
December 1995	(2,334.44)	442.19
January 1996	(5,859.55)	669.80
February 1996	(8,345.55)	327.56
March 1996	(8,346.55)	383.91
April 1996	(4,679.55)	(612.86)
May 1996	(4,679.55)	(656.10)

The differences in the reconciliations primarily stemmed from respondent's understatement of — or failure to include — the amounts that he should have been holding in trust. In addition, he did not accurately list several outstanding checks and failed to produce several client ledger cards for matters in which he had failed to include client balances, such as *Williams*, *Davis* and *Mungin*, although he was able to submit ledger cards for other matters. Tulloch testified that, because respondent's computations contained errors that were consistently in his favor and because the errors were frequent and repetitive, the only logical conclusion was that the discrepancies were purposeful. The OAE argued that respondent submitted inaccurate reconciliations and failed to produce critical

client ledger cards to conceal his knowing misappropriation of client funds, in violation of *RPC* 8.1(a) and *RPC* 8.4(c).

COUNT SIX – Recordkeeping Violations

The complaint charged — and respondent admitted — the following recordkeeping infractions: failure to maintain a running balance in his attorney trust account checkbook; missing or inaccurate data in his monthly trust account reconciliations; and failure to disclose on trust records EFC's interest in client matters that had been factored, all in violation of *RPC* 1.15(a) and (b) and *R.*1:21-6.

Respondent's Defenses and Mitigating Factors

Respondent offered several defenses and mitigating factors. With respect to his lack of awareness of his actual trust account balance, respondent pointed to the following: (1) it was his practice not to open a client ledger card until he disbursed trust funds, instead of when he received them; (2) his staff failed to provide files containing client ledger cards when he reconciled his trust account, resulting in the omission of client balances from his calculations; (3) his staff failed to maintain files in the proper file cabinets, again causing the omission of client balances from his calculations; (4) he had committed simple errors, such as writing down the wrong numbers or transposing numbers on trust account reconciliations or documents; (5) as a sole practitioner, he was subject to the demands of a busy practice; (6) the time spent to prepare his answer to a prior ethics complaint, to attend film school and to study for and take the Florida bar examination kept him from tending to his law practice (respondent passed the Florida bar examination in February 1996); (7) he

became depressed as a result of the severe emotional distress caused by the 1995 OAE investigation that ultimately led to his 1998 two-year suspension; (8) his mother had become ill in 1995 and then died in March 1998; (9) he had suffered anxiety and stress caused by his decision to change careers due to the likelihood that he would be suspended; (10) his attendance at the NYU film school had caused him anxiety and stress; and (11) he was beset by various ailments, such as hay fever, sinus attacks, severe headaches and respiratory problems, resulting in surgery in 1993, 1994 and 1997.[6]

* * *

The special master found that respondent knowingly misappropriated client funds in (1) the *Davis/Mungin* matters, when he withheld $4,000 for both clients and then was unable to offer a satisfactory explanation for the disposition of the funds; (2) the *Williams* matter, when he failed to keep settlement funds intact for a period of at least three months and failed to satisfactorily account for their whereabouts during that period; and (3) in the *EFC* matters, when he remitted monies to EFC without having sufficient trust funds on deposit, thereby invading other clients' funds. The special master further found that, with respect to the *Boyd, Rone* and *Parris* matters, respondent filed to safeguard EFC's funds, failed to promptly notify EFC of the receipt of the funds, failed to promptly deliver funds to EFC and engaged in conduct involving dishonesty, fraud, deceit and misrepresentation. Although the special master noted that respondent had submitted inadequate reconciliations to the OAE, that the errors had favored respondent's position and that he had failed to

[6] **Respondent did not produce any expert testimony on this issue.**

provide the OAE with requested documents, the special master found insufficient evidence that respondent had made deliberate misrepresentations to the OAE. The special master concluded, however, that respondent had violated the recordkeeping rules.

The special master rejected respondent's defenses as mitigating factors, observing as follows:

> Respondent's defense to the charges outlined in the Complaint and at the hearing comprised, for the most part, a constellation of excuses, explanations, obsfucations [sic], deflections, evasions, prevarications and dissembling. At times Respondent's testimony was so rambling and disjointed as to be incomprehensible.

The special master recommended respondent's disbarment.

* * *

Following a *de novo* review, we are satisfied that the special master's finding that respondent's conduct was unethical is supported by clear and convincing evidence.

