SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-359
District Docket No. XIV-03-588E

IN THE MATTER OF

GEORGE J. COTZ

AN ATTORNEY AT LAW

Decision

Argued: November 18, 2004

Decided: December 14, 2004

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Kim D. Ringler and Frederick J. Dennehy 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 on a recommendation for disbarment filed by Special Master Terry P. Bottinelli. We originally heard this matter, under Docket No. 03-149, on

September 11, 2003, on a recommendation for disbarment filed by Special Master Melinda L. McAllister, based on her finding that respondent had knowingly misappropriated client funds. On September 19, 2003, we remanded the matter for a limited hearing to give respondent an opportunity to present proofs in support of his defense that he reasonably believed that he had retained sufficient funds of his own in his trust account to cover the disbursements that gave rise to the charges of knowing misappropriation.

The four-count complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with knowing misappropriation of client funds, a violation of RPC 1.15(a) and RPC 8.4(c) (count one); conflict of interest, by borrowing money from clients, a violation of RPC 1.8(a) (count two); breach of an escrow agreement, a violation of RPC 1.15 and RPC 8.4(c) (count three); and recordkeeping improprieties, violations of RPC 1.15(d) and Rule 1:21-6 (count four). At the conclusion of the original hearing, Special Master McAllister allowed the presenter to amend the complaint to include the following additional charges, based on respondent's testimony during the ethics hearing: RPC 3.3(a)(1) and (4) (candor toward a tribunal), RPC 3.4(a) and (c)

(fairness to opposing party and counsel), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent was admitted to the New Jersey bar in 1974. He has no disciplinary history.

In this matter, respondent borrowed $75,000 from a friend and admitted that, he invaded other clients' funds, when he repaid the loan by means of a trust account check. Although the OAE contends that this misappropriation was knowing, respondent argues that it was merely negligent, based on his mistaken belief that he had an additional $18,000 in his trust account. For the reasons expressed below, we determine that the misappropriation was negligent and that, for the violations present here, the appropriate level of discipline is a six-month suspension.

Respondent admitted the allegations of counts two and four, that is, that he borrowed funds from clients without following the safeguards required by RPC 1.8(a), and that he violated the recordkeeping rules. He denied the remaining allegations.

On January 20, 1999, the OAE received a notice from Fleet Bank that respondent's trust account was overdrawn. On January 28, 1999, the OAE asked respondent for an explanation of the overdraft. In his February 19, 1999 reply, respondent admitted

that he had issued a trust account check knowing that he did not have sufficient funds in the account. That admission prompted the OAE to conduct a March 16, 1999 demand audit of respondent's books and records. After the audit, the OAE requested additional records, which respondent submitted on various dates, from March through May 1999. On October 30, 2000[1], the OAE advised respondent that the demand audit would continue on December 1, 2000. Respondent submitted the requested documents to the OAE before, during, and after the December 1, 2000 demand audit.

On August 11, 1998, respondent borrowed $75,000 from an attorney friend, Donald Reeder, for a down payment on the purchase of a house. Respondent placed the $75,000 in his business account. Before the deposit, his business account balance was $321.57. Because other checks were posted in the interim, after the deposit, the balance was only $72,321.57. Although the purchase of that particular house did not proceed to completion, Reeder permitted respondent to retain the funds while he continued to look for another house. Respondent drew against at least $12,000 of those funds to satisfy unrelated

[1] The record does not explain this lengthy delay in the investigation.

obligations, leaving in his business account $63,000 of the $75,000 loan.

On September 28, 1998, respondent signed a contract to buy another house and issued business account check number 200 for $63,000 as a down payment. The balance in his business account was only $37,444.47, however. Aware that his business account balance was insufficient to cover the $63,000 check, respondent issued check number 1807 from his trust account for $28,000 and deposited it in his business account, increasing that balance to $65,444.47. According to respondent, the $28,000 belonged to his client, Frank Gallo. Gallo had retained respondent for a collection matter and had orally authorized respondent to borrow any funds that respondent might collect in Gallo's behalf. The Gallo client ledger card confirmed that respondent was holding $28,450.52 to Gallo's credit. The term of the loans was to be "until Gallo asked for it." This $28,000 loan was not documented by a writing. The OAE did not dispute that respondent had Gallo's consent to the use of the $28,000.[2]

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[2] Although Gallo did not respond to the OAE's letters, Gallo's daughter notified the OAE, during the investigation in 2001, that her father, who was ninety years old at the time and residing in Florida, had authorized the loan to respondent and did not wish to participate in the ethics matter.

At about that time, however, respondent's trust account had an $18,766.33 deficiency. The account contained only $14,342.04, when it should have had $32,408.37 for all of respondent's clients. The complaint charged that this $18,000 shortage evidenced knowing misappropriation of client funds. According to the reconciliation prepared by the OAE auditor, respondent should have held the following sums in his trust account:

Client	Amount
Whippany	$13,920.00
Adams	12,280.00
Ritchie	3,000.00
Lesko	2,200.00
Gallo	430.50
Respondent	77.87
Total	$32,408.37

On October 1, 1998, three days after respondent had issued the $63,000 check for the down payment, Reeder told respondent that he was having "second thoughts" about the loan and asked respondent to return the $75,000 to him until the closing on respondent's house. By this time, respondent had realized that he could not afford the house he was intending to buy. He, therefore, should have canceled the real estate contract and returned to Reeder the remaining $63,000 as partial payment for the $75,000 loan. Instead, on October 1, 1998, respondent issued business account check number 202 for $63,000 and deposited it

in his trust account. His stated purpose was to preserve the funds in his trust account. Because check 202 for $63,000 cleared almost immediately, business account check 200, which respondent had issued for the $63,000 down payment, was returned for insufficient funds on October 6, 1998, when it was presented for payment.

