SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-353
District Docket Nos. XIV-2012-0590E
and XIV-2012-0591E

IN THE MATTER OF	:	
JORDAN B. COMET	:	
AN ATTORNEY AT LAW	:	Dissent

Decided: June 8, 2018

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

We dissent from the majority opinion and vote to recommend respondent's disbarment.

There is no "smoking gun" here – no spontaneous admission or an overt act, demonstrating that respondent knew that he invaded client funds. Indeed, the Court has acknowledged that "proving a state of mind -- here, knowledge -- poses difficulties in the absence of an outright admission." In re Johnson, 105 N.J. 249, 258 (1987). The Court accepted, however, "the complementary propositions that an inculpatory statement is not an indispensable ingredient of proof of knowledge, and that circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded." Ibid. Accord In re Cavuto, 160 N.J. 185, 196

(1999) (noting that the circumstantial evidence clearly and convincingly established that the attorney knew or had to know that he had repeatedly invaded client funds that were to be kept inviolate).

We believe the "circumstantial" evidence in this case strongly "adds up" to the conclusion that respondent knowingly misappropriated client funds. We so conclude on several bases.

First, we accept Lakind's testimony regarding respondent's destruction of his original records. Respondent's Counsel argues that such testimony is hearsay and should not be considered, noting that the residuum rule requires some legally competent evidence to support such a finding of fact. R. 1:20-7(b). This record contains such legally competent evidence. Specifically, respondent waited more than four months to provide any information to the OAE, and then submitted only information created by Kohlhagen or copies of documents – never original documents. That fact lends strong support to Lakind's unequivocal and sworn testimony, which the special master found very credible. Respondent did not deny that he had failed to provide his original records to the OAE. Thus, the special master found, as a fact, that respondent's records had been destroyed. Based on respondent's inability (or perhaps unwillingness) to turn over his original documents, we, too, conclude that the records were purposefully made unavailable to the

OAE. What possible motivation could respondent have had to secrete the documents other than to cover up what had actually transpired?

Second, like the special master, we find incredible respondent's testimony that he believed that his trust account held the $50,000 retainer. Specifically, respondent did not dispute making the thirteen disbursements from his trust account that Lakind identified. His explanation for making them was his mistaken belief that DeVito had wire-transferred $50,000 to the trust account as a retainer - funds that he could use at his own discretion. Respondent claimed that, because he failed to maintain adequate records or to open his bank statements, he did not realize that DeVito had never wired the funds. In our view, however, respondent's apt juggling of his trust, business, and personal accounts belies his assertion.

The special master, too, rejected respondent's explanation. Instead, he found that respondent's, and in some respects, DeVito's, testimony lacked credibility. By the same token, he found Lakind's testimony "to be highly credible." Although respondent's counsel argued that the special master improperly analyzed DeVito's testimony, affidavit, and letter to the OAE, the special master was in the unique position to observe the witnesses' demeanor and testimony. An appellate court should defer to a tribunal's findings with respect to those intangible aspects of the case not transmitted by the written record ["'demeanor,' 'feel of the case,' or other

criteria'"]. See Dolson v. Anastasia, 55 N.J. 2, 7 (1969). We, therefore, give great deference to the special master's findings on credibility. We do not discount those findings simply because he failed to utter explicitly that his findings were, in some part, based on the "intangible aspects of the record."

The special master's credibility findings notwithstanding, we independently find that respondent's testimony lacked credibility, based on: his changing testimony regarding when and with whom he spoke about his receipt of the $50,000 retainer or when it would be sent; his denial that he transferred funds electronically from his trust account until presented with proof that he had done so; his failure to turn over his original records; and, ultimately, his reconstruction of them during the four-month hiatus that he received as a result of his multiple requests for postponements and adjournments. Moreover, as the special master noted, a cloud of suspicion hangs over the March 5, 2007 "retainer agreement." Both respondent and DeVito provided inconsistent testimony with regard to the agreement's effect. Most curious though, was DeVito's failure to submit the document to the OAE in compliance with the subpoena he received. It is true that no metadata was submitted to establish when the retainer agreement was created – just as no metadata was submitted to support when respondent drafted the letter dated May 12, 2008, to Kohlhagen, asking Kohlhagen to reconcile his records

because of an "issue" with his trust account (he purportedly sent the letter before he received notice of the random audit).

Next, we were also persuaded by Lakind's testimony emphasizing, as significant, the fact that respondent never overdrew his trust account when he transferred funds from it to his business and personal accounts. In this context, respondent's explanation, that he never checked to see whether DeVito wire-transferred funds, simply strains credulity. The absurdity of this claim is highlighted by respondent's testimony that, in the past, when DeVito had failed to pay him the $5,000 or $7,000 he was owed, respondent was keenly aware of it because he was desperate for the funds. Moreover, respondent's counsel claimed that respondent's practice was to go to the bank in person to determine the amount of the overdraft in his personal account. Thus, his alleged habit of ascertaining the balance in his personal account, but failing to do so for his trust account, or even to ensure that he had received $50,000 from DeVito, to us, seems far-fetched. This contention becomes even less likely, given that respondent admittedly had financial problems, and admittedly had difficulty receiving payments from DeVito, which was the catalyst for the retainer in the first instance. The only logical conclusion to be drawn is that respondent's explanation was contrived to conceal his use of client funds to satisfy his personal (i.e., gambling, as shown by the $4,000 in dishonored checks in

connection with casino credit slips, among others) and professional (payroll taxes) obligations.

