SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-176

IN THE MATTER OF	:
KEVIN M. FORD,	:
AN ATTORNEY AT LAW	:

Decision
of the
Disciplinary Review Board

Argued: July 20, 1994

Decided: April 12, 1995

Frank P. Lucianna appeared on behalf of the respondent.

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

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

This matter was before the Board on a recommendation for discipline filed by Special Master Edward P. Seavers, Jr. The formal complaint charged respondent with several instances of knowing misappropriation and failure to safeguard client funds (RPC 1.15), misrepresentation (RPC 8.4(c)), failure to promptly deliver funds (RPC 1.15(b)), gross neglect (RPC 1.1(a)), failure to maintain complete records of funds coming into an attorney's possession (RPC 1.15(a)), failure to comply with the recordkeeping provisions of R.1:21-6 (RPC 1.15(d)) and knowingly making a false statement of material fact to a disciplinary agency (RPC 8.1(a)).

Respondent was admitted to the New Jersey bar in 1980. He has no prior disciplinary history.

Respondent was the subject of a select audit on or about November 20, 1990, after having previously been the subject of a random audit in 1986. As a result of the select audit, the OAE filed a six-count formal complaint, charging respondent with knowing misappropriation in five separate personal injury matters. The complaint charged that, between October 13, 1989 and May 2, 1990, respondent drew fee checks to himself from his trust account in advance either of the receipt or the deposit of the settlement drafts.

THE FAZIO MATTER

Respondent represented Mary Fazio in a personal injury matter. On October 13, 1989, respondent drew against his trust account a check payable to himself for fees in the amount of $2,916.66. His client had signed the release only one day earlier. According to respondent's trust account bank statement for the period ending October 31, 1989, respondent negotiated that fee check on the same day he wrote it. Exhibit C-10. The settlement draft, however, was not deposited into his trust account until October 20, 1989 — eight days after respondent presented the fee check for payment. In fact, at the time respondent drew and negotiated the check, he had not yet even received the corresponding settlement draft. Exhibit C-6. In addition, according to Nicholas Hall, one of the OAE auditors assigned to the matter, an OAE reconstruction of

respondent's client ledger balances as of October 13, 1989 showed no monies standing to the credit of client Fazio. Similarly, Hall testified, that schedule (hereinafter "trust analyzer") showed no monies amounting to $2,916.22 due to respondent in any other client matter. Exhibit C-12. However, Hall admitted that his investigation did not exclude the possibility that some of the client balances could have included monies due to respondent on that particular date. T53-54.[1] However, at no point during the OAE investigation, did respondent indicate to Hall that he believed that the trust account contained any monies due him.

Respondent deposited the Fazio fee into his attorney business account on October 13, 1989. On that day, respondent issued against his business account a certified check in the amount of $3,190.14, payable to the Internal Revenue Service ("IRS"). Three days later, on October 16, 1989, respondent again drew against his business account a check (#5373) payable to the IRS (apparently through Midlantic National Bank), in the amount of $3,000.00. Exhibit C-12A. The notation on respondent's business account disbursements journal for that check indicated that the check covered payment for third-quarter taxes for 1989. Exhibit C-12B. Hall testified that, according to the business account statement, that check cleared on October 16, 1989, the same day it was written. He further maintained that, had respondent not deposited

[1] "T" denotes the hearing transcripts of November 22 through November 24, 1993 and December 9, 1993.

the advanced Fazio fee into his business account three days earlier, that check to the IRS would not have cleared the account. Finally, respondent's client ledger card on Fazio inaccurately reflected the date of the deposit of the settlement funds as October 19, 1989 (actually, October 20) and further inaccurately reflected the date when respondent drew the fee check to himself as October 21, 1989 (actually, October 13). Exhibit C-9. While the record is silent as to exactly when respondent prepared the client ledger card, it is clear that he did so by his own hand.