On October 2, 1998, respondent issued a $75,000 trust account check to Reeder, knowing that the check would be returned for insufficient funds because he was aware that his trust account balance was lower than $75,000. He claimed that his purpose in giving a $75,000 check to Reeder was to placate him. As respondent expected, the $75,000 check was returned for insufficient funds. This is the overdraft that prompted Fleet Bank to contact the OAE. Because the $75,000 check was never cashed, it did not cause an invasion of clients' funds.

On October 7, 1998, after Reeder called respondent about the returned check, respondent gave Reeder a $65,000 cashier's check drawn against respondent's trust account funds, as partial payment of the $75,000 loan. That check was backed by the $63,000 funds that were still in respondent's trust account and, allegedly, by $2,000 in fees that respondent had left in the account. As detailed below, the OAE disputed respondent's

contention that he had – or could have reasonably believed that he had – $2,000 in fees left in his trust account. The complaint charged that this $2,000 shortage constituted another incident of knowing misappropriation.

Respondent gave the following account of these events. He and his wife were interested in buying a house. In late spring 1998, he borrowed $75,000 from Reeder. He expected that, by the end of 1998, he would receive fees of more than $100,000 from contingent matters and intended to use those monies to repay Reeder. Respondent claimed that, after the first real estate purchase was canceled, Reeder agreed that respondent could retain the borrowed funds for a down payment on another house.

Respondent explained the circumstances surrounding his issuance of the $75,000 trust account check to Reeder, knowing that it would not clear:

> Impulsively, and for no reason, rather than just putting a stop payment on the check I had written for the deposit and writing Don a new check, on October 1st I took the money out of [the business] account and put it into my trust account. I then wrote Don a trust check for the full $75,000, knowing that I did not have $75,000 in that account to cover his check. Writing this check, which I knew would not clear, was simply a misguided effort to temporarily satisfy Don's concerns. The bank bounced his check and notified the OAE of the overdraft. Don called me when the check was returned to

him, and on October 7th I got a $65,000 cashier's check on my trust account and gave that to Don in partial payment. I believed that I had at least that much of my own money in that account at that time.

The reason that I thought I had $65,000 of my own money in my trust account (including the $63,000 house deposit money which I had just transferred) was that for some time I had been not withdrawing fees from trust that I was entitled to. I was trying to build up some money in the trust account to use for this house purchase, and I was under the impression that I had accumulated substantial funds of my own there. I have since learned that I had not accumulated as much as I thought, because some checks that I had cashed in my business account, which did not clear, were charged back to this account.[3] I had not been reconciling my trust account on a regular basis, and was not aware of this.

[Exhibit C-3.]

In turn, the presenter challenged respondent's belief that his trust account contained at least $2,000 in fees, which, added to the $63,000 funds, would have covered the $65,000 cashier's check. The OAE investigator testified that, in 1998, respondent had thirty-six client matters. Thirty-two of those matters had been closed and the fees disbursed to respondent

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[3] As seen below, when several business account checks were returned for insufficient funds, Fleet Bank improperly charged those sums to respondent's trust account.

before September 30, 1998.[4] Of the remaining four active files, respondent had already taken one fee on September 8, 1998, and disbursed the remaining fees to himself on December 12, 1998, January 10, 1999, and February 8, 1999. The presenter argued, therefore, that respondent could not have reasonably believed that he maintained sufficient fees in his trust account because he had already removed all the fees from the account.

Respondent conceded that he had written the check for the down payment on the house to please his wife, who was pressuring him to buy a bigger house.

On October 9, 1998, he presented himself to the emergency room of Good Samaritan Hospital, reporting that he was depressed and had thoughts of suicide. Respondent was admitted to the hospital, where he remained for three days. Upon discharge, he was prescribed anti-depressants. During 1998 and 1999, respondent borrowed trust funds from the following clients: Frank Gallo, Peter Hadjiyerou, Ira Zalel, and Mark Thomas. The complaint charged that respondent admitted, during the March 16, 1999 audit, that he had failed to document the loans, to advise the clients to seek independent counsel, and to obtain the clients' written consent to the transactions. In respondent's

[4] The $65,000 cashier's check was issued on October 7, 1998.

answer to the complaint, although he claimed that he had documented the Zalel loan, he admitted the remaining allegations. The complaint also alleged that respondent had borrowed funds from another client, Jack Levin. Respondent denied that allegation.

As mentioned above, respondent was authorized to borrow Gallo's funds until Gallo asked for them. Respondent treated the Gallo funds as a "line of credit," without informing Gallo when he took the funds, the amount he took, or when he repaid the loan.

After respondent received the OAE's January 28, 1999 letter about the overdraft, he discovered that he had an $8,000 shortage in his trust account. On March 1, 1999, respondent borrowed $8,500 from a client, Peter Hadjiyerou, and deposited the funds in his trust account. Respondent admitted that he did not prepare a loan agreement, did not advise Hadjiyerou to consult another attorney, and did not obtain Hadjiyerou's written consent to the loan. Although respondent conceded that he had failed to follow the procedure mandated by RPC 1.8(a), he claimed that Hadjiyerou, a friend, had attended law school for two years and that he had lent money to Hadjiyerou in the past without signing a note. Respondent contended that, because

Hadjiyerou was a sophisticated client, respondent was not required to comply strictly with the requirements of RPC 1.8(a).

