Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 18-362
District Docket No. XIV-2016-0142E

In the Matter of	:
A. Jared Silverman	:
An Attorney At Law	:

Decision

Argued: January 17, 2019

Decided: May 29, 2019

Christina Blunda appeared on behalf of the Office of Attorney Ethics.

Respondent appeared pro se.

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

This matter was before us on a recommendation for disbarment filed by Special Ethics Master Harold W. Fullilove, J.S.C. (ret.). The Office of Attorney Ethics (OAE) charged respondent with knowing misappropriation of client and trust funds, a violation of RPC 1.15(a) (failure to safeguard funds), the principles set forth in In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J.

21 (1985), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); RPC 1.8(a)(2) (improper business transaction with a client); and RPC 1.15(d) (failure to comply with the recordkeeping requirements of R. 1:21-6). For the reasons set forth below, we also recommend that respondent be disbarred.

Respondent was admitted to the New York bar in 1971, the District of Columbia bar in 1981, and the New Jersey bar in 1988. At the relevant times, he maintained an office for the practice of law in West Orange. Respondent has no disciplinary history in New Jersey.

Respondent represented Kent Lessman from 2008 until Lessman's death in December 2016. Lessman brokered sales of petroleum and petroleum products and arranged the financing of "various petroleum related projects, such as sales/purchases and refining capacity."

Respondent functioned as Lessman's "paymaster," by depositing in his trust account funds from Lessman's business associates and, pursuant to Lessman's instructions, disbursing the monies to third party service providers in payment of fees, commissions, and expenses incurred in respect of particular projects. According to respondent, he accounted for Lessman's trust account funds on a project-by-project basis.

On April 15, 2015, respondent wired $7,500 to Ghassan Mahmoud Kamal Sajim for the "Impact Executive" matter. Prior to the transfer, the Lessman client ledger reflected a $108,848 balance. When the disbursement was entered on the ledger, however, the running balance remained the same, when it should have been $101,348.

Respondent attributed the incorrect balance to a "computer glitch." The OAE referred to it as "an innocent recordkeeping violation." The parties agreed that, due to this error, respondent subsequently over-disbursed $7,414 in Lessman funds.

Respondent learned of the error on May 26, 2015, when he performed a three-way reconciliation for the month of April 2015. He sent an e-mail to Lessman, informed him of the $7,414 "overdraw," and explained why it had happened. Respondent attached a copy of the ledger to the e-mail, and requested Lessman to replace the funds "immediately." Lessman replied: "There is a new deposit coming."

According to respondent, Lessman stated that he would "make up the shortfall from the proceeds from a completed transaction." Because Lessman had at least two projects in progress, respondent relied on his representation. Thereafter, market volatility required the cancellation or postponement of various Lessman projects and, thus, Lessman did not replenish the funds.

Respondent admitted that, after May 26, 2015, he was aware that the Lessman ledger continued to have a $7,414 shortage. Despite respondent's knowledge of the shortage, he continued to disburse funds from that account.

In early 2016, the OAE conducted a random audit of respondent's attorney books and records, which uncovered the trust account shortage. By letter dated February 1, 2016, Robert J. Prihoda, then Chief of the Random Audit Compliance Program, listed the deficiencies that had been discussed with respondent on the conclusion of the audit. In addition to the negative balance on the Lessman ledger card, respondent's business account was not properly designated; he had made electronic transfers from the trust account without signed written instructions; and he had failed to perform the three-way reconciliations properly.

In respect of the $7,414 trust account shortage, Prihoda instructed respondent to replenish the trust account and submit proof of doing so within two weeks. Respondent did not comply with the request.

By letter dated March 21, 2016, OAE Director Charles Centinaro set a ten-day deadline for respondent to comply with the February 1, 2016 letter. Because respondent ignored this letter as well, the matter was docketed on March 31, 2016.

On April 6, 2016, OAE Auditor Arthur Garibaldi requested respondent to replenish the trust account and to certify that he had corrected the recordkeeping deficiencies. Garibaldi also informed respondent that a demand audit would take place on April 26, 2016, at which time respondent was to produce all attorney trust and business account records from April 2015 forward. As seen below, respondent did not fully replenish the shortage until December 6, 2018.