THE MADIA MATTER

Respondent represented Sandra Madia in a personal injury matter. On November 6, 1989, respondent drew against his trust account a fee check (#3075) to himself in the amount of $4,333.33. According to respondent's trust account bank statement for the period ending November 30, 1989, that check was negotiated on that same day. In fact, respondent did not receive the settlement draft in the Madia matter until approximately November 14, 1989 (Exhibit C-58) and did not deposit it until November 16, 1989, ten days after he took his fee. Exhibit C-57. Furthermore, according to the OAE reconstruction of respondent's client ledger balances as of November 6, 1989, no monies were standing to the credit of client Madia at the time respondent took his fee. Therefore, Hall maintained, respondent invaded the funds of other clients when he prematurely took his fee. Hall further testified that, while respondent's business account showed a positive balance on November

6, 1989, when respondent deposited the advanced Madia fee, he quickly depleted that balance by November 15, 1989, when his business account was overdrawn by the amount of $1,468.56. In fact, between November 6, 1989 and November 15, 1989, respondent had written and negotiated at least five checks payable to himself, all in the same amount ($1,081.00). Exhibit-51A. These checks appear to be payroll checks. Exhibits C-68A and C-68B. Finally, respondent's ledger card in the Madia matter inaccurately reflected the deposit date of the settlement proceeds as November 6, 1989 (actually, November 16, 1989) and the date respondent withdrew his fee as November 16, 1989 (actually, November 6, 1989).

THE LaBELLE MATTER

Respondent represented Robert LaBelle in a personal injury matter. On November 16, 1989, respondent drew against his trust account a fee check (#3077) to himself in the amount of $3,333.00. Respondent negotiated that check and deposited the fee into his business account on that same date. Exhibits C-62 and C-51A. As previously noted, respondent's business account showed a negative balance on November 15th, one day before the deposit of the advanced fee. Although the record is silent as to when respondent received the LaBelle settlement draft, it is clear that he did not deposit those proceeds until November 27, 1989, eleven days after he took his fee. Exhibits C-46 and C-62. Furthermore, Hall testified that the OAE reconstruction of respondent's client ledger balances as of November 16, 1989 showed no funds standing to the

credit of client LaBelle. Exhibit C-51. Hall, therefore, maintained that respondent invaded the funds of other clients when he took his fee in advance. Finally, respondent's client ledger card for the LaBelle matter inaccurately reflected the date when respondent took his fee as November 23, 1989 (actually, November 16, 1989). It also appeared to inaccurately reflect the date of the deposit of the settlement draft as November 21, 1989 (actually, November 27, 1989), though the ledger card is not entirely legible. Certainly, the placement of the receipt date above the disbursement of both the client's net check and respondent's fee check would seem to support that reading. See Exhibit C-48.

THE PARR MATTER

Respondent represented William Parr in a personal injury matter. On January 24, 1990, respondent drew against his trust account a fee check (#3124) to himself in the amount of $10,000.00. Respondent presented that check for payment and deposited the fee into his business account on that same date. Exhibits C-32, C-39, C-41A and T84. The record is silent as to when respondent actually received the settlement draft. However, the draft itself was dated February 1, 1990 and was not deposited into respondent's trust account until February 12, 1990. Exhibits C-35 and C-39. Respondent, therefore, took his fee at least nine days in advance of his receipt of the settlement draft and twenty days in advance of its deposit into his trust account. Furthermore, Hall testified that the OAE reconstruction of respondent's client ledger balances

as of January 24, 1990 showed no fees due respondent on that date. Exhibit C-41 and T83-84. Hall, therefore, concluded that respondent invaded the funds of other clients when he took his advance fee. Hall further testified that, while respondent's business account statement showed a positive balance on January 24, 1990, respondent thereafter quickly depleted that balance by February 9, 1990, when he wrote four certified checks to the IRS in amounts varying between $550.00 and $5,234.47. Were it not for the advanced fee deposit, Hall maintained, those checks to the IRS would not have cleared respondent's business account.

Finally, respondent's client ledger card in the Parr matter inaccurately reflected the date when respondent deposited the settlement proceeds into his trust account as January 24, 1990 (actually, February 12, 1990).

THE GIANCOLA MATTER

Respondent represented John Giancola in a personal injury matter, which he settled on or about April 17, 1990. Exhibit C-16. Respondent then drew against his trust account three fee checks to himself on April 17, 1990 ($10,000.00) and May 2, 1990 ($1,000.00 and $3,000.00). Respondent negotiated those checks on the dates when they were drawn and deposited those fees into his business account on those same dates. Exhibits C-26, C-29A and C-29B. On various dates, respondent drew three additional checks against his trust account allocable to this matter. On September 17, 1990, respondent drew a trust account check (#3281) payable to himself in

the amount of $1,500 and another (#3285) on September 20, 1990 in the amount of $238.41. Finally, on September 21, 1990, respondent drew a trust account check (#3286) payable to North Jersey Reporting Services in the amount of $379.25.