In 1996 or 1997, respondent borrowed $10,000 from a former client, Ira Zalel, to pay outstanding debts. Respondent contended that he had signed a promissory note and provided the OAE with an unsigned copy. Again, he asserted that, because Zalel was a retired attorney, and therefore, an experienced and sophisticated client, respondent had not taken advantage of Zalel in the loan transaction.[5]

Although the presenter alleged that respondent had also borrowed funds from another client, Jack Levin, respondent vehemently denied this allegation at the hearing, contending that he had lent funds to Levin instead. In late October 1998, respondent represented Levin in a mortgage closing. The closing was delayed until January 1999, while Levin obtained the necessary documents. On December 24, 1998, respondent deposited the $50,000 mortgage proceeds in his trust account. After he made necessary disbursements, a balance of $41,000 remained. On January 12, 1999, respondent issued two checks to Levin, one for $11,000 and the other for $2,000. Levin endorsed the $11,000

[5] The presenter pointed out that Zalel was a disbarred, *not* a retired, attorney. Respondent claimed that he did not know about Zalel's disbarment.

check to respondent. Respondent left $28,000 in his trust account to repay Gallo. Notwithstanding these disbursements, the client ledger card indicated that respondent disbursed $41,000 to Levin.

At the hearing, respondent pointed out that the RESPA statement for Levin indicated that, from the closing funds, Levin was required to satisfy a $45,000 mortgage to respondent. According to respondent, he agreed to accept $39,000 to satisfy that debt, disbursed $11,000 to himself, and applied the remaining $28,000 to his debt to Gallo.

During the hearing, respondent conceded that the RESPA was dated October 26, 1998, presumably the original settlement date, although the closing did not take place until January 12, 1999. He also acknowledged that the Levin client ledger card erroneously indicated that $41,000 was disbursed to Levin, when, in fact, respondent received $39,000 (an $11,000 check plus the $28,000 left in his trust account and applied to the Gallo loan). As seen below, Levin obtained the mortgage to repay respondent in connection with events concerning an individual named Bradford Liva.

In 1994, Bradford Liva filed an ethics grievance against respondent, alleging that he had breached an escrow agreement.

On July 8, 1994, the District IIA Ethics Committee dismissed the grievance because Liva had filed a civil lawsuit and the OAE's policy is not to consider ethics matters during the pendency of civil litigation. The committee secretary informed Liva that he could file another grievance upon the conclusion of the litigation. Apparently, Liva failed to do so and the grievance remained dormant until the OAE included it in the present complaint.

In 1990, respondent represented Levin, a real estate developer, in a mortgage foreclosure against Liva. Levin and a partner had sold Liva a house and taken back a mortgage. Liva had defaulted on the mortgage. Although the parties reached a settlement whereby Liva would pay $100,000 to Levin and his partner, Liva could pay only $90,000 at the time of the settlement. The remaining $10,000 was to be paid at a later date. In a December 12, 1991 letter to respondent, Liva's attorney enclosed a $90,000 check, with the following instructions:

> The check is tendered with the understanding same will be held in escrow until I am in receipt of the following documents:
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> - Fully executed discharge of mortgage or mortgage endorsed for cancellation. I note that the original mortgage had apparently been assigned to Vincent Hubin. Please account for this assignment

> by delivering a reassignment from Hubin to Levin or have Hubin discharge the mortgage.
>
> - General Release in favor of Brad Liva from Jack Levin and Allendale Park associates.
>
> - Stipulation of Dismissal to be filed with the Court . . . .
>
> Finally, it is my understanding that payment of the final $10,000.00 will be negotiated directly between Jack Levin and Brad Liva and will not otherwise interfere with the settlement of this action.
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> [Exhibit C-6.]

On December 13, 1991, respondent, who was affiliated with a law firm at the time, deposited the check in the firm's trust account. Four days later, he issued two checks to the firm, totaling approximately $3,000, to reimburse the firm for costs. In addition, although he issued another check to the firm for an $18,354.50 fee, for the reasons stated below, he did not negotiate the check until January 14, 1992. Pursuant to Levin's instructions, between January 3 and January 7, 1992, respondent disbursed about $5,400 to satisfy Levin's outstanding obligations.

As noted on the letter from Liva's attorney, Levin had assigned part of the mortgage to Vincent Hubin. On January 10, 1992, the day before respondent's wedding, Levin asked respondent to release the remaining escrow funds. Respondent

refused to do so without Hubin's written consent. According to respondent, Levin represented that, although Hubin had signed a document consenting to release the partial assignment, Levin had left the document at home. Levin, a longtime friend of respondent, promised to bring Hubin's written consent either later that day or the next day, at respondent's wedding. Based on Levin's representation, respondent disbursed the remaining proceeds, including the December 17, 1991 check for his firm's fees that he had been holding. As it turned out, Levin had not obtained Hubin's consent to release the partial assignment. Thus, although Liva had settled the foreclosure lawsuit, the mortgage remained as a lien against his property.

When Hubin discovered that respondent had disbursed the escrow funds despite the assignment of mortgage, Hubin sued respondent. Respondent borrowed $45,000 from his parents to pay Hubin. After respondent satisfied Levin's debt to Hubin, the Liva mortgage was discharged.

Levin gave respondent a promissory note for $45,000 for the Hubin debt that respondent had paid. As noted above, Levin obtained a mortgage in January 1999 to satisfy the $45,000 debt to respondent.

