SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 03-396

IN THE MATTER OF	:
VINCENT E. BEVACQUA	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 29, 2004

Decided: March 4, 2004

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Thomas R. Ashley appeared on behalf of respondent.

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 (two-year suspension) filed by Special Master Kenneth R. Stein, J.S.C. (retired).

Respondent was admitted to the New Jersey bar in 1990. Following his graduation from law school, he obtained a judicial clerkship. From 1990 through 1994, he was an associate in a law firm. From 1994 through the spring of 1999, he was a partner in the firm of Winkler, Bevacqua & Simmons. When that partnership dissolved, respondent and Kimberly Tyler opened

the law firm of Bevacqua & Tyler. That association lasted from June 1999 to March 2000. Respondent is currently a sole practitioner in South Orange, New Jersey.

In 2002, respondent was reprimanded for misconduct in three matters, including gross neglect, pattern of neglect, lack of diligence, failure to communicate with clients, failure to explain matters to the extent reasonably necessary to permit clients to make informed decisions about the representation, failure to provide written retainer agreements, failure to promptly return a client's file, and assistance in the unauthorized practice of law (respondent allowed a lawyer not admitted in New Jersey to conduct a deposition in New Jersey). Mitigating factors were respondent's relative inexperience at the time of the infractions and the lack of venality on his part.

The complaint charged respondent with violations of RPC 1.15(a) (knowing misappropriation), RPC 1.15(c) (failure to safeguard client funds), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) (first count); RPC 1.7(a) (conflict of interest; client's representation directly adverse to another client), RPC 1.7(b) (conflict of interest; client's representation materially limited by the lawyer's responsibilities to another client), RPC 1.4(a) (failure to communicate with the client), and RPC 1.4(b) failure to explain matters to the extent reasonably necessary to permit the client to make informed decisions about the representation) (second count); and RPC 1.15(a) (failure to safeguard trust funds) and RPC 1.15(d) (failure to comply with Rule 1:21-6) (third count).

(1) The Knowing Misappropriation Charge (Count One)

At the time of the alleged knowing misappropriation of client's funds, respondent and Kimberly Tyler were law partners. Respondent alone was responsible for the maintenance of the law firm's books and records. Admittedly, the firm's accounting practices were woefully deficient. Respondent testified that, when he formed his association with Tyler, he was unaware of the recordkeeping rules and, in fact, "wouldn't even know where to look for [them]." During the firm's nine-month existence, respondent delegated his recordkeeping duties to his father, an employee of the firm. According to respondent, his father would come to the office once or twice a week to maintain the firm's books and records. As detailed below, however, the father's bookkeeping practices were grossly inadequate.

In February 2000, respondent settled a case on behalf of a client, Theodore Bryant. On February 4, 2000, respondent deposited Bryant's $10,000 settlement draft in his trust account. Bryant's net share of the settlement was $7,500; the $2,500 balance represented respondent's fee. According to respondent's trust account check stub, on February 2, 2000, respondent issued trust account check No. 1167 to Bryant, in the amount of $7,500.[1] Bryant did not present the check for payment until March 29, 2003. Bryant testified that he did not need the money. On March 30, 2003, the check was returned for insufficient funds. The bank's overdraft notification to the OAE spurred an investigation that ultimately led to the OAE's charge of knowing misappropriation.

[1] Although the check bears a date of February 8, 2000, this circumstance is not relevant to the charges against respondent.

On April 20, 2002, respondent replied to the OAE's request for an explanation about the overdraft. Respondent's letter stated that, after Bryant advised him that the check had not arrived by mail, he instructed Bryant to call him in a few days if he still had not received the check. Not having heard from Bryant, a few weeks later he called the bank and found out that the check had not been presented for payment. Accordingly, he "stopped payment on the check and withdrew the funds to protect Mr. Bryant's funds from fraud." As seen below, that statement was inaccurate and respondent so admitted at the hearing below.

Apparently dissatisfied with respondent's explanation about the overdraft, the OAE scheduled a demand audit of Bevacqua & Tyler's attorney records. The initial audit took place on August 3, 2000, and continued on August 23, 2000. The audit uncovered the following recordkeeping deficiencies, which respondent stipulated:

- separate ledger sheets were not maintained for each client.
- a schedule of clients' ledger accounts was not prepared and reconciled to the bank statement.
- deposit slips lacked sufficient detail to identify each item of deposit.
- trust account deposit slips were not maintained in accordance with generally accepted accounting practices.
- a running cash balance was not kept in the trust account checkbook.
- the trust account was used as a business account and the business account designation was improper.
- receipts and disbursements journals for the trust and/or business accounts were not maintained.