Although the record is silent as to when respondent actually received the settlement draft, the draft itself was dated September 6, 1990 and the letter from the defendant's carrier transmitting the draft was dated September 20, 1990. Exhibit C-18. Furthermore, respondent did not deposit that draft into his trust account until September 21, 1990, over five months after he drew his first fee checks in this matter. Exhibit C-27.

Hall testified that the OAE reconstruction of respondent's ledger balances as of April 17, 1990 showed no fees due respondent on that date. Hall concluded that respondent had invaded the funds of other clients when he took the advanced fees. Hall further maintained that, although respondent's business account statement showed a positive balance on April 17, 1990, that balance ($3,514.38) was insufficient to cover a check (#5774) drawn against the business account one day earlier (April 16, 1990), payable to the IRS in the amount of $6,250 — thus, the necessity to make the initial advanced fee deposit in the amount of $10,000 on April 17, 1990. That deposit notwithstanding, the negotiation of that check on April 30, 1990 caused an overdraft in respondent's business account in the amount of $1,291.89. Exhibit 29B.

Finally, respondent's client ledger card in the Giancola matter inaccurately reflected the date when respondent deposited

the settlement proceeds into his trust account as either September 11 or 12, 1990 (actually, September 21, 1990) and the dates when he drew his initial fee checks as September 17, 1990 (actually, April 17, 1990) and September 2, 1990 (actually, May 2, 1990).

In all of these matters, respondent maintained that he believed that he had sufficient funds of his own in his trust account to cover his fee advances. Respondent testified that, between 1986 and 1988, he had deposited into his trust account $30,000 to $35,000 in personal funds, a portion of which he had used to finance the construction on his house. T469, T498. According to respondent, he designated those funds as "Healy" or "Healy Construction" funds, Eileen Healy being his wife. That construction continued up until 1988 or 1989. T472. In addition, respondent maintained that, over several years, he had accumulated both fees and costs in his trust account, which he had not disbursed to himself.

When asked about the source of his belief, respondent testified that, at least through the middle of 1989, he "reconciled" his trust account on a regular basis by totalling the client balances and comparing them to the amount on deposit in his trust account, after allowing for outstanding checks. Although respondent did not necessarily prepare client ledger cards or a written schedule of client balances, he was certain that he included all client balances in his review and found no significant discrepancies between those balances and the amount on deposit in his trust account at any given time. T474-475. It is clear that

respondent performed this reconciliation at least through September 1989, when he discovered an error in the Behlman matter (discussed below).

Respondent offered no documentation to support his allegation that there were excess personal funds in the trust account in an amount sufficient to cover the fee advances to himself. The only documentary evidence he produced was a page from his trust account disbursements journal for the period November 13, 1990 through November 30, 1990, which was apparently prepared by respondent's accountant after the OAE select audit in 1990. Although respondent initially maintained, on direct examination, that the document showed that he was entitled to approximately $7,500 in fees as of November 30, 1990, he admitted, on cross-examination, that he had offered into evidence only one-half of that document (Exhibit R-1). In fact, the full-page document (Exhibit C-95) showed an adjustment, requiring respondent to reimburse his trust account in the amount of $6,007.91. T526-527. Thus, according to respondent's own exhibit, as of November 30, 1990, he was entitled to only approximately $1300 in fees — not $7,500, as he had previously testified. See also Exhibit C-96. That notwithstanding, respondent testified, he still believed that, during 1989, he had available to him approximately $10,000 to $20,000 in personal funds. Although respondent expressed his belief that he must have deposited the bulk of those personal funds into an old trust account (United Jersey Bank, hereinafter "UJB"), he earlier certified to the OAE that, when he closed that account,

in or about November 1987, he transferred only $927.45 in "Healy" funds to his new trust account at Midlantic National Bank ("Midlantic"). Exhibit C-12. Despite painstaking efforts on the Special Master's part, respondent was unable to produce any other documentary evidence to support his claim that he carried between $10,000 and $20,000 in personal funds in his trust account.