The Davis and Mungin Matters

In the *Davis* and *Mungin* matters, respondent withheld $4,000 from the clients' share of settlement proceeds, allegedly to pay a potential medical lien to Glenwood Medical. He failed, however, to either pay the medical provider or remit the funds to his clients. The failure to pay escrow funds to a third party under certain circumstances constitutes knowing misappropriation. *See In re Cavuto*, 160 *N.J.* 185 (1999). In that case, the attorney was disbarred for knowing misappropriation after he received settlement proceeds from a personal injury action, agreed to pay his client's health care providers from those funds, issued a check to his client for his share and disbursed the remaining funds to himself. In finding clear and convincing evidence that Cavuto knowingly misappropriated client funds, the Court stated as follows:

> Respondent either knew or had reason to know that he was invading client funds when he immediately started to issue checks to himself and failed to retain the required amount to pay his client's medical bills. The inference of knowledge is clear and inescapable.
>
> [*Id.* at 193]

See, also, In re Picciano, 158 *N.J.* 470 (1999) (attorney held $5,000 in escrow to pay client's medical bill while attorney unsuccessfully tried to obtain doctor's consent to compromise the bill; attorney's failure to retain the escrow funds intact in his trust account and his use of the funds for personal purposes was deemed knowing misappropriation of escrow funds and required disbarment).

Here, respondent retained $4,000 from the *Davis* and *Mungin* settlement funds, allegedly to pay chiropractor's bills. Yet, there was no "letter of protection" or any other indication in the file that there was a medical lien. Respondent represented to EFC that there were no charges or liens associated with these two cases. His clients were unaware of any outstanding medical bills. Nothing in the record indicates that there were such expenses. We, thus, find that his explanation was contrived. Even if we were to give respondent the benefit of the doubt in this regard, it was his obligation to retain the $4,000 inviolate in his trust account, which he did not do.

Respondent had no specific information on — or reasonable explanation for — the disposition of those funds. He merely contended that there must have been a "prior existing negative balance" that offset the $4,000. He had no explanation for this "prior existing negative balance."

After the presenter establishes a *prima facie* case of knowing misappropriation, if the respondent asserts a defense, the burden of proof shifts to the respondent to show that he or she has not committed that infraction. Here, respondent did not discharge that burden.

Based on respondent's failure to maintain the $4,000 intact in his trust account, we find that he knowingly misappropriated client trust funds in the *Davis* and *Mungin* matters.

The Williams Matter

In *Williams*, too, there is clear and convincing evidence that respondent knowingly misappropriated client trust funds. On December 19, 1994 respondent deposited a $6,000 settlement check in his trust account. More than nine months later, on October 3, 1995, he issued a $2,750 trust account check to his client. In the interim, however, during July, August and September 1995, respondent failed to maintain the $2,750 in his trust account. He, thus, knowingly misappropriated Williams' funds by using them without his client's consent.

In his defense, respondent criticized Tulloch's accounting methods, claiming that rather than relying on the trust account balance, Tulloch should have reviewed the records from some unidentified "point of origin." Respondent further asserted that, because he was in a rush to attend film school, he had hurriedly reviewed his banking records to determine whether Williams was owed the funds. According to respondent, he reviewed the deposit slip and bank statement to confirm that the $6,000 had indeed been deposited into his trust account. He then examined his check stubs to determine whether he had previously issued a check to Williams. He thus had sufficient information at the time he issued the check to conclude that Williams was owed $2,750. Yet, the record shows that, for at least three months in 1995, respondent failed to maintain the $2,750 untouched in his trust account. He

produced no evidence of the disposition of these funds. As in *Davis* and *Mungin*, respondent failed to discharge his burden of proof.

As to the knowing misappropriation of other client funds, however, the record does not contain any indication of the amount of respondent's trust account balance as of October 3, 1995, the date he issued the $2,750 check to Williams. The only evidence introduced on this issue showed that, as of October 31, 1995, respondent had a shortage of $2,568.19. Although the complaint charged that respondent knowingly misappropriated other clients' funds to pay Williams, it is possible that, on October 3, 1995, respondent's trust account had sufficient funds to cover the check and that the shortage appeared after that date. Because there was no clear and convincing evidence that, by issuing the check to Williams, respondent invaded other clients' funds, we dismissed that charge of knowing misappropriation.

The EFC Matter

In the *EFC* matters, in a number of cases respondent assigned to a factoring company his interest in his legal fees. Respondent's procedures for identifying which cases were factored consisted of simply reviewing the file for a copy of the assignment and warranty agreement. According to respondent, because there was no copy of the agreement in the *Boyd*, *Rone* and *Parris* files, he did not realize that he had assigned his fee, when he disbursed the settlement proceeds. As a result, respondent issued the fees to himself, instead

of to EFC. He, thus, obviously failed to safeguard the funds belonging to EFC, to whom respondent owed a fiduciary duty, pursuant to their agreement.