The audit also revealed – and respondent so stipulated – that respondent routinely used his trust account to pay personal and office expenses. Respondent's explanation for this improper practice was that he avoided using his business account to pay such expenses because, in February 2000, there had been an unlawful levy on his business account funds. Respondent claimed that he kept sufficient legal fees in the trust account to cover his personal and business expenses.

It is undisputed that, on March 29, 2000, respondent's trust account check to Bryant, in the amount of $7,500, was returned for insufficient funds. It is also undisputed that Bryant's funds were not kept inviolate in respondent's trust account. Respondent's trust account statement shows that, on March 8, 2000, the account balance fell below $7,500 ($7,175.49 on that date). On March 29, 2000, the balance dropped to $3,831.77. The formal ethics complaint alleges that respondent knowingly invaded Bryant's funds.

Respondent denied the charge, blaming the funds' invasion on his poor bookkeeping practices and a levy on his business account funds on February 24, 2000. Respondent claimed that, because of his inattention to his recordkeeping responsibilities, he had only a "ballpark idea" of his trust account balance.

As to the levy, which, according to respondent, caused his inadvertent use of Bryant's funds, respondent explained that Primo Moving & Storage, Inc. ("Primo") had obtained a $7,574.67 judgment against his former law firm, Winkler, Bevacqua, Simmons & Greene. His own funds had been improperly seized to satisfy the firm's debt to Primo. There had been other

unlawful levies prior to February 24, 2000, but he trusted that his then-partner, Kimberly Tyler, was taking appropriate action to correct the problem.[2]

Between February 22 and February 29, 2000, respondent was in Jamaica, on a family vacation. Upon arriving in Jamaica, he wire-transferred $5,000 from his trust account to his business account. The $5,000 represented an earned legal fee in a matter titled Cureton. When respondent attempted to withdraw a fairly large portion of his business account funds at an ATM machine in Jamaica, he was unsuccessful. Later, he was able to get small amounts ($5.08, $50.75, $187.79, and $380.65). According to respondent, he assumed that the transfer had not gone through and that the $5,000 remained in his trust account; he thought that he was "spending the money that had been in [the business account] prior to the transfer." Unbeknownst to him, the $5,000 transfer had gone through and, on February 24, 2000, there had been a levy on $4,257.55 in his business account, bringing the account balance to zero. Respondent testified that, mistakenly believing that his $5,000 fee was still in his trust account, he began to use it for personal and business purposes when he returned from Jamaica, thereby causing the unknowing invasion of Bryant's funds.

Respondent further testified that, immediately after his return, he began to move his office to another location and did not review his mail during the entire moving process. He had seen a notice from his bank about a prior levy on February 14, 2000, but could not recall when he had seen it. Or on about March 10, 2000, he "may have gotten a call from the bank" and "began to realize that there was a problem." As of March 8, 2000, he "didn't have an idea what [his] running balance was, at least an accurate perception of what [his] running balance was . . . ." On March 10, 2000, respondent placed an order to sell his AOL stock to "put back

[2] During an interview by the OAE investigator, Tyler confirmed that she had filed a motion opposing the turnover of the "funds" (presumably respondent's).

the money that had been levied". Respondent did not, however, deposit the sale proceeds in his trust account. When he learned from Bryant, on April 4, 2000, that the $7,500 check had been dishonored, he gave Bryant $7,500 in cash on April 5, 2000.[3]