Respondent testified that he had no knowledge of the assignment of the mortgage to Hubin. That document, however, was prepared and witnessed by respondent. When confronted with the mortgage assignment, respondent testified that he did not recall it.

At the hearing below, the presenter stated that, although the Liva grievance had been dismissed earlier, he could not ascertain the reason for the dismissal. According to the presenter, if the grievance had been dismissed based on a finding that respondent's conduct was not unethical, the charge that respondent had breached an escrow agreement could be dismissed on double jeopardy grounds; but if the matter had been administratively dismissed, the presenter could proceed with the allegations of unethical conduct. Respondent testified that he had retained an attorney to represent him in connection with the Liva grievance and that his attorney had informed him that the matter had been dismissed, following a determination that his conduct was not unethical.

On the next hearing day, the presenter pointed out that, on March 19, 1999, three days after the demand audit, respondent had supplied the OAE with a copy of the July 8, 1994 letter dismissing the grievance, due to pending civil litigation. The

presenter then accused respondent of misrepresenting the reason for the dismissal. Because the July 8, 1994 letter indicated that a copy had been sent directly to respondent, the presenter also questioned respondent's testimony that he had been represented by counsel. Included in the documents that respondent sent to the OAE on March 19, 1999, however, was a copy of a June 15, 1994 letter from respondent's attorney to the ethics committee. It appears, thus, that respondent was represented by counsel in the Liva grievance.

In his answer to the complaint, respondent contended that he was not obligated to retain intact the entire $90,000 settlement until a discharge of the mortgage was prepared, because the payment of the $10,000 balance could be delayed for a long time. According to respondent, he was required to retain only Hubin's interest of $45,000. When the presenter pointed out at the hearing that respondent's version was directly contrary to the express instructions contained in Liva's attorney's letter of December 12, 1991, respondent stated that it was his understanding that the discharge could not be issued until the full $100,000 had been paid and that he could release all but $45,000 of the escrow funds.

Respondent had been the subject of a random audit of his trust and business accounts on August 25, 1995. On April 15 and April 24, 1996, respondent certified to the OAE that he had corrected the deficiencies disclosed by the audit. The March 16, 1999 demand audit, however, revealed the following deficiencies in respondent's recordkeeping, all of which had been previously identified in the 1995 audit:

- a running balance was not maintained in the trust account checkbook;
- client trust ledgers were not fully descriptive;
- excess personal funds remained in the trust account;
- the trust account designation was improper;
- a trust receipts book was not maintained;
- a trust disbursements book was not maintained;
- three-way reconciliations of the attorney trust account were not maintained;
- the attorney business accounts receipts journal was not fully descriptive; and
- earned legal fees were not deposited in the attorney trust account.

During the March 16, 1999 demand audit, respondent admitted that he sometimes cashed trust account checks to himself, when he should have been depositing them in his business account first. He also admitted that he commingled personal and trust

funds by depositing in his trust accounts funds unrelated to his law practice.

At the hearing, the presenter was permitted to amend the complaint as follows:

- <u>RPC</u> 8.4(c) This amendment was based on respondent's preparation of a RESPA statement in the Levin matter that did not reflect the true nature of the transaction.
- <u>RPC</u> 3.4(a) (attorney shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document), <u>RPC</u> 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and <u>RPC</u> 3.3(a)(4) (failure to make reasonable diligent efforts to comply with legally proper discovery requests by an opposing party). At various times during the hearing, respondent was asked whether he had supplied to the OAE particular documents in discovery. Respondent replied that the documents had not been specifically requested or that he had not deemed them to be relevant. Moreover, in his brief to the special master, respondent contended that the OAE had never

requested discovery. The presenter pointed out that not only had the OAE requested discovery in its standard letter serving the complaint, but also respondent had replied that discovery would follow.

- RPC 3.3(a)(1) (false statement of material fact or law to a tribunal). This amendment was based on respondent's testimony that (1) the Liva grievance had been dismissed because of a determination that his conduct had not been unethical, when it had been dismissed because of pending civil litigation, and (2) he had been committed to a psychiatric institution, when he had voluntarily admitted himself to the hospital.

On remand, the following additional facts were presented. While in law school, respondent was employed as a law clerk for a firm that eventually hired him as an associate upon his admission to the bar in 1974. Respondent became a partner eight years later. In 1994, after an association of more than twenty years with the firm, respondent left and established a solo practice. For the first time, respondent was responsible for operating his own business. Until September 2003, respondent had

never taken an accounting course. Respondent's support staff consisted only of a part-time secretary.

In addition to his law practice, respondent had substantial family responsibilities in 1998, the year in which the misappropriation occurred. Because respondent's wife was attending law school in the evening, respondent was required to be at home by four o'clock in the afternoon to assume child care responsibilities for the couple's young daughter and his stepsons and, to a lesser extent, his sons. Respondent appeared in courts in both New York and New Jersey virtually every day. His practice included collection cases, personal injury litigation, real estate closings, matrimonial cases, bankruptcy, and criminal matters. He also performed pro bono work for victims of domestic violence, for a women's shelter, and for the Ramapo Indian tribe. Respondent usually brought work home.

As a result of respondent's obligations to his clients and to his family, he began to feel overwhelmed and his recordkeeping suffered. Although respondent entered deposits and debits in a trust account ledger, he did not enter information in his trust account checkbook, did not maintain a running balance in the checkbook, did not maintain a trust receipts or disbursements journal, and did not reconcile his trust account.

