Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-403
District Docket No. XIV-2017-0142E

In the Matter of

Alexander Perchekly

An Attorney at Law

Decision

Argued: May 21, 2020

Decided: August 18, 2020

Hillary K. Horton appeared on behalf of the Office of Attorney Ethics.

Respondent did not appear despite proper notice.

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

This matter was before us on a motion for reciprocal discipline filed by the Office of Attorney Ethics (OAE), pursuant to R. 1:20-14(a), following respondent's resignation from the New York bar. An order from the Appellate Division of the Supreme Court of New York, First Judicial Department (First Judicial Department), suspended respondent from the practice of law, effective

February 23, 2017, until disciplinary matters pending before the Attorney Grievance Committee for the First Judicial Department, Supreme Court of New York, Appellate Division (the NY Committee) were concluded, and until further order of the First Judicial Department. The OAE asserts that respondent admitted violating the equivalents of New Jersey 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) (knowingly misappropriating client and/or escrow funds) and RPC 5.5(a) (practicing law while suspended).

On December 21, 2017, the First Judicial Department granted respondent's application to resign while an ethics proceeding or investigation was pending, accepted respondent's resignation, and struck his name from the roll of attorneys in the State of New York, effective nunc pro tunc to August 15, 2017. As detailed below, respondent's resignation was tantamount to a consent to disbarment.

For the reasons set forth below, we determine to grant the OAE's motion, find that respondent knowingly misappropriated client funds, and recommend his disbarment.

Respondent earned admission to the New Jersey and New York bars in 1999. From September 27, 2010 through March 25, 2013, he was ineligible to practice law in New Jersey for failure to pay the required annual assessment to

the New Jersey Lawyers' Fund for Client Protection (CPF). On August 25, 2014, the Court entered an Order again declaring him ineligible to practice law for failure to pay the annual assessment to the CPF. He remains ineligible to date.

At the relevant times, respondent maintained an office for the practice of law in New York, New York. He has no disciplinary history in New Jersey.

In March 2014, respondent settled a personal injury lawsuit for his client, Michelle Thomas, for $24,000, and promptly took his $8,000 legal fee from the settlement proceeds. One year later, in March 2015, respondent finally remitted $16,008 to Thomas, which represented her share of the settlement proceeds, but only after she had retained another attorney to investigate respondent's delay in disbursing her funds.

On August 17, 2015, Thomas filed a complaint with the NY Committee, alleging that respondent failed to remit her portion of the settlement for one year, and that the defendant insurer erroneously paid respondent an additional $16,000, which he failed to return. On May 6, 2016, the NY Committee directed respondent to produce Thomas's file, as well as specific financial records that he was required to retain, pursuant to the New York Rules of Professional Conduct (the NYRPCs). On May 20, 2016, respondent told the NY Committee that a fire had destroyed his law office and the requested documents. He

represented that he could verify the fire via a fire marshal's report, but never produced the report.

The NY Committee then obtained respondent's attorney financial records, which revealed that, on March 24, 2014, respondent made a $7,000 cash withdrawal from his trust account. Between April and September 2014, respondent deposited in his attorney trust account $40,000 in settlement funds in behalf of Thomas, including $16,000 that represented the defendant insurer's overpayment. As of June 30, 2014, respondent had received the entire $24,000 in Thomas's settlement proceeds; yet, he failed to promptly disburse to Thomas her share of the settlement funds. By September 24, 2014, respondent also had deposited in his attorney trust account the $16,000 overpayment from the defendant insurer, but did not return the overpayment until September 2015, from a check drawn on his operating account, not his attorney trust account.

From June 30, 2014 through March 16, 2015, the date that Thomas finally received her share of the settlement proceeds, respondent should have held $16,000 in his attorney trust account, inviolate, in behalf of Thomas. In early August 2014, however, the balance began to decline below $16,000 and, on December 8, 2014, was reduced to only $252.34.

Respondent's attorney financial records revealed that he invaded Thomas's settlement funds by "repeatedly transferring funds from this trust

account to his other business and escrow accounts, and issuing checks unrelated to the client's matter," replenishing the funds with other clients' settlement monies, and then transferring funds from his business accounts and also possibly his personal account.