The OAE took the position that respondent's use of Bryant's funds was either knowing or the result of willful blindness, in either case warranting disbarment. According to the OAE, respondent had to know that the $5,000 sum had been removed from his trust account and that he was utilizing client trust funds to pay for his own expenses. This was so, the OAE argued, because, on February 22, 2000, when respondent left for Jamaica, his business account balance was -$1.18 and respondent knew about this overdraft because, according to the bank statement, he made an "inquiry" on that date, presumably about the account balance; therefore, he had to know that any future withdrawals could only have been made against the $5,000. According to the OAE, respondent also had to know about the ensuing levy because Kimberly Tyler told the OAE investigator that respondent knew that his accounts "were being levied," and because prior levies on his account had "alerted him to the existence of the levy." Moreover, the OAE pointed out that, after March 10, 2000, respondent continued to use his trust account to pay personal and office expenses, thereby causing further invasions of Bryant's funds. By being on notice of prior levies and by failing to pay even casual attention to his trust account records, "respondent chose to remain 'willfully blind' to the true state of his account." Therefore, the OAE concluded, respondent must be disbarred under In re Fleischer, 102 N.J. 440 (1986) ("It is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using client's trust funds." Id. at 447); In re Skevin, 104 N.J. 476 (1986) "(The concept [of willful blindness] arises in a situation where the party is aware of the highly probable existence of a

[3] Exhibit 15 is a receipt signed by Bryant on April 5, 2000.

material fact but does not satisfy himself that it does not in fact exist . . . . The proposition that willful blindness satisfies for a requirement of knowledge is established in our cases." Id. at 486); and In re Davis, 127 N.J. 118 (1992) ("The intentional and purposeful avoidance of knowing what is going on in one's trust account will not be deemed a shield against proof of what would otherwise be a 'knowing misappropriation.'" Id. at 130).

We noted that, on February 23, 2000, while respondent was in Jamaica, there was a $300 deposit to his trust account. On March 10 and March 13, 2000 – after respondent learned of a shortage in his trust account – two $10,500 deposits were made into the trust account.

As to respondent's initial letter to the OAE, dated April 20, 2000, stating that he had removed Bryant's $7,500 funds from his trust account to protect them from "fraud" and from a levy by a creditor, respondent conceded at the hearing below that the statement was "poorly worded inaccurate."

(2) The Jennings Matter (Count Two)

According to stipulation of facts executed by respondent and the OAE, respondent represented Ruth Jennings in a personal injury suit arising out of an automobile accident. On or about March 5, 1995, respondent filed a complaint on Jennings' behalf. On that same date, he filed a complaint against Jennings, on behalf of Kevin Fooks, a passenger in Jennings' car.

Respondent did not notify Jennings that he had filed a suit against her and did not advise her of the risks involved in his representation of two parties with conflicting interests.

The formal ethics complaint charged respondent with violations of RPC 1.4(a) (failure to keep the client reasonably informed about the status of the matter), RPC 1.4(b) (failure to explain

the matter to the extent reasonably necessary to permit the client to make informed decisions about the representation), RPC 1.7 (a) (representation of clients with conflicting interests), and RPC 1.7(b) (conflict of interest; client's representation materially limited by the lawyer's responsibilities to another client).

(3) The Recordkeeping Violations (Count Three)

As noted earlier, the OAE audit revealed numerous recordkeeping deficiencies, which respondent stipulated. In addition, respondent testified extensively about his poor accounting practices.

Specifically, respondent asserted that, when he was a partner at Winkler, Bevacqua, Simmons & Greene, Winkler was responsible for the maintenance of the firm's accounts. Respondent's involvement was limited to "periodically" writing "a handful" of trust account checks. When the Bevacqua & Tyler partnership was formed, he assumed responsibility for the firm's recordkeeping. In July 1999, he opened the firm's trust and business accounts. He did not refer to the recordkeeping rule because "[a]t that time I wouldn't even know where to look for [it] . . . ." His father would come to the office once or twice a week to do the firm's bookkeeping, including the reconciliations of the trust and business account.[4] Respondent's involvement in the review of his trust account books and records was "minimal to none." Admittedly, he did not open and review his trust account statements, leaving that task to his father.

[4] The OAE investigator, however, testified that there were no reconciliations of the trust account bank statements to the client ledger sheets.

Respondent's father's accounting practices were grossly deficient, however, as illustrated by the trust account receipts and disbursements journal from September 1999 through May 2000. According to respondent, most of the handwriting on that document is his father's, although respondent himself made some entries. The maintenance of that journal was woefully inadequate. Not only should there have been separate journals for the receipts and the disbursements, but the entries were not fully descriptive in many instances. For example, certain entries did not list either a payee, a date, the amount of the check, or a running balance. Similarly, not all deposits and withdrawals were recorded on the journal. Hence, the journal did not accurately reflect the balance in the trust account. According to respondent, however, he did not rely on that journal to determine his trust account balance:

> [Presenter] If you weren't relying upon this document, Exhibit O-31, in order to tell you what the balance was in your trust account, at any one time, how did you have any idea what the balance was in your trust account?
>
> [Respondent] As a businessman and an attorney trying to commence my own firm, run my own show, if you will, I simply did not have the time or the ability to stay on top of these numbers. I knew in my heart that I was making enough money, and as long as my father didn't come to me and say, son, we have a grave problem, I continued to operate and do what I had to do. And the short answer is, at times I did not know, but I did not -- I did not check regularly.
>
> [2T134-2T135.][5]

The special master found no clear and convincing evidence of knowing misappropriation, concluding that respondent's use of Bryant's funds was the result of "a gross negligence in Trust Account management and a failed attempt to conduct a law practice without maintaining adequate records."

[5] IT denotes the transcript of the hearing on July 31, 2003.
2T denotes the transcript of the hearing on August 1, 2003.

In the Jennings matter, the special master found that respondent represented clients with conflicting interests, in violation of RPC 1.7(a) and RPC 1.7(b).

The special master found the following aggravating factors: (1) respondent made a false statement of material fact to the OAE, when he claimed that he had withdrawn Bryant's funds to protect them from fraud; (2) although, on March 10, 2000, respondent knew of problems in his trust account, he continued to transfer funds from the trust account to his business account and to pay personal and office expenses directly from the trust account; and (3) although respondent gave Bryant $7,500 in cash on April 5, 2000, there was no corresponding withdrawal from either the trust account or the business account.[6]

The special master recommended that respondent be suspended for two years, take ICLE courses on trust account management or a substantially equivalent course, and, upon reinstatement, either practice law under the supervision of a proctor approved by the OAE or provide the OAE with quarterly audits prepared by a certified public accountant.

Following a de novo review of the record, we find that the evidence clearly and convincingly establishes that respondent's conduct was unethical. Like the special master, we do not find, however, that respondent intentionally misappropriated Bryant's funds.[7]

According to the OAE, respondent had to know that the $5,000 transfer had gone through and that there had been a levy of these funds in his business account. The OAE argued that, in the face of such knowledge, respondent's continuing practice of using his trust account to pay personal and office expenses meant that he intended to avail himself of Bryant's funds, which

[6] The significance of this finding is not clear.

[7] Although paragraphs 17 and 22 of the complaint make reference to "other client funds," the evidence was limited to the misappropriation of Bryant's funds.

were still being held in his trust account. The OAE's contentions were based on the following: (1) because respondent made a balance inquiry on February 22, 2000, just prior to his cash withdrawals in Jamaica, he had to know that his business account was overdrawn by $1.18; therefore, any withdrawals after February 22, 2000 could only have been made against a new infusion of funds, that is, the $5,000 transfer; (2) since respondent knew that his business account had been the subject of prior levies, he had to know that the $5,000 had been transferred to his business account and then seized one more time; (3) because respondent could not have reasonably believed that the $5,000 remained in his trust account, his continuing use of the account for personal purposes constituted a knowing misappropriation of Bryant's funds.

We find that, although it is possible – or even likely – that the OAE's contentions are correct, it is equally possible that respondent's explanations are truthful. If it is true, as respondent contended, that he did not make a balance inquiry on February 22, 2000, he might not have known that his business account balance was overdrawn by $1.18. Without the bank's confirmation that the "inquiry" notation on the account statement meant a balance inquiry, there is no clear and convincing evidence that respondent was aware of the negative balance in the account. Furthermore, because respondent made a $300 deposit to the business account on February 23, 2000, and because he did not keep accurate records, he might have reasonably believed that the small withdrawals made on February 23 and February 24, 2000 were funded by the $300 deposit and by other personal monies contained in the account.[8] Indeed, respondent testified that he thought that he was spending "other monies that had been in the account, which, unbeknownst to me, had also been levied prior to my leaving for Jamaica."

---

[8] The withdrawals made after February 25, 2000 were covered by a $1,000 transfer to the business account on that date.