On April 15, 2016, respondent informed the OAE that he "reasonably" expected that, "within the next week, funds will be available to replenish [his] attorney trust fund." Specifically, a Lessman transaction would be completed within a week, and respondent expected to receive funds from another transaction within two weeks. The trust account funds were not replenished.

Garibaldi testified about respondent's trust account activity, based on respondent's own 2015 accounting records, which included the original Lessman ledger reflecting the error, a corrected ledger, and the monthly three-way trust account reconciliations. According to Garibaldi, respondent claimed that, between May 26, 2015, when he discovered the shortage, and December 31, 2015, neither he nor Lessman had personal funds sufficient to replenish the trust account. Yet, respondent's 2015 receipts journal showed that, after respondent had discovered the $7,414 shortage, he received $9,090 in total fees through the end of the year in non-Lessman matters. Respondent used none of the monies to

replenish the trust account. Instead, he used the funds to pay bills and make purchases.

In addition to the legal fees, on July 31, 2015, respondent received a $10,000 loan from his client, Richard Yahya. Respondent used none of the loan proceeds to replenish the trust account shortage. We discuss the propriety of the loan below.

Between April 29 and December 31, 2015, the Lessman ledger reflected no transactions. Thus, on January 1, 2016, the Lessman ledger showed a -$7,414 "balance forward." The ledger was dormant for the next six months.

Respondent continued to perform three-way reconciliations, which reflected the $7,414 shortage on the Lessman ledger, and the shortage, in turn, affected the total ledger balance. For example, the June 2016 three-way reconciliation reflected a $350.83 total ledger balance for all client matters, when respondent should have been holding $7,764.83 in behalf of eight clients.

On July 7, 2016, a $50,000 deposit in behalf of ACR Equities, Inc. (ACR) was entered on the Lessman ledger. Although the deposit took the Lessman ledger balance from -$7,414 to $42,588, there was now a shortage in ACR funds.

According to respondent, there were two ways of looking at the trust account shortage:

> One is the aggregate, which is what is shown on the ledger card. And the other way, which is not here, which is the running total, project by project.
>
> The monies received – so Mr. Lessman received money, let's say, from ACR, the first entry. The question is how were the ACR funds to be sent out. If the – what I tried to do is match the disbursements against the ACR account. I think the entry for that is paid from ACR is [sic] funds. So I tried to keep the funds that came in – because there's also an obligation to the person that sent the funds in that they're disbursed according to the purpose that the depositor sent them in for, in other words, the project.
>
> So the ACR – these went out against the ACR project for which he received money. Does it affect the overall balance negatively, yes, as indicated on the ledger card. But when you look at the allocations of the ACR funds, the ACR funds went as directed up to the limit of the receipt of the ACR funds.
>
> [2T25-13 to 2T26-10.][1]

Respondent claimed that the negative balance belonged to Lessman because ACR had expected that its $50,000 would be disbursed in a particular way to fund its project. In respect of respondent's other clients, the following exchange is telling:

> Q. Okay. And so in order to fulfill ACR's expectations, you had to use the funds of the clients that were listed in your three-way reconciliations that were expecting you to hold their money inviolate for them only, right?

[1] "2T" refers to the transcript of the March 26, 2018 hearing before the special master.

A. Unfortunately, yes.

[2T27-5 to 10.]

Notwithstanding respondent's claim that ACR's funds were to be used solely for the ACR project, he testified that Lessman had directed him to apply $3,000 of ACR's monies to reduce the trust account shortage from $7,414 to $4,414. Although, on July 8, 2016, respondent made a note on the ledger that $3,000 was to be used as a "partial repayment of Lessman account shortfall," he never credited the ledger in that amount. Thus, the Lessman ledger balance continued to reflect the $7,414 shortage.

On July 25, 2016, respondent transferred $500 to Lessman, and $500 to himself, which he characterized as a "1% Fee." Again, respondent acknowledged that, when he disbursed the funds, he knew that the Lessman ledger had a shortage, that the shortage would increase, that the OAE had told him to replenish the monies, and that he was now the subject of a disciplinary investigation for his failure to do so.