During his sworn testimony before the NY Committee, respondent admitted that he had knowingly misappropriated Thomas's funds, claiming that he was in the midst of closing his practice and was having financial problems. He did not challenge the financial records that confirmed his misappropriation and other improper transactions. He testified that, although he knew he was taking money that belonged to Thomas, he intended to replace the funds:

> STAFF COUNSEL: So when you were withdrawing the money, you knew you were taking money that belonged to [the client].
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> RESPONDENT: Not intentionally. I needed those funds. I knew I'm putting those funds back. I'm being absolutely honest. Obviously, I'm trying to answer everything truthfully. I really stopped holding an accounting at that point in time. I kept my ledgers and all that stuff, but I wasn't really following up on them and transfers were being made. It was not intentionally taking [the client's] funds. The intent was always to put those funds back.
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> [OAEbEx.C6-7].[1]

[1] "OAEb" refers to refers to the OAE's October 22, 2019 brief submitted in support of the motion for reciprocal discipline; and "Ex.C" refers to the February 23, 2017 First Judicial Department Suspension Order and Opinion.

The First Judicial Department determined that respondent further violated NYRPC 1.15(a) by commingling business and client funds, on February 4, 2015, the same date that he remitted the first settlement check to Thomas, by transferring $16,008 from an escrow account to his attorney trust account, which previously had held only $918.34. The First Judicial Department further determined that, by making a $7,000 cash withdrawal from his trust account, respondent violated NYRPC 1.15(e), which requires that all special account withdrawals be made to the named payee.

Therefore, on February 23, 2017, the First Judicial Department held that respondent "repeatedly converted and misappropriated client funds, commingled business and client funds, improperly withdrew trust funds, [and] made an improper $7,000 cash withdrawal," which immediately threatened the public interest. The First Judicial Department, thus, issued an interim suspension, pursuant to 22 NYCRR §§ 1240.9(a)(2) and (5).

On August 15, 2015, respondent submitted to the First Judicial Department an application to resign while an ethics proceeding or investigation was pending. In that application, he acknowledged that he was under investigation for professional misconduct, and specifically admitted that he had practiced law while suspended by filing documents and contacting a firm in a client's behalf. He conceded that he could not successfully defend himself,

submitted his resignation, and noted that he had paid Thomas the $16,008 owed to her. The NY Committee did not oppose respondent's resignation application, but noted additional pending ethics allegations against him.

On December 21, 2017, the First Judicial Department granted the motion, accepted respondent's resignation, and struck his name from the roll of attorneys in the State of New York, effective August 15, 2017.

Following a review of the record, we determine to grant the OAE's motion for reciprocal discipline. Pursuant to R. 1:20-14(a)(5), "a final adjudication in another court, agency or tribunal, that an attorney admitted to practice in this state . . . is guilty of unethical conduct in another jurisdiction . . . shall establish conclusively the facts on which it rests for purposes of a disciplinary proceeding in this state." Thus, with respect to motions for reciprocal discipline, "[t]he sole issue to be determined . . . shall be the extent of final discipline to be imposed." R. 1:20-14(b)(3).

In New York, the standard of proof in attorney disciplinary matters is a fair preponderance of the evidence. In re Capoccia, 453 N.E.2d 497, 498 (N.Y. 1983).

Reciprocal discipline proceedings in New Jersey are governed by R. 1:20-14(a)(4), which provides in pertinent part:

> The Board shall recommend the imposition of the identical action or discipline unless the respondent

> demonstrates, or the Board finds on the face of the record on which the discipline in another jurisdiction was predicated that it clearly appears that:
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> (A) the disciplinary or disability order of the foreign jurisdiction was not entered;
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> (B) the disciplinary or disability order of the foreign jurisdiction does not apply to the respondent;
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> (C) the disciplinary or disability order of the foreign jurisdiction does not remain in full force and effect as the result of appellate proceedings;
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> (D) the procedure following in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
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> (E) the unethical conduct established warrants substantially different discipline.

A review of the record does not reveal any conditions that would fall within the ambit of subparagraphs (A) through (E).

The First Judicial Department accepted respondent's resignation from the bar. Pursuant to New York's Rules for Attorney Disciplinary Matters, an attorney who is subject to a disciplinary investigation is permitted to resign from the New York bar, and that attorney is then disbarred. 22 N.Y.C.R.R. § 605.10(b); 22 N.Y.C.R.R. § 1240.10(a)(1). See also, In re Hesterberg, 50 N.Y.S.3d 165 (2017), and In re Frazer, 290 A.D.2d 68, 69, 735 N.Y.S.2d 603, 604 (N.Y. App. Div. 2001).

We note that, in respondent's New York disciplinary proceedings, he admitted his violations of that jurisdiction's RPCs and agreed to the quantum of discipline to be imposed. Specifically, respondent admitted, in his resignation application, that he violated RPC 5.5(a) by practicing law while suspended when he filed documents and contacted a firm in a client's behalf. In addition, respondent admitted, under oath, that he had knowingly misappropriated Thomas's settlement proceeds, and did not challenge the financial records that confirmed his misappropriation of her funds. As a result, the First Judicial Department determined that respondent had misappropriated Thomas's client funds.