In order to obtain a clearer picture of the accounts' transactions, a reconstruction of respondent's records would have been helpful. For instance, since the OAE alleged that, after March 10, 2000, respondent continued to misappropriate Bryant's funds by using the trust account to pay his personal expenses despite his knowledge that his trust liability to clients exceeded the funds in the account, the evidence had to clearly and convincingly establish that respondent was not entitled to the funds that he spent. The proofs had to demonstrate that any deposits made after that date belonged entirely to clients and that respondent was not entitled to any portion of these deposits as fees. Yet, the record is either unclear or silent in this regard. Although respondent testified that the two $10,500 deposits, made on March 10 and March 13, 2000, corresponded to settlements in two matters (Green and DeRose), it is not known how much respondent was entitled to receive as fees. There was some testimony that respondent's fee in the Green matter was about $3,500, but nothing was said about his fee in DeRose. To say that it was $3,500 as well would only be a conjecture, since the nature of the matter and the fee arrangement are unknown. Respondent, thus, might have reasonably believed that the funds that he withdrew after March 10 were his own.

According to the trust account bank statement for March 2000, respondent spent $12,921.72 from the account after March 10, 2000. The balances of the two $10,500 settlements, after the disbursements to the clients ($5,800 to Green and $4,200 to DeRose), amounted to $11,000. There is no evidence that there were outstanding costs and expenses to be satisfied from the settlement amounts. It is, therefore, possible that respondent's share of the Green and DeRose settlements amounted to $11,000. If respondent was not aware of the exact balance of the trust account because of his poor recordkeeping practices, he might not have known that he was spending more than he had. It is also possible that, although he might have

had a fairly precise idea of the trust account balance, he believed that the balance already reflected the negotiation of Bryant's $7,500 check, which had been given to Bryant early in February. As noted earlier, it was not until April 4, 2000 that Bryant informed respondent of the return of the check.

We are mindful that all of the above are suppositions. Although the record raises a suspicion that respondent's actions were knowing, it does not clearly and convincingly show that respondent knew that he was misappropriating Bryant's funds and that he intended to do it. As stated in In re Konopka, 126 N.J. 225, 234 (1991) (citations omitted),

> [w]e 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) (citations omitted), 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.'

In some situations, the requirement of knowledge may be satisfied if the attorney knew that the invasion of clients' funds was a likely result of his or her conduct. In re Skevin, supra, 194 N.J. 476 (1986). In Skevin, the attorney had a practice of advancing to himself fees in personal injury cases, before the receipt of the settlement proceeds. During a six-month period, the attorney was out of trust in amounts ranging from $12,000 to $133,000. The attorney claimed that he had relied on substantial personal funds left in his trust account. The special master who heard that case concluded that the attorney knew that he was withdrawing clients'

funds from commingled accounts each time that he drew his own fee or made disbursements in advance of receiving settlement checks. The time periods were sometimes significant – as long as months between the advance and the receipt of the check. Also, the amounts withdrawn were substantial, ranging from hundreds of dollars to thousands. The special master reasoned that these two facts led to the unavoidable inference that the attorney knew that he was endangering other clients' funds that were in the commingled accounts. The Court agreed. The Court found that, because the attorney did not maintain an accounting or running balance of his own funds in the trust account, each fee advance "posed an at least realistic likelihood of invading the accounts of another client since respondent had no way of knowing what the balances were." Id. at 485. Characterizing the attorney's conduct as willful blindness, the Court equated that state of mind with intent. "Such cases should be viewed as acting knowingly and not merely as recklessly." Id. at 486. The Court ordered the attorney's disbarment.

In a recent case, In re Riva, 172 N.J. 232 (2002), cited in the OAE's brief to us, the Court disbarred an attorney who, five days after placing a $92,500 real estate deposit in his trust account, began to invade those funds by disbursing "fees" to himself. During a three-month period, the attorney made thirty-three "fee" withdrawals, causing a $24,000 shortage in his trust account. The attorney's defense was that he mistakenly believed that he had deposited $30,000 in his account, a fee for performing legal services for his father. The attorney claimed that, because of his deficient bookkeeping practices, he was unable to detect his mistake promptly. According to the attorney, after his trust account was the subject of a levy arising from a default judgment against him, he reviewed his records and learned about the missing $30,000 deposit. He explained that he did not redeposit the money because he feared another levy. As pointed out by the presenter in that case, however, the attorney had made six other deposits after the levy.

We found a general lack of credibility on the attorney's part, particularly because his father had no recollection of having given him $30,000 for legal services, and because the attorney himself had presented conflicting versions of the events surrounding the $30,000 deposit. We concluded that the attorney had knowingly misappropriated the deposit monies. The Court agreed. The attorney was also found guilty of willful blindness because, as a result of his shoddy recordkeeping, he did not know with certainty whether there were sufficient funds to cover any trust account disbursements.