Respondent admitted that he had paid himself attorney fees during the time that the total ledger balance was negative. He denied having paid the fees out of the Lessman funds because that would have increased the Lessman shortage. Instead, he disbursed the funds "from other transactions," as he had

accounted for disbursements on a project-by-project basis. The shortage remained, however.

On September 17, 2016, an $85,000 deposit for the benefit of Indranil Roychoudhury resulted in a positive Lessman ledger balance of $80,603, but respondent still held less than he should have in the trust account, due to the previous shortage. Thus, he continued to invade trust account funds belonging to others, and he knew that he was doing so, based on his own ledger sheets and reconciliations.

Between July 25 and November 7, 2016, respondent disbursed a total of $17,500 to Lessman. He admitted that he knew that he was using other clients' funds to make the disbursements because Lessman had not replenished the shortage. Garibaldi testified that respondent could have replenished the trust account by withholding sufficient funds from the payments to Lessman and entering the individual amounts as reimbursements on the ledger card and in the receipts journal. Respondent disagreed, contending that the monies were not Lessman's personal funds because the disbursements had been made pursuant to pay orders, which were related to specific projects. Respondent stated: "If the funds were not disbursed per order, per pay order, there would have been complications for the project financing."

Respondent conceded that Lessman never put his own money into the various projects. Although Lessman had received monies, they were not for his personal use. Instead, the monies were "disbursed on a project-by-project basis to match the funds that were received to do the project."[2] Respondent feared exposing Lessman to breach of contract claims, which would have resulted if respondent had withheld funds from Lessman. Respondent recognized that, by taking this approach, he had placed himself in "an unfortunate position" because he invaded other client trust account funds.

Despite respondent's previous claims to the OAE that the shortage would be replenished, it remained as of December 2016, eighteen months after respondent had learned of it. Once again, respondent claimed that the shortfall would have been replenished in December 2016 with the proceeds of a Lessman project that was to close that month. Lessman died three days before the closing, however, and the project fell through.

Although the OAE had taken the position that the shortage began as an innocent recordkeeping violation, Garibaldi testified that, by November 2016, the trust account shortage was no longer a mere recordkeeping violation because, after respondent had discovered the shortage in May 2015, neither he

[2] This position is inconsistent with respondent's claim that Lessman had given him the authority to apply $3,000 of ACR's funds to the shortage.

nor his client replaced the funds, and respondent continued to disburse funds that he did not have for Lessman.

Respondent testified that he had always intended to eliminate the trust account shortage. He was "extremely frustrated" with the shortage and had discussed the matter with Lessman "a number of times." At the March 26, 2018 ethics hearing, he asserted that three transactions were scheduled to close within forty-five days and that "[t]he closing of any one of [them would] generate fees which will allow payment of the deficiency of the Lessman trust account." He conceded that he had made similar claims before, and, as shown below, he did not replenish the trust account within the forty-five-day period.

In respondent's brief to us, he asserts that his failure to replenish the trust account was not "a willful act." Rather, he had relied on Lessman's representations, but Lessman failed to give respondent the funds, and respondent did not have the financial ability to replenish the monies with personal funds. Respondent also asserts that he has now replenished the account via three installments: $1,000 on June 13, 2018; $2,600 on October 16, 2018; and $1,176 on December 6, 2018, which was one week before his brief was due to us in this matter.

In addition to the knowing misappropriation charge, the OAE alleged that respondent had engaged in a prohibited business transaction with his client,

Richard Yahya. Garibaldi testified about a "purported" $10,000 loan that respondent had received from Yahya, which was identified as a "fee advance" in respondent's business account receipts journal. Garibaldi used the word "purported" because Yahya did not fully cooperate with the OAE's investigation and, thus, Garibaldi had been unable to verify the loan or identify who had prepared the document.

According to Garibaldi, nothing in respondent's file demonstrated that he had informed Yahya, in writing, of his right to seek independent counsel regarding the business transaction. Respondent claimed that, prior to the execution of the promissory note, he and Yahya verbally had discussed "[a]ll aspects of the loan . . ., including his right to seek separate counsel regarding the note."