Although respondent corrected the deficiencies noted during the 1995 random audit and complied with the recordkeeping requirements for a period of time, he fell behind in these obligations and did not catch up.

In 1998, respondent became interested in relocating to a new home for several reasons: he thought he could generate more business if he lived in the same community where his office was located; he was concerned for his daughter because his next door neighbor allowed his Rottweiler to run loose; and he wanted his daughter to start first grade in a good school system in 1999.

Respondent explained the circumstances of the loan to him made by a client, Frank Gallo. Gallo was a friend who retained respondent, in 1996 or 1997, to file a lawsuit to enforce a promissory note received upon the sale of a diner. Shortly after retaining respondent, Gallo was sued in a separate matter in which he expected to pay a substantial amount of money. Gallo instructed respondent to retain the funds collected from the diner lawsuit for future use to pay the settlement or damage award in the second case. Gallo authorized respondent to borrow the funds until the funds had to be paid for the second case. Respondent did not maintain written records of the sums that he borrowed from Gallo, relying instead on his memory. It was not

until December 1998 or early 1999, after the misappropriation, that respondent reconstructed the Gallo loans in a writing, introduced into evidence as Exhibit C-22.

According to respondent, in 1998, he recalled that he had borrowed about $19,000 from Gallo and that he had repaid that amount. He claimed, however, that he either had forgotten that he had borrowed $9,000 in 1997, or thought that he had repaid those funds to Gallo. In any event, he failed to account for an additional $9,000 that he had borrowed from Gallo. When he created a summary of the Gallo loans, he realized that he had borrowed a $9,000 sum that he had not repaid.

At the time that he created the loan summary, respondent also discovered that, in 1998, when he had issued checks from his business account without sufficient funds, Fleet Bank had charged those deficiencies to his trust account, without his knowledge or consent. Respondent testified that, because he was not reviewing his trust account statements, he was not aware of these "chargebacks." Exhibit C-22, prepared by respondent, reflected that Fleet Bank had charged his trust account $10,548.67 between January 15 and July 24, 1998. According to respondent, these funds, along with the $9,000 that he

unknowingly owed Gallo, explain the $18,000 shortage in his trust account.

Respondent, thus, stated that, in September 1998, he believed that he was holding $28,000 (the $9,000 borrowed in 1997 plus the $19,000 borrowed in 1998) in his trust account on behalf of Gallo, and that those funds were available for his use. When Reeder asked respondent to return the $75,000, stating that he felt more comfortable holding the funds until respondent's real estate closing, respondent was too embarrassed to admit that he did not have the full $75,000 to return to Reeder. Respondent issued a $75,000 check from his trust account to Reeder, knowing that the check would not be honored. According to respondent, he hoped to gain a few days to find a way to explain to Reeder that he had used part of the loan funds. Respondent then deposited $2,350 of his own money into his trust account to add to the $63,000 that he had transferred from his business account, and, with those funds, obtained a cashier's check for $65,000 that he gave to Reeder, explaining that he would repay the $10,000 balance at a later time. Reeder informed respondent that the bank would notify the OAE that respondent's trust account check had been dishonored.

Respondent stated that he became distraught over this series of events, i.e., the potential liability from canceling the real estate transaction, the neighbor's dog posing a threat to his daughter's safety, his debt to Reeder, and the possible disciplinary consequences of issuing a bad check from his trust account. Respondent began entertaining thoughts of suicide and, on October 9, 1998, went to the emergency room of Good Samaritan Hospital in Suffern, New York. According to respondent, although he admitted himself voluntarily, he signed a document requiring that he stay at the hospital for seventy-two hours. Respondent was discharged three days later, on October 12, 1998.

Since 1998, respondent has made changes in both his personal and professional life. He accepts fewer collection, personal injury, and real estate matters, so that his trust account activity is greatly reduced; he reconciles his trust account monthly; he has accepted a salaried position as the village attorney in Sloatsburg, New York; and his wife has become his law partner.

At the ethics hearing, Reeder confirmed that, in the summer of 1998, he lent respondent $75,000 to purchase a home, that he had asked for the return of the money, and that respondent's trust account check had been dishonored. He testified that

respondent eventually repaid the loan in full and that he would lend money to respondent again if respondent needed a loan. According to Reeder, although he lent the $75,000 for respondent to use as a down payment, he did not limit respondent's use of the money to that specific purpose. Reeder referred clients to respondent in the past and continued to do so as of the time of the hearing. He volunteered to serve as respondent's proctor, if that condition is imposed.

Respondent presented other witnesses at the hearing. His wife and law partner, Lydia Cotz, testified that respondent's reputation in both the legal profession and in his community is outstanding. She also confirmed that, during 1998, respondent felt overworked and overwhelmed by his professional and personal obligations.

Thomas Williams, an attorney, testified that he has known respondent for almost twenty years, that he refers cases to respondent, that he retained respondent to represent him in a refinance, and that respondent has an excellent reputation in the legal community.

Respondent's rabbi, Sam Waidenbaum, testified that, within his congregation, respondent's reputation for honesty and integrity is excellent.

In addition to the testimony from the above witnesses, respondent submitted "character" letters from thirty-four individuals, including ten attorneys, eleven clients, six businesspersons, three family members, his secretary, and Rabbi Waidenbaum. All indicated that respondent is an honest and decent man and requested that he be permitted to continue to practice law.

