

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-320
District Docket No. XIV-2015-0405E

IN THE MATTER OF
JONATHAN G. BURNHAM
AN ATTORNEY AT LAW

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Decision

Decided: April 21, 2017

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter is before us on a certification of default filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-4(f). The complaint charged respondent with having violated RPC 1.1(a) (gross neglect), RPC 1.3 (lack of diligence), RPC 1.4(b) (failure to keep the client reasonably informed about the status of the matter), RPC 1.15(a) and the principles of In re Wilson, 81 N.J. 451 (1979) and In re Hollendonner, 102 N.J. 21 (1985) (knowing misappropriation of client funds), RPC 1.15(b) (failure to safeguard funds), RPC 1.16(d) (failure to protect the client's interests after termination of the representation), RPC 8.1(b)

(failure to cooperate with disciplinary authorities), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

For the reasons detailed below, we determined that respondent knowingly misappropriated escrow funds and recommend his disbarment.

Respondent was admitted to the New Jersey bar in 2001. He has no history of discipline. He has been registered as retired since July 24, 2014.

Service of process was proper in this matter. On July 5, 2016, the OAE sent a copy of a complaint against respondent, to his last known home address, in accordance with R. 1:20-4(d) and R. 1:20-7(h), by regular and certified mail, return receipt requested. Both the regular and certified mail were returned, marked as "Unable to Forward." On July 21, 2016, a disciplinary notice was published in the Daily Record. On July 25, 2016, a disciplinary notice was published in the New Jersey Law Journal.

On August 3, 2016, the OAE sent a copy of the complaint, to respondent's last known office address, in accordance with R. 1:20-4(d) and R. 1:20-7(h), by regular and certified mail, return receipt requested. The regular mail sent to his office was not

returned. The certified mail envelope was returned, marked "Unable to Forward."

As of September 14, 2016, the date of the certification of the record, respondent had not filed an answer to the complaint.

In July 2012, Michelle Booker was having difficulty with her landlord's maintenance of an apartment that she rented. Respondent's brother, a coworker of Booker at the time, referred her to respondent. On July 16, 2012, Booker met with respondent at his office to discuss her matter and retained his services. Booker does not recall signing a fee agreement. At that meeting, however, Booker issued two checks to respondent. She wrote personal check number 140 to respondent's trust account for \$3,990. The funds represented two months of unpaid rent that she had been withholding from her landlord in an effort to have repairs completed in her apartment. Booker also issued personal check number 141 to respondent's attorney trust account for \$200, as an initial deposit against the \$1,000 retainer fee she agreed to pay him.

The next day, July 17, 2012, respondent deposited both checks, totaling \$4,190, into his attorney trust account. Prior to that deposit, respondent's trust account had a zero balance. On the

same day, without permission from Booker, respondent issued attorney trust account check number 101 to Michelle Spievak for \$1,700. Respondent's relationship with Spievak is unclear, other than the fact that they shared a joint checking account at the time of these events. Respondent had no funds on deposit in his attorney trust account on behalf of Spievak.

In the days following his receipt of Booker's funds, respondent made the following electronic transfers, totaling \$2,490, from his attorney trust account:

1. July 18, 2012, \$300 to his attorney business account;
2. July 19, 2012, \$400 to his personal bank account;
3. July 19, 2012, \$300 to his attorney business account;
4. July 23, 2012, \$400 to his attorney business account;
5. July 23, 2012, \$200 to his personal bank account;
6. July 25, 2012, \$100 to his personal bank account;
7. July 30, 2012, \$700 to his personal bank account;
8. August 14, 2012, \$80 to his personal bank account;
9. August 16, 2012, \$10 to his attorney business account.

Thus, by August 16, 2012, after writing a \$1,700 check to Spievak and electronically transferring \$2,490 to his business and personal accounts, respondent had depleted all of Booker's \$3,990, which she had entrusted to him. He did so without her permission.

Subsequently, respondent contacted Booker to discuss settlement of her underlying claims against her landlord, against an upstairs tenant, and against the management company of the apartment. In August 2013, Booker signed a settlement agreement for \$3,000, with each of the three parties contributing \$1,000. She has received no communication from respondent since.

Six months later, on February 20, 2014, Yolanda Ayala, Esq., counsel for defendant in Booker's landlord/tenant matter, filed a motion to deposit the \$3,000 settlement funds into the Superior Court Trust Fund because she had been unable to reach respondent regarding the payment of the settlement. That motion was granted. Later, Booker's former landlord sued her for the two months' rent that she had withheld, pending the repairs to her apartment. Booker agreed to settle that matter by paying \$6,000 to her landlord.

To date, respondent has neither submitted an accounting to Booker regarding her escrow funds, nor returned any of those funds to her.

On November 19, 2015, the OAE sent a letter to respondent at his last known home address, by regular and certified mail, return receipt requested, requesting a written reply to Booker's grievance, by December 4, 2015. The letter further requested all documents and letters relevant to the matter. The regular mail was not returned. The certified letter was returned unclaimed.

On January 13, 2016, the OAE sent a second letter to respondent at his last known home address, requesting a response to the grievance by January 29, 2016. The regular mail was not returned. Respondent failed to reply.

Finally, on February 19, 2016, the OAE sent a third and final letter by regular and certified mail, return receipt requested, requesting a reply to the grievance by February 29, 2016. The certified letter was returned marked "attempted not known". The regular mail was not returned. Respondent failed to reply.

* * *

The complaint alleges sufficient facts to support the charges of unethical conduct. Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1).

Although the complaint charged respondent with eight RPC violations arising from his representation of Booker, we address only the most serious charge - knowing misappropriation. Respondent, without permission, withdrew \$3,990 of Booker's funds for his own personal use (he was permitted to use the \$200 payment toward his legal fee). These funds were to be held in escrow; yet, respondent knowingly withdrew them without Booker's permission.

In Wilson, the Court described knowing misappropriation of client trust funds as follows:

Unless the context indicates otherwise, "misappropriation" as used in this opinion means any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom.

[In re Wilson, supra, 81 N.J. 455 n.1.]

Six years later, the Court elaborated:

The misappropriation that will trigger automatic disbarment that is "almost invariable" . . . 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.

[In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, there must be clear and convincing evidence that the attorney took client funds, knowing that the client had not authorized him or her to do so, and used them. This same principle also applies to other funds that the attorney is to hold inviolate, such as escrow funds. In re Hollendonner, 102 N.J. 21 (1985).

In Hollendonner, the Court extended the Wilson disbarment rule to cases involving the knowing misappropriation of escrow funds. The Court noted the "obvious parallel" between client funds and escrow funds and held that "[s]o akin is the one to the other that henceforth an attorney found to have knowingly misused escrow


funds will confront the [Wilson] disbarment rule." In re Hollendonner, supra, 102 N.J. at 28-29.

Respondent is guilty of using escrow funds from his client without her permission. We, therefore, recommend that he be disbarred.

Vice-Chair Baugh did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: 
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Jonathan G. Burnham
Docket No. DRB 16-320

Decided: April 21, 2017

Disposition: Disbar

Members	Disbar	Recused	Did not participate
Frost	X		
Baugh			X
Boyer	X		
Clark	X		
Gallipoli	X		
Hoberman	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	8		1


Ellen A. Brodsky
Chief Counsel