On cross-examination, respondent acknowledged that he did not use any portion of the $10,000 to replenish the trust account shortage. Moreover, he conceded that he had repaid only a portion of the loan.

Finally, the ethics complaint charged respondent with the following recordkeeping violations: (1) client ledger cards with negative balances; (2) no monthly trust account reconciliations with client ledgers, journals, and checkbook; (3) electronic transfers made without proper authorization; and (4) improper designation of the business account. The OAE and respondent

stipulated that, as of March 2016, respondent's business account was properly labeled. The OAE withdrew the charge alleging that respondent had failed to perform three-way reconciliations.

In respect of the remaining allegations, that is, the negative balances and improper electronic transfers, Garibaldi testified that, to his knowledge, respondent had not corrected the deficiencies. Respondent has been silent on this issue.

The special master concluded that the OAE had proven, clearly and convincingly, that respondent knowingly misappropriated $7,414 in client trust account funds, a violation of RPC 1.15(a), and that he violated RPC 1.8(a). The special master dismissed the RPC 1.15(d) and RPC 8.4(c) charges.

In finding that respondent had violated RPC 1.8(a), the special master referred to respondent's acknowledgment that, despite advising Yahya, verbally, to seek the advice of counsel prior to receiving the $10,000 loan, he did not memorialize that advice in writing.

In the special master's analysis of the knowing misappropriation charge, he first observed that, as of May 26, 2015, respondent knew about the $7,414 shortage in the trust account. Despite the OAE's directive, in February 2016, respondent failed to replenish the trust account, but continued to do business with Lessman and disburse funds to Lessman and to himself. The special master

noted respondent's argument that the disbursements to Lessman were necessary to complete particular projects, and that, if he had not made the disbursements, he would have exposed Lessman to liability to his investors. Yet, by doing so, respondent had jeopardized the funds of other clients and his own practice. The special master concluded that, by continuing to issue trust account checks, despite the known shortage in that account, respondent had knowingly misappropriated "escrowed trust account funds," a violation of RPC 1.15(a).

In dismissing the RPC 1.15(d) charge, the special master found that, by the OAE's admission, respondent's attorney books and records were in proper form, to the point of reflecting the shortage underlying the knowing misappropriation charge. In dismissing the RPC 8.4(c) charge, the special master noted respondent's acknowledgment of the shortage, because it was reflected repeatedly on the client ledger sheet and in respondent's reconciliations.

For respondent's knowing misappropriation of trust account funds, the special master recommended his disbarment.

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

RPC 1.8(a) prohibits a lawyer from entering into a business transaction with a client, absent certain conditions, which include advising the client, in writing, of the desirability of seeking the advice of independent legal counsel of the client's choice and giving the client a reasonable opportunity to do so. In this case, respondent admitted that he did not comply with the writing requirement of the Rule, choosing instead to, at best, notify Yahya verbally of his right to seek the advice of independent counsel. Thus, as the special master found, respondent violated RPC 1.8(a).

Respondent also violated RPC 1.15(d), which requires a lawyer to comply with the recordkeeping requirements set forth in R. 1:21-6. When the disciplinary hearing concluded, two of the original recordkeeping charges had remained, that is, the maintenance of a client ledger card with a negative balance and the electronic transfer of trust account funds without proper authorization, each of which violated a provision of R. 1:21-6.

R. 1:21-6(d) requires an attorney's financial books and other records to be maintained "in accordance with generally accepted accounting practice." One such practice is that, in reconciling accounts, the reconciled difference between an account balance and account transactions should equal zero. Here, with one exception, between May 2015 and July 2017, respondent's reconciliation of the Lessman ledger consistently reflected a shortage.

R. 1:21-6(c)(1)(A) permits the electronic transfer of funds from a trust account only on signed written instructions from the attorney to the financial institution. In respondent's answer to the complaint, he neither admitted nor denied the allegation because, he claimed, the OAE had failed to provide any example of such a transaction. He did not address the issue in his post-hearing brief to the special master or in his brief to us.