Respondent also presented the testimony of Dr. David J. Gallina, a neuropsychiatrist. Dr. Gallina examined respondent on July 9, 2003, five years after the misappropriation, and issued a report on July 13, 2003, opining that respondent was suffering from a "moderately severe major depression" at the time of the evaluation. Dr. Gallina described respondent's symptoms as a lack of interest in normal activities, lack of motivation, insomnia, fatigue, loss of energy, feelings of worthlessness, feelings of guilt, feelings of failure, diminished ability to think clearly or to concentrate, and indecisiveness. Dr. Gallina opined that respondent's depression, coupled with his poor management skills and lack of organizational ability, contributed to his disciplinary situation.

Dr. Gallina stated that respondent's difficulties existed over a long period of time, that his depression predated the

events in 1998, and that he suffered from chronic depression over the years, which "contributed further to the mismanagement of his life."

According to Dr. Gallina, if respondent had not admitted himself, the hospital would have initiated involuntary commitment proceedings, in light of respondent's suicidal thoughts. He asserted that the hospital had respondent sign a letter requiring him to remain in the hospital for seventy-two hours, and that, although respondent asked to leave, the hospital did not permit him to sign out against medical advice.

Special Master Bottinelli concluded that, on September 29, 1998, when respondent transferred $28,000 from his trust account to his business account, he created a shortage in excess of $18,000 because his trust account balance was only $14,000, when he should have been holding more than $32,000 for four clients, plus his own funds. The special master determined that respondent knowingly, rather than negligently, invaded client funds, noting that respondent had not offered any factual basis for his claim that he believed that he had enough personal funds in the trust account.

Following a _de novo_ review of the record, we are satisfied that the special master's finding that respondent's conduct was

unethical is supported by clear and convincing evidence. We are unable to agree, however, with the special master's conclusion that respondent's invasion of clients' funds was knowing.

At the initial hearing before the first special master, respondent contended that he believed that he had enough funds of his own in the trust account to cover the checks he had issued. After we remanded the matter to permit respondent to explain why he thought that he had more money in his trust account, he provided two reasons for his belief.

First, respondent asserted that he had borrowed $9,000 from Gallo in 1997, and then had either forgotten to repay him or had forgotten about the loan, so that he had $9,000 less in his trust account than he believed. Next, respondent expanded his theory about the chargebacks, claiming that his bank had improperly charged his trust account for checks issued on insufficient funds from his business account. According to respondent, those chargebacks amounted to $9,000. He stated that he was not aware of these chargebacks because, at that time, he was not reviewing his bank statements in detail. Respondent, thus, explained the $18,000 shortage in his trust account by the $9,000 non-payment to Gallo and the $9,000 chargebacks to his trust account.

The evidence that respondent submitted in support of his claim that he had borrowed $9,000 from Gallo in 1997 was a client ledger card, Exhibit C-22, which respondent prepared in December 1998 or early 1999 to reconstruct his loans from Gallo. That exhibit indicates that the balance carried forward from 1997 was $9,630.69. Exhibit C-22 also supported respondent's claim that his bank had charged his trust account for insufficient business account checks. According to that exhibit, the bank charged respondent's trust account $10,548.67 from January 15 through July 24, 1998.

Respondent argued that his professional and personal obligations kept him from maintaining better records. He did not contend that these obligations excused his failure to comply with the rules, but that, because his clients and family had priority, he was unable to devote the time necessary to sort out his trust account records, thus contributing to his erroneous belief that his trust account had a higher balance.

The OAE argued that respondent, motivated by pressure from his wife to buy a bigger and better house, "borrowed money from Mr. Reeder, then subsequently overextended himself and invaded his clients' trust funds." Citing In re Mininsohn, 162 N.J. 62 (1999), in which the Court rejected the attorney's defense that

he thought that he had maintained a "cushion" of his own funds in his trust account, the OAE contended that respondent did not point to any specific factual data to support his claim of a belief that he had sufficient funds of his own in his trust account.

Respondent, however, provided two factual bases for his belief that he maintained an additional $18,000 in his trust account – the $9,630 that he had borrowed from Gallo in 1997 and the $10,548.67 that the bank had improperly deducted from his trust account for bad checks issued from his business account. In our view, those explanations appear plausible. It is just as likely as not that respondent forgot that he had borrowed $9,630 from Gallo in 1997. The record does not contain clear and convincing evidence that respondent knew that he was using client funds when he refunded the loan to Reeder. As to the bank chargebacks, at oral argument before us, respondent's counsel stated that all the relevant bank records had been provided to the OAE. That assertion was not refuted. Thus, although the OAE had the relevant bank records, there was no rebuttal offered after respondent introduced documentary and testimonial evidence of the chargebacks. It is unlikely that respondent would produce

false evidence under circumstances where the deception could be so easily uncovered.

In disciplinary matters, the presenter has the burden of proving unethical conduct by clear and convincing evidence. R.1:20-6(c)(2)(B) provides that "[f]ormal charges of unethical conduct, medical defense, and reinstatement proceedings shall be established by clear and convincing evidence." Here, the OAE showed, and respondent conceded, that, in 1998, respondent's trust account was short by at least $18,000. Pursuant to R.1:20-6(c)(2)(C), "the burden of proof in proceedings seeking discipline or demonstrating aggravating factors relevant to unethical conduct charges is on the presenter. The burden of going forward regarding defenses or demonstrating mitigating factors relevant to charges of unethical conduct shall be on the respondent." In this case, respondent asserted the defense of a reasonable belief that he had additional personal funds in his trust account, and he proved that defense by a preponderance of the evidence. The burden then shifted back to the OAE to refute respondent's defense. The OAE did not carry its burden.