It is clear, however, that "shoddy bookkeeping alone does not suffice for a finding of knowing misappropriation." In re Davis, supra, 127 N.J. 118, 127 (1992). "Although an attorney's records may reveal repeated and frequent instances of being out of trust, that circumstance does not necessarily constitute *knowing* misappropriation." Id. at 127.

In a case that led to a three-month suspension, In re Gallo, 117 N.J. 365 (1989), the Court found no clear and convincing of knowing misappropriation or of willful blindness, despite the attorney's poor accounting procedures. There, the attorney took over another lawyer's practice, which included over 200 files in a state of complete disarray. The attorney's recordkeeping practices mirrored those of a prior employer, who paid all of his operating expenses from his trust account. The attorney assumed that his employer's bookkeeping methodology was an appropriate way to keep attorney records. The attorney left his fees in his trust account, never kept a running balance of the account, and never used client ledger cards. The attorney, thus, never knew exactly how much money was in the trust account or to whom the funds belonged. If the attorney believed that the trust account balance was too low to pay for his office expenses, he occasionally deposited his own funds in the trust account. As a result of his inadequate bookkeeping practices, the attorney invaded clients' funds on numerous occasions. In addition,

two checks drawn on his trust account were returned for insufficient funds. The OAE asserted that the return of those checks signaled to the attorney that his clients' funds were being spent improperly and that an invasion of clients' funds was a likely result of his conduct. The Court disagreed. The Court found that, unlike the attorney in In re Fleischer, supra, 102 N.J. 440 (1986), who designed a bookkeeping system that prevented him from knowing whether he was using clients' trust funds, Gallo followed the practices of his former employer, was unfamiliar with basic principles concerning the management of trust accounts, and apparently had no knowledge of the current balance in his trust account. The Court found no evidence of knowing misappropriation, but concluded that Gallo's misconduct was inexcusable and deserving of a three-month suspension.

In another case, In re James, supra, 112 N.J. 580 (1988), the Court also declined to find knowing misappropriation, as urged by the OAE, and, instead of disbarment, imposed a three-month suspension on an attorney whose poor accounting procedures caused the invasion of clients' funds. In that case, the attorney was out of trust on numerous occasions, at times for as long as four years. The attorney had a practice of leaving substantial fees in his trust account. He used his 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 did not maintain separate ledger cards for each client, failed to maintain receipts and disbursements journals, and failed to reconcile the trust account bank statements with the trust account ledger. For twenty-four years – and without incident – the attorney followed the same business practices and accounting procedures learned from his legal mentors. In essence, the attorney used his trust account as a second business account, paying client expenses and employee payroll taxes out of that account. Whenever the trust account balance approached an insufficient level to satisfy

outstanding obligations, the attorney's secretary transferred funds from his business account to his trust account. On several occasions, the secretary informed the attorney that the trust account balance was insufficient to satisfy client obligations. Instead of reviewing his books to discover the reason for the deficiency, the attorney simply cured the shortage with funds from his business account. Since no checks ever bounced, the attorney assumed that the trust account contained sufficient funds to cover the checks written. The attorney's personal solvency and successful law practice were never at issue. He simply did not know how to manage his attorney records (his bookkeeping improprieties were discovered through the OAE's Random Audit Program). The Court found that the attorney had "in good faith perpetuated an inadequate system that led to negative balances in his trust account," id. at 591, and that any misappropriation of clients' funds was negligent, rather than knowing. Balancing the length of time spanned by the attorney's conduct and the serious level of his negligence against the strong mitigating factors presented, the Court found that a three-month suspension was the appropriate measure of discipline for the attorney's ethics offenses.

In yet another instance, In re Konopka, supra, 126 N.J. 225 (1991), the Court refused to disbar an attorney who, according to the OAE, was guilty of knowing misappropriation of clients' funds. There, for a period of three weeks, the attorney failed to keep a client's funds intact. In addition, another client's ledger (the client was the Konopka family) showed a balance of $153.81 and then, two lines down, two $500 disbursements. The attorney had handwritten the entries for the balance and for the disbursements. Yet, no deposits were made to cover these excessive disbursements until sixty days later. As a result of the disbursements, trust funds were invaded on twenty-six instances, over three years. The Court found that "[t]here [was] simply no proof of when Konopka made the 'balance forward' entry in relation to the issuance of the

checks." Id. at 230. Concluding that the invasion of clients' funds was the product of the attorney's serious inattention to his recordkeeping responsibilities, the Court imposed a six-month suspension.