Here, the Lessman ledger shows numerous transfers out of respondent's trust account. Although respondent correctly points out that the formal ethics complaint offered no examples of these transfers having been made without proper authorization, and Garibaldi offered no such examples when he testified, Prihoda's February 1, 2016 letter identified the violation, which would have been discussed with respondent during the random audit. Respondent did not take issue with Prihoda's identification of the issue in the letter, which he ignored. Moreover, respondent did not take issue with the violation when he wrote to Garibaldi on April 16, 2016. Thus, we find that the record clearly and convincingly establishes the RPC 1.15(d) violation.

The knowing misappropriation case against respondent is straightforward. In April 2015, a "computer glitch" led to a shortage on the Lessman ledger, which respondent discovered the following month when he performed a three-way reconciliation. Although respondent immediately reported the shortage to

Lessman, and requested that he replace the funds, Lessman failed to do so, and respondent took no further steps to replenish the trust account, until years later and shortly before the disciplinary hearing.

In Wilson, 81 N.J. at 455 n.1, the Court described knowing misappropriation 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.

Six years later, the Court elaborated:

> 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 is 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. To the extent that the language of the DRB or the District Ethics Committee suggests that

> some kind of intent to defraud or something else is required, that is not so. To the extent that it suggests that these varied circumstances might be sufficiently mitigating to warrant a sanction less than disbarment where knowing misappropriation is involved, that is not so either. 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.
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> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

Thus, to establish knowing misappropriation, the evidence must be clear and convincing that the attorney took client funds, knowing that he or she was not authorized to do so, and used them. Here, by respondent's admission, he knew that there was a $7,414 shortage in the trust account, which he failed to replenish. He then continued to disburse trust account monies, including more than $15,000 each to Lessman and to himself, knowing that the trust account continued to have a shortage.

Attorneys, such as respondent, who become aware of shortages in their trust accounts and fail to replenish the funds commit knowing misappropriation and are, thus, disbarred. See, e.g., In re Uzodike, 170 N.J. 395 (2002) (attorney disbarred for different acts of knowing misappropriation of trust account funds; one such act involved his failure to replenish funds that he had disbursed against the deposit of $52,000 in money orders, which the bank subsequently

dishonored; in addition, he continued to disburse trust account monies after the bank had informed him of the dishonored money orders), and In re Brown, 102 N.J. 512 (1986) (attorney disbarred for waiting four years to replenish the trust account after a client's $20,000 check had been dishonored; during that four-year period, he used the funds of one client to pay another (lapping)).

As stated above, respondent learned of the trust account shortage in 2015 but failed to replenish the monies. He failed to replenish the monies in 2016, after he was directed to do so by the OAE. The fact that he finally replenished the funds in 2018 does not save him from the consequences of his failure to do so years earlier.

We find that, by knowingly misappropriating trust account funds, respondent also violated RPC 8.4(c), which prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Although the special master was correct in his observation that respondent had not attempted to conceal the shortage, we find that, by invading non-Lessman trust account funds without the permission of those who had an interest in the monies, respondent acted dishonestly, a violation of RPC 8.4(c).

To conclude, the clear and convincing evidence established that respondent knowingly misappropriated client funds, a violation of RPC 1.15(a)

and RPC 8.4(c), and the principles set forth in In re Wilson, 81 N.J. 451, and In re Hollendonner, 102 N.J. 21. He also violated RPC 1.8(a) and RPC 1.15(d).

Respondent must be disbarred for knowingly misappropriating trust account funds. In re Wilson, 81 N.J. at 455 n.1, 461; In re Hollendonner, 102 N.J. at 26-27. Accordingly, we need not consider the appropriate level of discipline for respondent's other infractions.

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
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of A. Jared Silverman
Docket No. DRB 18-362

Argued: January 17, 2019

Decided: May 29, 2019

Disposition: Disbar

Members	Disbar	Recused	Did Not Participate
Frost	X		
Clark	X		
Boyer	X		
Gallipoli	X		
Hoberman	X		
Joseph	X		
Rivera	X		
Singer	X		
Zmirich	X		
Total:	9	0	0

Ellen A. Brodsky
Chief Counsel