We, thus, find that respondent maintained a good faith, albeit mistaken, belief that he had more funds in his trust

account than were actually there, and that the resulting misappropriation was negligent, not knowing.

In In re Noonan, 102 N.J. 157, 159-60 (1986), the Court defined the requirements for a finding of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id*. at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money was used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind is irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' — all are irrelevant. While this Court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since *Wilson*, it has been invariable. (Footnote omitted)

Under Noonan, thus, intent to steal or defraud and dishonesty are irrelevant. So long as the lawyer knows that the funds are not the lawyer's and knows that the client has not consented to the taking, the absence of evil motives, the lack of intent to permanently keep the monies, the good use to which

the funds may be put, the lawyer's prior unblemished character and, moreover, the circumstances or pressures impelling the lawyer are all irrelevant. To mandate disbarment, proof is required that the lawyer took the funds knowing that they were not the lawyer's and knowing that the taking was unauthorized.

In In re Konopka, 126 N.J. 225, 234 (1991), the Court made the following pronouncement on the sufficiency of proofs in a knowing misappropriation case:

> We insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. Obviously, we consider the attorney's records, if relevant, along with all other testimony, but 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.

In In re Mininsohn, supra, 162 N.J. at 72-73 (1999), the Court addressed the issue of negligent versus knowing misappropriation:

> The central issue is whether respondent knowingly or negligently invaded client funds. Knowing misappropriation of client funds is an ethical violation under *RPC* 1.15(a) and (c). Misappropriation that results in disbarment "consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking." *In re Noonan*, 102 *N.J.* 157, 150, 506 *A.2d* 722 (1986). Disbarment

is required for the misappropriation of either escrow funds or client trust funds because of the obvious parallel between escrow funds and trust funds. *In re Hollendonner*, 102 *N.J.* 21, 28, 504 *A.2d* 1174 (1985).

Intent to steal funds from a client is not an element of knowing misappropriation. *In re Barlow*, 140 *N.J.* 191, 198, 647 *A.2d* 1197 (1985). The motive of an attorney ordinarily is irrelevant in determining the appropriate punishment for knowing misappropriation. *In re Greenberg*, 155 *N.J.* 138, 156, 714 *A.2d* 243 (1998); *Barlow, supra*, 140 *N.J.* at 195, 657 *A.2d* 1197; *Noonan, supra*, 102 *N.J.* at 160, 506 *A.2d* 722. This Court consistently has applied the long-standing rule that "disbarment is the only appropriate discipline" for knowing misappropriation of client funds. *In re Wilson*, 81 *N.J.* 451, 453, 409 *A.2d* 1153 (1979).

However, clear and convincing evidence is required to prove that respondent knowingly misappropriated client funds. *In re Konopka*, 126 *N.J.* 225, 234, 596 *A.2d* 733 (1991) (holding that attorney's careless record-keeping was evidence of negligent misappropriation of client funds). The *Wilson* rule is not applicable unless there is clear and convincing evidence that respondent knowingly misappropriated client funds. *In re Roth*, 140 *N.J.* 430, 444, 658 *A.2d* 1264 (1995); *Barlow, supra*, 140 *N.J.* at 196, 657 *A.2d* 1197 ("Proof of misappropriation, by itself, is insufficient to trigger the harsh penalty of disbarment. Rather, the evidence must clearly and convincingly prove that respondent misappropriated client funds knowingly."); *Hollendonner, supra*, 102 *N.J.* at 29, 504 *A.2d* 1174.

Thus, although intent to steal is not a requirement for knowing misappropriation, there must be clear and convincing evidence that the attorney knew that the use of client funds was unauthorized. Unlike the attorney in Mininsohn, *respondent* presented evidence of a factual basis for believing that he had more funds in his trust account than were actually on deposit.

Other attorneys have advanced a belief that their trust account contained funds in excess of its actual balance. In In re Librizzi, 117 N.J. 481 (1990), the attorney's trust account had a shortage of about $25,000. The shortage was discovered during a random audit by the OAE. Librizzi's recordkeeping was grossly negligent; he failed to maintain cash receipts journals, cash disbursement journals, and client ledger cards; he did not reconcile his trust account; and he commingled personal and client funds. His trust account shortage arose primarily from three matters in which he mistakenly deposited funds in his business account, intended for his trust account. When he issued checks from his trust account, the shortage resulted.

In a separate matter, a client's check for $1,800 deposited in his trust account was dishonored. He did not replenish the $1,800 trust account deficiency. After he sued the client, he received payments in "dribs and drabs," which he did not deposit

in the trust account. Two years elapsed from the time the client's check was dishonored and the $25,000 shortage was cured.

Librizzi contended that he relied on three lines of credit with his bank — overdraft protection, revolving credit, and installment loans — to ensure that his checks would be honored. He also erroneously relied on excess real estate recording and cancellation fees accumulated in his trust account. He assumed that these funds totaled thousands of dollars, although he never calculated the amount.

Although the OAE contended that Librizzi knowingly misappropriated funds on a systematic basis, the Court found otherwise. It agreed with our conclusion that the deposits in the business account "were the product of inadvertence and not of evil design to utilize the funds for personal purposes." Id. at 490. The Court concluded that Librizzi's problems stemmed from his lack of bookkeeping experience, noting that he did not intentionally establish his accounting system to use clients' funds. Furthermore, the Court observed:

> Poor accounting procedures do not excuse the use of clients' funds. Attorneys must have accounting procedures that prevent misappropriation of trust funds. *In re Fleischer, supra,* 102 *N.J.* at 447. Nonetheless, while "poor accounting should not, and does not, establish a *Wilson* defense; but poor accounting is not a *Wilson*

> violation absent evidence of a knowing misappropriation." (Citations omitted)
>
> [In re Librizzi, supra, 117 N.J. at 492.]