Even after respondent agreed on January 5, 1996 to pay EFC the overdue amounts in *Boyd*, *Rone*, *Parris* and *Sinoe*, he failed to timely honor his own deadlines. He did not remit the *Boyd* and *Sinoe* funds until January 22, 1996, when he issued an insufficient business account check, in violation of his agreement with EFC requiring a trust account check. Respondent finally remitted a bank check on January 26, 1996 to EFC, four months after the *Boyd* funds were due. He did not pay EFC for the *Rone* and *Parris* matters until February 6, 1996, two months after he had received the settlement funds and one month after he had agreed to make payment.

Moreover, when respondent used trust funds to obtain the bank check for the *Boyd* and *Sinoe* fees, he invaded other clients' funds. As of the date of the bank check, January 26, 1996, respondent should have been holding $9,948.75 in trust for six clients. After the $5,178.01 debit memo for the EFC bank check, he retained only $5,089.20 in his bank account and was out-of-trust by $4,859.55. Respondent's explanation for invading other clients' funds was that he believed that he had retained $10,000 in fees in his trust account, enough to cover the check to EFC and the $4,380 in fees that he took on January 22, 1995. As noted in the factual recitation, however, three of the ten fees identified by respondent had already been disbursed to him, two were received after he issued the January 22, 1995

business account check to EFC and the remaining five totaled only $3,630, an amount obviously insufficient to cover the $5,178 check to EFC.

We, therefore, find that respondent's invasion of other clients' funds when he paid EFC constituted the knowing misappropriation of client funds.

Willful Blindness

In addition, we find that respondent's conduct in the *Davis, Mungin, Williams* and *EFC* matters 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. 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 establish knowing misappropriation of client funds. In response to the attorney's argument that her bookkeeper and accountant were to blame for the shortages in her trust account, the Court remarked as follows:

> The fact that respondent may have permitted her bookkeeper to sign checks drawn on the trust account does not mitigate the seriousness of her breach of professional responsibility. 'Lawyers may not absolve themselves of the misappropriation of client funds by delegating to employees the authority to complete signed checks and then failing to supervise these employees.' *Irizarry, supra,* 141 *N.J.* [189] at 193, 661 *A.*2d 275.
>
> [*In re Pomerantz*, *supra*, 155 *N.J.* at 136]

Here, respondent failed to keep a running trust account checkbook balance, failed to maintain contemporaneous trust account records and invaded client funds in *Davis, Mungin, Williams* and *EFC*. He placed a greater priority on other matters, such as attending film school and taking the Florida bar examination, than on safeguarding his clients' funds. Moreover, his computations contained errors that were not only consistently in his favor, but also frequent and repetitive. As the Court stated in *In re Fleischer*, 102 *N.J.* 440, 447 (1986), "[w]e are not confronted here with an isolated or even an occasional bookkeeping mistake. . .

. Lawyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds."

We, thus, find respondent guilty of willful blindness in the *Davis, Mungin, Williams* and *EFC* matters.

Misrepresentations to the OAE

With respect to misrepresentations to the OAE, the complaint charged that respondent presented inaccurate trust reconciliations that (1) excluded client trust funds or understated client trust balances and (2) either excluded checks or understated outstanding check amounts. The presenter argued that respondent knowingly submitted the inaccurate trust reconciliations to conceal the negative balances in his trust account from June 1995 through July 1995. The presenter further maintained that respondent intentionally failed to produce the client ledger cards for *Davis, Mungin* and *Williams* to conceal his knowing misappropriation of client funds in those cases.

There is no doubt that respondent submitted inaccurate trust reconciliations and that he failed to produce the client ledger cards in certain cases. In light of our finding of knowing misappropriation, however, we need not determine whether respondent did so intentionally, in violation of *RPC* 8.1(a) and *RPC* 8.4(c).

Recordkeeping Violations

Respondent admitted that he failed to maintain a running balance in his trust account checkbook, prepared inaccurate monthly trust account reconciliations and failed to disclose on trust records EFC's interest in client matters that had been factored. We, thus, find that he violated *RPC* 1.15(d) and *R.* 1:21-6.