THE SELVIN ESTATE MATTER

Respondent represented the estate of Hannan Selvin. On March 21, 1990, respondent drew against his trust account a fee check to himself in the amount of $7,205.22 and deposited that check into his business account. At that time, there were no funds on deposit for the Selvin estate. In fact, it was not until August 10, 1990 — some five months after respondent already disbursed his fee to himself — that he deposited into his trust account the sum of $7,325 relative to the Selvin matter. Furthermore, while the Selvin client ledger card accurately disclosed both the date of the fee disbursement and the subsequent deposit date, the later deposit date appeared on that card in a physical location before the date of the fee disbursement. Exhibit C-72. The OAE contended, therefore, that respondent had knowingly invaded the funds of other clients when he disbursed the fee to himself and, further, had attempted to mislead the OAE by his placement of the deposit date.

Respondent testified that he had been a close friend of the decedent and his family for over twenty years. Respondent admitted taking his fee in advance of its payment by the executrix,

albeit not knowingly. He testified that, at the time he took his fee, he believed that the money had already been deposited into the trust account. At a minimum, respondent went on, he believed that he had sufficient personal funds in the trust account to cover his fee. Respondent was not able to identify the date when he created the Selvin client ledger card.

THE BEHLMAN MATTER

Respondent and his wife purchased a residence from Mr. and Mrs. Behlman for $625,000. Respondent represented himself in this transaction. Prior to the closing, respondent had paid a deposit of $62,500. In addition, he had obtained a first mortgage in the amount of $375,000, leaving a balance of $198,678.08 to be paid at closing. Prior thereto, respondent had obtained a $100,000 "bridge" loan, which he paid directly to the sellers' attorney. T126. Therefore, in order to complete the transaction, respondent was to bring to the closing the amount of $98,678.08. On or about August 21, 1989, the date of the closing, respondent deposited into his trust account the sum of $94,678.08, $4,000 less than the amount required to complete the closing. Nevertheless, on that same date and, presumably, at closing, respondent wrote several trust account checks totalling $98,678.08.

Thereafter, on or about September 21, 1989, one month after the closing, respondent deposited $4,000 into his trust account, ostensibly to reimburse the account for the $4,000 overdisbursement on the date of closing. A review of the client ledger card for the

transaction disclosed an arrow originating from the correct deposit date for the $4,000 and leading to the balance column for August 21, 1989. The OAE maintained that respondent had written checks totalling $98,678.08 relative to his own real estate closing knowing that he had deposited only $94,687.08 in corresponding funds, thereby knowingly misappropriating the sum of $4,000 in client funds.

Respondent admitted that he had written trust account checks in excess of the $94,678.08 deposit. He maintained, however, that he had done so by oversight and did not discover his mistake until approximately one month after the closing, on September 21, 1989, when he performed "one of [his] periodic reconciliations." T403. Respondent testified that, when he discovered his error, he "immediately" deposited $4,000 into his trust account. T405. Respondent further stated that, when he made the $4,000 deposit on September 21, 1989, he also corrected the August 21, 1989 deposit on the client ledger card, crossing out what had once read "$98,678.08" to read "$94,678.08."

THE GLENDENNING MATTER

Respondent purchased a condominium in Dover Township from Glendenning Corporation ("Glendenning"). Respondent represented himself at the closing, which occurred on or about March 3, 1987. The property was encumbered by a construction mortgage to First National Bank ("FNB") in the amount of $52,657.88, which respondent was to satisfy. On or about August 4, 1987, the attorney for

Glendenning, York, wrote respondent a letter advising that FNB had complained that the construction mortgage had not been satisfied. Exhibit C-81. In fact, respondent had not, at that point, paid off the construction mortgage. Thereafter, on or about November 18, 1987, respondent wrote to FNB, advising that he had previously forwarded his trust check #3164 in full satisfaction of the mortgage. However, respondent indicated in that letter that, based upon York's representation that FNB had not received the check, a new check (#2472) was enclosed in satisfaction of the mortgage. Exhibit C-88. Admittedly, respondent had never forwarded check #2164 to FNB at any time. In fact, that check had no relation whatever to the Glendenning transaction.

Thereafter, on or about November 19, 1987, respondent wrote to York, enclosing a copy of a ledger card and deposit slip, showing that he had indeed deposited the funds for the pay-off of the mortgage on March 3, 1987. The ledger card attached to that letter showed both the actual pay-off date of the mortgage and the earlier date, which respondent crossed out and to which he added a notation indicating that payment had been stopped and a new check re-issued on November 18, 1987. According to Gus Pangis, another OAE auditor also assigned to this matter, respondent admitted to him, during a September 1992 meeting, that he had prepared this ledger card with the intent to mislead York. Respondent did not explain why he had done so.