The question here is whether respondent's conduct was the product of intent, willful blindness, or merely gross negligence. We find that the OAE has not discharged its burden of proving by clear and convincing evidence that respondent's conduct was knowing and deliberate. In our view, the two bases for the OAE's argument – that respondent's $187.79 and $380.65 withdrawals in Jamaica could only have been made against the $5,000, and that respondent had to be aware of the February 24 levy because of prior levies – are insufficient to support a finding of knowing misappropriation. The proofs do not clearly and convincingly demonstrate that respondent was aware of the -$1.18 balance in his business account, when he made the above withdrawals. Neither do they establish that respondent knew, at that time, about the February 24 levy. We cannot find, thus, that respondent was fully aware that the $5,000 was no longer in his trust account and that his continuing use of the trust account for personal purposes constituted a knowing misappropriation of Bryant's funds.

The next question for us to decide is whether respondent's shoddy bookkeeping practices reflected intentional ignorance or true lack of knowledge of the recordkeeping rules. The test is whether respondent knew that his conduct "posed an at least realistic likelihood of invading the accounts of another client . . . ." In re Skevin, supra, 104 N.J. at 485. As noted above, the attorney in Skevin had a practice of withdrawing fees or disbursements in advance of receiving settlement checks. For a period of six months in 1982, the attorney's trust account shortages ranged from $12,000 to $133,000. The Court found that the attorney knew that an invasion of trust funds was a likely result of his conduct. Otherwise stated, the attorney "was aware of the

highly probable existence of a material fact but [did] not satisfy himself that it [did] not in fact exist." Id. at 486. Unlike the attorney in Skevin, respondent did not disburse fees to himself prior to receiving settlement checks; the funds of only one client, Bryant, were affected; and the trust account shortage lasted a short time: from March 8 to either March 10, 2000, at the earliest (when respondent sold his AOL stock), or to April 4, 2000, at the latest (when he gave Bryant $7,500 in cash). We, therefore, find that the record does not clearly and convincingly support a finding of intentional ignorance or willful blindness.

Unquestionably, however, respondent was inexcusably careless – worse yet, reckless – in the observance of his recordkeeping obligations. His position that he did not even know where to look for the recordkeeping rules is indefensible. One of the primary responsibilities of practicing attorneys is the maintenance of records required by Rule 1:21-6. This responsibility is nondelegable. In re Barker, 115 N.J. 30, 36-37 (1989). Yet, respondent completely relegated the performance of his bookkeeping duties to his father. Moreover, he made his father's job difficult by not informing him of certain trust account withdrawals. That more clients' funds were not invaded was simply fortuitous. After a careful, independent review of the record, we conclude that respondent's invasion of Bryant's funds was the result of his atrocious accounting procedures, and, therefore, the product of ignorance and neglect, rather than intent and deliberation.

As mentioned earlier, the special master found, as an aggravating factor, that respondent made a false statement of material fact to the OAE when he stated, in his letter of April 20, 2000, that he had removed Bryant's funds from his trust account to protect them from fraud. Presumably, the special master considered it an aggravating factor, instead of an RPC violation, because the complaint did not charge respondent with this impropriety. We agree with the

special master's finding. The evidence does not support respondent's contention that his statement was merely inaccurate, as opposed to knowingly false.

Finally, it is undisputed that, in the Jennings matter, respondent improperly filed a complaint on behalf of the driver of the car and then sued his client, the driver, on behalf of the passenger. His conduct violated RPC 1.7(a) (representation of a client with interests directly adverse to the interests of another client). Although the special master also found a violation of RPC 1.7(b), RPC 1.7(a) is more applicable to respondent's conduct. RPC 1.7(b) encompasses situations where the lawyer's representation of a client is materially limited by his or her responsibilities to another client. RPC 1.7(a), on the other hand, applies to the representation of clients with directly adverse interests, as here. We, therefore, dismiss the finding of a violation of RPC 1.7(b). We also dismiss the allegations that respondent violated RPC 1.4(a) and RPC 1.4(b). We find no evidence that respondent failed to communicate with either client or failed to explain matters to them to the extent reasonably necessary to allow them to make informed decisions about the representation.