Motion to Amend the Complaint

As noted above, the special master denied the OAE's motion to amend the complaint to include an additional charge of a violation of *RPC* 8.4(c), based on respondent's testimony that he instructed his staff to sign his name and acknowledge the "signature." His actions constituted misrepresentation because he misled those reviewing the documents to believe that he had signed them and, furthermore, that the acknowledgment had been taken with all the necessary formalities. Although respondent was not specifically charged with a violation of *RPC* 8.4(c), the record developed below contains clear and convincing evidence of a violation of that *RPC.* Indeed, it was respondent's own testimony that brought the misconduct to light. Respondent did not object to the admission of such evidence in the record. In light of the foregoing, we deemed the complaint amended to conform to the proofs, *R.* 4:9-2, *In re Logan*, 70 *N.J.* 222, 232 (1976), and find a violation of *RPC* 8.4(c).

* * *

One other point warrants mention. Questions about respondent's credibility arose during the hearing. For example, he claimed that, even though EFC wrote to him in October and December about the *Boyd* fee, he did not "acknowledge" the letter until January. Respondent contended that, because he had been served with a disciplinary complaint that required an answer to be filed in December, he was distracted and did not read his mail or tend to his practice as carefully as he should have. As pointed out by the special master, however, the disciplinary complaint was not served on respondent until November 14, 1995, almost one month after EFC "faxed" an October 16, 1995 letter to him. Respondent's explanation for ignoring the October letter, thus, was based on a false premise.

In addition, although neither the *Davis* nor the *Mungin* files contained a letter of protection or any indicia that there was a medical lien on the settlement proceeds, and despite respondent's preparation of a statement of settlement representing that there were no charges or liens, he insisted that Glenwood Medical had a lien on the funds.

Moreover, respondent failed to maintain a running balance in his trust account checkbook. When questioned about this practice, respondent adamantly refused to concede that the chances of creating an overdraft would be reduced if he had maintained a running balance. In light of respondent's training and employment as an accountant, his testimony in this regard was less than reliable.

Furthermore, although respondent claimed that various distractions, such as his mother's illness, his own health problems and the prior ethics complaint kept him from focusing on his practice, he passed the Florida bar examination and earned a "B plus" in film school during this time, thereby demonstrating an ability to concentrate on other tasks.

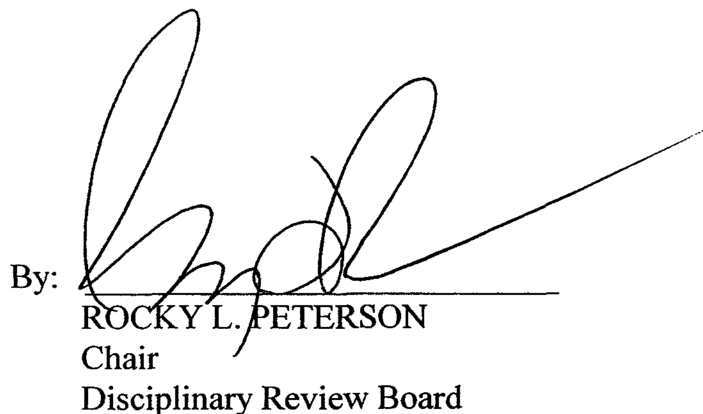
Because we find that respondent knowingly misappropriated client or escrow funds, under *In re Wilson*, 81 *N.J.* 451 (1979) and *In re Hollendonner*, 102 *N.J.* 21 (1985), he must be disbarred. In *Wilson, supra*, the Court announced the bright-line rule that knowing misappropriation of client funds will, almost invariably, result in disbarment. The Court placed the highest priority on the maintenance of public confidence in the Court and in the bar, such that "mitigating factors will rarely override the requirement of disbarment." *Id* at 461. Although the use of such terms as "almost invariable" and "rarely override" raised the possibility of a departure from the automatic disbarment rule, since 1979, the *Wilson* rule has been applied without exception. Every attorney who has been shown to have knowingly misappropriated client funds has been disbarred. In *Hollendonner, supra,* the Court extended the *Wilson* rule to escrow funds.

Moreover, even in the absence of a finding of knowing misappropriation or willful blindness, disbarment is warranted based on the totality of respondent's egregious wrongdoing. Respondent has a prior two-year suspension for, among other things, false statements to a tribunal, false statement in connection with a disciplinary action, conduct involving misrepresentation and conduct prejudicial to the administration of justice. He was

served with the complaint in that matter on November 14, 1995. Notwithstanding his knowledge that the disciplinary authorities had charged him with serious violations of the ethics rules, he continued to engage in unethical conduct, as demonstrated by the within ethics offenses.

For the protection of the public, as well as for the preservation of the integrity of the bar and the judicial system, respondent must be disbarred. We, thus, unanimously voted to recommend his disbarment. 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 R. Wesley Agee
Docket No. DRB 01-097

Argued: July 19, 2001

Decided: January 11, 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

Robyn M. Hill 1/16/02

Robyn M. Hill
Chief Counsel