Thereafter, on or about December 7, 1987, York wrote to respondent demanding payment of the mortgage interest for the

period during which the mortgage remained unsatisfied. Respondent did, indeed, pay that interest. The OAE contended that respondent's conduct in this matter constituted misrepresentation, gross neglect and failure to promptly deliver funds to a third party. There is no allegation that respondent used the mortgage proceeds at any time. To the contrary, the evidence discloses that those monies remained in respondent's trust account at all times.

Respondent admitted that he had failed to pay off the mortgage in a timely fashion. He attributed his failure to an oversight caused, in part, by his lengthy bout with peritonitis. Respondent testified that York had called him on November 17, 1987 to advise of FNB's complaint. Respondent denied ever having received York's August 4, 1987 letter. During that telephone conversation, and after having checked his records, respondent advised York that he had, indeed, failed to send FNB the check in satisfaction of its mortgage. Respondent, therefore, assured York that he would send the check out immediately. At that point, respondent testified, York advised respondent that the principals of Glendenning were experiencing some trouble with FNB. Therefore, he asked respondent to send FNB proof that he had forwarded a check at the time of closing. Respondent testified that he first objected to York's request and suggested, instead, that respondent simply advise FNB of the truth, that is, that respondent had inadvertently neglected to pay off the mortgage. Nevertheless, because York insisted to the contrary and because the principals of Glendenning were respondent's longtime friends, respondent agreed to send the

allegedly requested proof to FNB. He testified that he had not told the OAE auditor of York's request because he did not want to create any further problems for the Glendennings.

FAILURE TO MAINTAIN REQUIRED RECORDS

On or about November 20, 1986, the OAE conducted a random audit of respondent's books and records. That audit disclosed several recordkeeping deficiencies, which the OAE requested respondent to correct. By letter dated July 30, 1987, respondent submitted a certification to the OAE, indicating that all deficiencies had been corrected. The OAE, therefore, closed its investigation. Thereafter, on or about November 2, 1990, the OAE conducted a select audit of respondent's books and records. That audit revealed that respondent had corrected only one of the five deficiencies. That one correction consisted of maintaining a running cash balance in the trust account checkbook.

In addition to those deficiencies disclosed by the earlier random audit, the select audit revealed three other deficiencies, including respondent's failure to deposit fees for professional services into his business account, disbursement against uncollected funds and failure to maintain fully descriptive client ledger sheets. The OAE alleged that respondent's conduct, therefore, violated the provisions of RPC 1.15(a) (failure to maintain complete records of funds coming into his possession) and RPC 1.15(d) (failure to comply with the recordkeeping provisions of R. 1:21-60.).

The OAE further contended that, during an interview of respondent on or about September 10, 1992, respondent represented to OAE auditor Pangis that he had been performing quarterly reconciliations since the random audit of 1986. Because a previous OAE auditor, Chris McKay, had indicated on a prior audit checklist that respondent had not reported performing such reconciliations, Pangis asked respondent to produce documentary proof of his reconciliations. Respondent, however, advised Pangis that he had discarded any such records after he had determined that the account was in balance. The OAE contended that respondent's certification in the random audit matter, as well as his statements to Pangis during their September 1992 interview or to McKay during their 1990 interview, constituted false statements of material fact to a disciplinary authority, in violation of RPC 8.1(a).

Respondent testified that "he did the best he could based upon what Chris McKay had said in reconciling the trust account." T436. Respondent claimed that he had reconciled regularly in 1987, 1988 and most of 1989. In fact, respondent maintained that it was through one of his 1989 reconciliations that he discovered his arithmetic error in the Behlman matter. He further testified that, although he may not have maintained his records perfectly, he believed that he had been doing it properly by virtue of conversations he had had with other attorneys. Id. Respondent admitted, however, that he did not perform regular reconciliations after 1989, and, most notably, during the period in which he advanced fees to himself. T468, 473-475, 518.