It is abundantly evident to us that respondent was well aware of instances when his trust account funds were insufficient to satisfy his clients' obligations. Indeed, when he was about to overdraw his trust account, respondent borrowed $50,000 from a relative to avoid doing so. Respondent's counsel's explanation, that he monitored only his personal and business accounts, not his trust account, the most important of his accounts, simply defies logic. While respondent consistently overdrew his personal and business accounts (incurring more than $20,000 in bank charges), he could not chance doing so with his trust account, lest the bank notify the OAE. Respondent's ploy would have succeeded, had he not been selected for a random audit. Respondent should have borrowed funds from the outset, rather than use client funds to satisfy his personal and professional obligations.

As the Court noted:

> [d]isbarment is mandated for the knowing misappropriation of clients' funds . . . for combining operating and trust funds in order to pay personal and office expenses, . . . and for borrowing from one client's account to make up for a shortfall in other's . . .
>
> [citations omitted; Johnson, 105 N.J. at 259.]

Finally, respondent is nothing if not a master of delay. He managed to postpone his ethics matter for ten years by making multiple adjournment requests, and by failing to cooperate with ethics authorities. In the interim, he continues to practice law with impunity and, worse, now asks us to reward him for obstructionist behavior by urging mercy due to the passage of time.

The OAE argued that respondent was guilty of willful blindness. In In re Skevin, 104 N.J. 476 (1986), the attorney was out of trust in amounts ranging from $12,000 to $133,000. He admitted the shortages, but pointed out that he had deposited $1 million of his own funds in the trust account (commingled funds) to cover personal withdrawals. The Court found that, because the attorney did not maintain an accounting or running balance of his personal funds in the account, each time he made withdrawals for himself and for clients before the receipt of corresponding settlement funds, there was a "realistic likelihood of invading the accounts of another client since respondent had no way of knowing what the balances were." Id. at 485. The Court equated "willful blindness" to knowledge:

> The concept arises in a situation where the party is aware of the highly probable existence of a material fact but does not satisfy himself that it does not in fact exist. Such cases should be viewed as acting knowingly and not merely as recklessly. The proposition that willful blindness satisfies for a requirement

> of knowledge is established in our cases [citations omitted].
>
> [Id. at 486.]

Skevin was disbarred. As the Court later noted in the Johnson case:

> We will view "defensive ignorance" with a jaundiced eye. 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." There may be semantical inconsistencies, but we are confident that within our ethics system, there is sufficient sophistication to detect the difference between intentional ignorance and legitimate lack of knowledge.
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> [Johnson, 105 N.J. at 260.]

Although willful blindness may be one theory for respondent's use of client funds, we reiterate that the evidence here establishes that, despite respondent's failure to have maintained proper records, he was aware of the balances in his personal and business accounts, as well as in his trust account. Indeed, he managed to successfully transfer or borrow funds from his trust account to replenish funds in his other accounts or to satisfy his business and personal obligations. And, as previously noted, when respondent found himself on the brink of overdrawing his trust account, he finally borrowed funds to cover his shortages. Thus, rather than willful blindness, the evidence more clearly establishes lapping, which, colloquially, is defined as "robbing Peter to pay Paul." In other words, the

attorney takes the designated funds of one client and uses them to pay for another client's needs (In re Brown, 102 N.J. 512, 515 (1986) (disbarred)), or in this case, some of his own needs. Like respondent, Brown kept his office running on money that belonged to his clients. By using those funds, he avoided refinancing his home mortgage, and the interest charges that would have accrued on that mortgage. Id. at 516.

Misappropriation is defined as:

> any unauthorized use by the attorney 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.
>
> [Wilson, 81 N.J. at 455, n.1.]

As noted by the Court in In re Noonan, 102 N.J. 157 (1986):

> The misappropriation that will trigger automatic disbarment under [In re Wilson], disbarment that is "almost invariable," [citation omitted] 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 is used for a good purpose or a bad purpose, for the benefit of the lawyer of 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.
>
> [Id. at 160.]

Respondent admitted that he did not have his clients' authorization to use their funds. In our view, the circumstances surrounding respondent's conduct clearly and convincingly demonstrate that he knowingly misappropriated his clients' funds and did not have a reasonable belief that he was using his own funds — the non-existent retainer. We recognize respondent's otherwise good standing in and service to the community, and it is with no pleasure that we vote to recommend his disbarment under In re Wilson and its progeny, for his knowing misappropriation of client trust funds. But the protection of the public requires the ultimate sanction.

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