Finding that Librizzi's misconduct was nevertheless extremely serious, the Court imposed a six-month suspension for his negligent misappropriation of client funds.

See also In re Tompkins, 155 N.J. 542 (1998) (three-month suspension imposed on attorney who mistakenly deposited a check in his business account instead of his trust account and was found guilty of negligent, not knowing, misappropriation and "horrendous" accounting practices; the OAE's petition for review was denied, In re Tompkins, 155 N.J. 278 (1998)); In re Prado, 159 N.J. 528 (1999) (attorney who maintained trust and personal accounts at the same bank was found to have negligently misappropriated client funds when he directed the bank to automatically charge loan payments to his personal account and the bank erroneously deducted $2,079.18 from his trust account; although the attorney became aware of the trust account shortage and the ensuing invasion of other clients' funds, he did not replace the monies until eighteen months later; the attorney received a three-month suspension); and In re Colby, 172 N.J. 37 (2002) (reprimand imposed on an attorney who had been aware that a client's check had been returned for insufficient funds, thus

causing a shortage in his trust account, but waited about seventeen months to replenish the shortage; the attorney had simply forgotten about the shortage and his failure to properly reconcile his trust account contributed to the inadvertent invasion of other clients' funds).

Here, we do not find clear and convincing evidence that respondent knew that he was invading client funds when he issued checks from his trust account. The misappropriation resulted from negligent, perhaps even reckless, bookkeeping practices, as in Librizzi, Tompkins, Prado, and Colby.

In addition to the misappropriation, respondent admitted that he borrowed funds from several clients without observing the requirements of RPC 1.8(a), and that he violated RPC 1.15(d) by failing to maintain proper records, despite the deficiencies disclosed in the 1995 random audit and his certification to the OAE that he had corrected these deficiencies. Also, he breached an escrow agreement in the Levin matter, a violation of RPC 1.15(a).

We dismiss the charges added at the conclusion of the first hearing, RPC 3.3(a)(1) and (4), RPC 3.4(a) and (c), and RPC 8.4(c). Those charges primarily stem from the first special master's conclusion that respondent gave false testimony at the

first hearing. Respondent, however, was not represented by counsel, and it was not proven by clear and convincing evidence that he made any misrepresentations to the first special master.

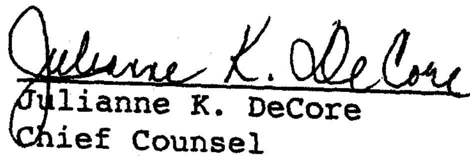
In sum, respondent was guilty of negligent misappropriation, borrowing funds from clients without observing the requisite safeguards of RPC 1.8(a), and recordkeeping violations. The range of discipline for such unethical conduct is ordinarily a reprimand to a short-term suspension. See, e.g., In re Arch, 181 N.J. 325 (2004) (three-month suspension imposed on an attorney for negligent misappropriation, recordkeeping violations, and failure to communicate with the client; attorney had a private reprimand, two admonitions, and a three-month suspension; a mitigating factor was the passage of time (nine years) since the infractions had occurred); In re Glynn, 180 N.J. 169 (2004) (attorney suspended for six months for conflict of interest after he borrowed funds from two clients without observing the safeguards of RPC 1.8(a), negligent misappropriation, and failure to comply with recordkeeping rules); In re LeVine, 167 N.J. 608 (2001) (reprimand imposed on an attorney who borrowed client funds without making the required disclosures or obtaining the necessary consents, commingled personal and trust funds, failed to comply with recordkeeping requirements, and failed to

safeguard client funds); In re Gallo, 117 N.J. 481 (1989) (attorney suspended for three months for using his trust account as a business account, commingling client and personal funds, failing to keep a running balance of the trust account, failing to maintain trust account receipts and disbursements journals, and negligently misappropriating client funds); and In re James, 112 N.J. 580 (1988) (three-month suspension imposed for grossly inadequate recordkeeping and negligent misappropriation of client funds).

Here, we take into account respondent's widespread practice of improperly borrowing money from clients and, in particular, the reckless element inherent in borrowing money from his client, Gallo, without keeping written records of the amount borrowed and repaid. In mitigation, we consider that respondent was admitted to the bar of this state thirty years ago and has no disciplinary history. We also consider his pro bono contributions to the community, the evidence of good character submitted both by testimony and letters, and respondent's psychiatric condition. After balancing the above factors, we determine that respondent's violations of RPC 1.8(a) and RPC 1.15(a) and (d) require a six-month suspension. Chair Mary J. Maudsley did not participate.

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

Disciplinary Review Board
William J. O'Shaughnessy, Vice-Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

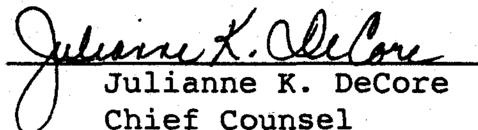
In the Matter of George J. Cotz
Docket No. DRB 04-359

Argued: November 18, 2004

Decided: December 14, 2004

Disposition: Six-month suspension

Members	Six-month Suspension	Reprimand	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:	8				1



Julianne K. DeCore
Chief Counsel