* * *

The Special Master found respondent guilty of misconduct in each of the matters charged. Specifically, in each of the advance fee matters (Fazio, Madia, LaBelle, Parr and Giancola), the Special Master found that respondent had knowingly misappropriated client funds when he withdrew his fees from the trust account in advance of receipt and/or deposit of corresponding funds, in violation of RPC 1.15. The Special Master observed that respondent "effectively used his trust account . . . as an interest free credit line . . . ." Report of the Special Master at 16-17. The Special Master further found that respondent's conduct in misrepresenting, on each of the client ledger cards, either the date of the receipt or the deposit of corresponding funds or the date when he drew his fee constituted misrepresentation, in violation of RPC 8.4(c). The Special Master further found that respondent's claim of excess personal funds in the trust account was incredible for several reasons.

First, the Special Master noted that respondent had not, at any time prior to the hearing, raised this defense — not in his answer and not during any meeting with OAE representatives. Rather, the Special Master observed, respondent's claim "appeared to be a recent fabrication at the hearing by an attorney desperate to find a way to avoid the finding of knowing misappropriation for advancing fees, a specific scenario already addressed by the Supreme Court ... [The] only conclusion possible is that he . . .

tried to find a suitable defense when he learned too late that the practice is prohibited." Id. at 14-15. By advancing this claim, "respondent may have prolonged his career, but he left the indelible mark of lack of credibility for his story." Id. at 15.

Second, the Special Master pointed to respondent's testimony that he had deposited these personal funds into his trust account between 1986 and 1988. Yet, on or about July 30, 1987, in response to the findings of the random audit conducted in 1986, respondent certified to the OAE that, as of November 30, 1986, all surplus funds in the trust account had been removed, leaving only client funds in the trust account. Therefore, "having been put on notice of the impropriety of maintaining personal funds in the trust account, [respondent's alleged] creation of a $10,000 - $20,000 cushion by 1989 is not believable." Id. at 12.

Third, the Special Master noted, as a result of the November 1990 select audit, respondent hired an accountant, who prepared a schedule of client balances as of October 31, 1990. As of that date, respondent was required to deposit into the trust account the sum of $6,007.98 in order to balance the account. Under these circumstances, the Special Master commented, while respondent could reasonably have been mistaken as to some surplus, his belief that "there was even minimally a $10,000 surplus when it was over $15,000 less is not credible." Ibid.

Fourth, and perhaps most critical to the Special Master's evaluation of respondent's credibility on this issue, was respondent's offer into evidence a document, Exhibit R-1, which was

only one-half of a full-page document (Exhibit C-95) and which told only one-half of a story — that is, that respondent was due approximately $7,500 from his trust account, as opposed to $1,500, at most.

Fifth, the Special Master found that respondent's defense to the Behlman matter was inconsistent with his defense to the advanced fee matters: when respondent took the advanced fees, if he genuinely believed that his trust account contained between $10,000 and $20,000 in personal funds, why then did he feel compelled to act swiftly to replace the $4,000 "arithmetic error" he committed in the Behlman matter? The Special Master found respondent's reaction in the Behlman matter to be a believable and rational reaction only if respondent knew that a cushion did not exist. Furthermore, if respondent truly discovered his $4,000 "arithmetic error" during his reconciliation of the account on September 21, 1989, then he knew that the trust account contained, at most, $1,500 of personal funds. Yet, only three weeks later, when he advanced himself fees in the Fazio matter, he claimed that he believed that the trust account contained between $10,000 and $20,000 in personal funds. Since respondent testified that he deposited those personal funds into the trust account between 1986 and 1988, there could be no believable claim of a sudden surplus between September and October 1989, when he advanced the fees to himself.

Sixth, the Special Master observed that, between late March 1990 and early May 1990, respondent took advanced fees in both the

Giancola and Selvin matters totalling over $21,000. Respondent, by his own testimony, was only certain that his trust account contained, at minimum, $10,000 in personal funds. That being so, the Special Master questioned, why did he not check his records by performing a reconciliation to ensure that his account contained an amount in excess of $10,000?

Finally, the Special Master found that respondent's inaccurate entries on the client ledger cards constituted more than clerical errors. Rather, he observed, the inaccurate entries "suggest a complete lack of credibility of respondent's statements and self-prepared records." Id. at 14.

In the Selvin matter, the Special Master found respondent guilty of knowing misappropriation for many of the same reasons articulated in the prior advanced fee matters. In addition, however, the Special Master found that, if respondent genuinely believed that he had a substantial cushion in his trust account, then he would not have deposited the fee check into his trust account when he finally received it. The Special Master did not find clear and convincing evidence of misrepresentation for his placement of the true date on which he deposited the fee check before his entry for the earlier fee disbursement.