We, thus, determine that, by deliberately invading Thomas's settlement funds, without her consent or authorization, respondent knowingly misappropriated funds entrusted to him, in violation of RPC 1.15(a) and the principles of Wilson.

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

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' . . . 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 . . . . The presence of 'good character and fitness,' the absence of 'dishonesty, venality or immorality' – all are irrelevant.
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> [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 used trust funds, knowing that they belonged to the client and knowing that the client had not authorized him or her to do so.

In urging respondent's disbarment, the OAE maintained that, because he had been found guilty of intentional misappropriation of client funds in New York, disbarment is the appropriate sanction in New Jersey, pursuant to Wilson.

In New York, "conversion" does not necessarily equate to knowingly misappropriating or stealing. In In re Fretz, 222 N.J. 435 (2015), an attorney was suspended for one year, on a motion for reciprocal discipline, after he was suspended for three years in New York for a combination of ethics infractions, including misappropriation and conversion of more than $36,000 in client funds held in his attorney trust account, charges that were not the focus of the hearing. We determined that the evidence set forth in the record suggested negligent, not knowing, misappropriation. In the Matter of David Eldon Fretz, DRB 14-249 (slip op. at 1, 35-37) (March 13, 2015). We concluded that the facts supporting a knowing misappropriation charge were not established by clear and convincing evidence. Id. at 37. We stated as follows:

> [I]n New York, conversion and knowing misappropriation appear to be two different things. See, e.g., In re Duke, 174 N.J. 371 (2002) (attorney disbarred in New York for "converting" trust funds, commingling trust and personal funds, improperly drawing an escrow check to cash, failing to maintain required bookkeeping records, and failing to timely cooperate with the grievance committee; on motion for reciprocal discipline, however, the attorney received a reprimand in New Jersey).
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> . . .
>
> Moreover, when New York disciplinary authorities charge an attorney with knowing misappropriation of client or escrow funds, the petition generally alleges, and the Court finds, failure to safeguard funds (DR 9-102(A)) and conduct involving dishonesty, fraud, deceit, or misrepresentation (DR 1-102(A)(4)). See,

> e.g., In re Stevens, 741 N.Y.S.2d 536, 539 (N.Y. App. Div. 2002), and In re Lubell, 599 N.Y.S.2d 557, 558 (N.Y. App. Div. 1993) (both decisions observing that intentional conversion of client funds violates DR 1-102(A)(4)).
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> [Id. at 34-35.]

In In re Vogel, 724 N.Y.S.2d. 166, 167 (N.Y. App. Div. 2001), the court held that intentional conversion in New York is inherently met with disbarment, while conversion attributable to carelessness may lead to a lesser penalty.

In the instant matter, respondent admitted deliberately misappropriating Thomas's settlement funds, which he should have held, inviolate, in his attorney trust account and promptly disbursed to Thomas. As set forth above, respondent testified that he knew he was removing Thomas's funds, rationalizing that, "I needed those funds." Despite his claim that he always intended to "put those funds back," the testimony established that his misuse of the trust account was intentional. As the Court held in In re Blumenstyk, 152 N.J. 158, 161-62 (1997), intent to repay funds is irrelevant when an attorney knowingly misappropriates clients' trust funds. The Court quoted from Wilson: "Lawyers who 'borrow' may, it is true, be less culpable than those who had no intent to repay, but the difference is negligible in this connection." Ibid.

It is clear that, although the First Judicial Department did not make a specific finding of knowing misappropriation, pursuant to New Jersey law, and

the principles of Wilson, respondent knowingly misappropriated Thomas's settlement funds. Respondent admitted that he knew the funds belonged to Thomas, but misappropriated them for his own use, without permission, and although he asserted that he intended to replace the funds, his intent does not obviate his obligations and the consequences of Wilson.

Consequently, we find that respondent violated the equivalent of New Jersey RPC 1.15(a) and the principles of Wilson. Accordingly, we determine to grant the motion and recommend to the Court that respondent be disbarred. Based on our disbarment recommendation, we need not consider the appropriate quantum of discipline for respondent's other misconduct.

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
Bruce W. Clark, Chair

By: _____
FOR: Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Alexander Perchekly
Docket No. DRB 19-403

Argued: May 21, 2020

Decided: August 18, 2020

Disposition: Disbar

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

For: Ellen A. Brodsky
Chief Counsel