There remains the issue of the appropriate discipline for this respondent. Generally, an admonition or a reprimand is imposed for recordkeeping deficiencies and negligent misappropriation, even if the attorney also commingled personal and client funds. See , e.g., In the Matter of Bette R. Grayson, Docket No. DRB 97-338 (May 27, 1998) (admonition imposed where the attorney had deficient recordkeeping practices and failed to prepare quarterly reconciliations of client ledger accounts, resulting in the negligent misappropriation of client trust funds in eleven instances); In the Matter of Joseph S. Caruso, Docket No. DRB 96-0076 (May 21, 1996) (admonition imposed where the misrecording of a deposit led to a trust account shortage and the attorney committed a number of violations in the maintenance of his trust

account); In re Blazsek, 154 N.J. 137 (1998) (reprimand where the attorney negligently misappropriated client funds and failed to comply with recordkeeping requirements); In re Goldstein, 147 N.J. 286 (1997) (reprimand where the attorney negligently misappropriated client funds as a result of recordkeeping deficiencies); In re Liotta-Neff, 147 N.J. 283 (1997) (reprimand where the attorney negligently misappropriated client funds after commingling personal and client funds); In re Gilbert, 144 N.J. 581 (1996) (reprimand where the attorney negligently misappropriated in excess of $10,000 in client funds and violated the recordkeeping rules, including commingling personal and trust funds and depositing earned fees into the trust account; the attorney also failed to properly supervise his firm's employees with regard to the maintenance of the business and trust accounts); and In re Marcus, 140 N.J. 518 (1995) (reprimand where the attorney negligently misappropriated client funds as a result of numerous recordkeeping violations and commingled his and his clients' funds; the attorney had received a prior reprimand; the attorney's lack of awareness that the account was out of trust, his subsequent adoption of proper recordkeeping procedures, his successful completion of a two-year proctorship, following his previous reprimand, and the absence of loss to any client were considered as mitigating factors).

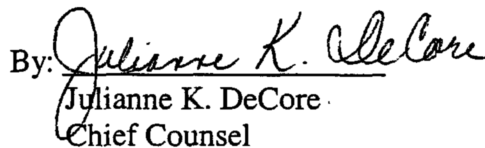
Respondent's conduct warrants more than a reprimand, however. His recordkeeping procedures were not merely careless – they were extremely reckless. Moreover, his negligent misappropriation of Bryant's funds was not the product of one mistake, such as, for instance, a misdeposit, but the result of his pattern of noncompliance with the recordkeeping rules. Finally, respondent created a conflict of interest by representing clients with adverse interests. Cases involving conflict of interest alone, absent egregious circumstances or serious economic injury to the clients, result in a reprimand. In re Berkowitz, 136 N.J. 134, 148 (1994). An attorney who,

like respondent, represented the driver and the passenger of a car involved in an accident received a reprimand. In re Nadel, 147 N.J. 559 (1997) (reprimand imposed on attorney who represented a driver in a suit against the driver of another vehicle, and then represented the passenger in a suit against both drivers).

After consideration of the relevant circumstances, which include respondent's false statement to the OAE as an aggravating factor and his prior reprimand, we determine that a six-month suspension is the appropriate degree of discipline for his misconduct. Prior to reinstatement, respondent should provide proof of completion of ICLE courses on attorney accounting procedures. Following reinstatement – and for a period of two years – respondent should submit annual trust account audits, certified by an accountant approved by the OAE. Two members did not participate.

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

Disciplinary Review Board
Mary J. Maudsley, Chair



By: Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

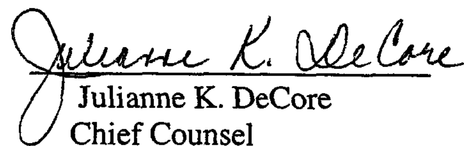
In the Matter of Vincent E. Bevacqua
Docket No. DRB 03-396

Argued: January 29, 2004

Decided: March 4, 2004

Disposition: Six-month suspension

Members	*Disbar*	*Six-month Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley		X					
O'Shaughnessy							X
Boylan		X					
Holmes		X					
Lolla							X
Pashman		X					
Schwartz		X					
Stanton		X					
Wissinger		X					
Total:		7					2



Julianne K. DeCore
Chief Counsel