In the Behlman matter, the Special Master found that the evidence did not clearly and convincingly establish that respondent's invasion of client funds in the amount of $4,000 was the result of anything more than an arithmetic error. In the same vein, the Special Master noted that respondent made no attempt to

hide the $4,000 invasion on the client ledger card. He, therefore, made no finding of misrepresentation.

In the Glendenning matter, the Special Master found respondent guilty of misrepresentation for his false statements contained in his letter to FNB and for his creation of a fictitious ledger card, which he then forwarded to York, both in violation of RPC 8.4(c). Even if York had solicited the misrepresentation, the Special Master observed, that would not have constituted a defense to the misrepresentation made to FNB. The Special Master further found respondent guilty of a violation of RPC 1.15(b) for his admitted failure to promptly deliver to FNB the funds intended to satisfy the mortgage. He declined, however, to find that respondent's failure in that regard constituted gross neglect.

Finally, with regard to the recordkeeping allegations of the complaint, the Special Master found that respondent failed to comply with the requirements of R. 1:21-6, in that he failed to provide proof of compliance and, by his own statement, admittedly violated the seven-year retention requirement of the rule. However, the Special Master declined to find respondent guilty of misrepresentation to the disciplinary authorities by virtue of his alleged misstatements to McKay or Pangis as well as his certification in response to the random audit conducted in 1986. The Special Master found that respondent's certification of July 30, 1987 constituted a promise of future compliance. As such, he did not consider it to form the basis of a charge of misstatement of material fact. Similarly, the Special Master found,

respondent's statements to McKay and/or Pangis did not constitute a knowing misrepresentation, in light of his limited familiarity with accounting practices and terminology, and in the absence of contrary testimony by McKay.

While the Special Master found several mitigating factors, including the wealth of character references submitted in respondent's behalf, he recognized that, under the present state of the law, such factors could not be considered given the finding of knowing misappropriation. The Special Master, therefore, recommended public discipline for respondent's conduct.

* * *

Following a de novo review of the record, the Board is satisfied that the Special Master's finding that respondent was guilty of unethical conduct is supported by clear and convincing evidence. The Board agrees with the Special Master's factual conclusions. Those conclusions rested, to some degree, upon a credibility assessment of the witnesses — particularly respondent. The Board considers the Special Master's findings to represent not only a well-reasoned assessment of credibility but also a thorough and appropriate analysis of the documentary evidence presented. Like the Special Master, the Board is particularly influenced by respondent's clear attempts to hide the advanced payments to himself by creating ledger cards containing fictitious information. If respondent genuinely believed that his trust account contained substantial excess personal funds, then there would be no need to misrepresent the various dates of fee disbursements and/or dates of

deposit. He misrepresented that information because he knew there were no personal funds on deposit to cover his various advancements. In addition, an individual facing the loss of his professional license for alleged knowing misappropriation would certainly produce, at the hearing on the charges, some type of documentary evidence to support of his critical assertion that he deposited $30,000 to $35,000 in personal funds to his trust account in 1986 or 1987, $10,000 to $20,000 of which he believed remained on deposit from October 1989 through May 1990. Such records, if they truly existed, would have been required to be maintained as of 1993, the year of the hearings below. Even if respondent himself did not maintain any such documentary evidence, as required by R. 1:21-6, he certainly could have obtained it from the bank. His failure to do so, in the face of such grave charges, leads to the inevitable conclusion that he had not deposited personal funds into the trust account. Like the Special Master, the Board finds that respondent's assertion of the availability of excess personal funds in the trust account is nothing more than a desperate post-facto attempt to justify the grave consequences for the most serious misconduct of all. While respondent may have been beset, in the past, by some fairly serious health problems, there was no claim that any of those problems caused respondent to suffer "a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In re Jacob, 95 N.J. 132, 137 (1984). Respondent's actions warrant nothing less than disbarment. See In re Davis,

127 N.J. 118 (1992) and In re Warhaftig, 106 N.J. 529 (1987). The Board unanimously so recommends. Two members did not participate.

The Board further recommends that respondent be required to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/12/95

By: Elizabeth L. Buff
Elizabeth L. Buff, Vice-Chair
Disciplinary Review Board