SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 11-049 (formerly
DRB 07-314 and DRB 08-051)
District Docket No. XIV-05-0625E

IN THE MATTER OF :
:
MICHAEL S. ETKIN :
:
AN ATTORNEY AT LAW :

Decision

Decided: July 28, 2011

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

This matter was initially before us on January 17, 2008, on a disciplinary stipulation between the Office of Attorney Ethics (OAE) and respondent's former counsel. It arose out of respondent's failure to safeguard a legal fee that belonged to his former law firm. Respondent stipulated violations of RPC 1.15(b) (failure to promptly notify a third party of the receipt of funds in which the third party has an interest and to promptly

lawyer and a third person claim interests), and RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The OAE recommended the imposition of a reprimand.

Following our January 2008 review of the record and the parties' oral argument, we remanded the matter to the OAE for the filing of a complaint charging respondent with knowing misappropriation. On February 6, 2008, the OAE filed a motion for reconsideration of our decision. Respondent's counsel joined the OAE in its motion. Although there is no provision in the Rules of Court for the filing of a motion seeking a reconsideration of our dispositions, we entertained the motion because of the magnitude of respondent's conduct and the serious consequences that could flow from it. For the same reasons, we scheduled oral argument on the motion.

After considering the motion and the parties' oral argument on April 17, 2008, we determined to deny the request for the imposition of a reprimand for the stipulated conduct and RPC violations. In a formal decision filed with the Court on May 28, 2008, we reaffirmed our determination to remand the matter to the OAE for the filing of a complaint charging respondent with knowing misappropriation under both In re Siegel, 133 N.J. 162 (1993) (misuse of law firm funds) and In re Hollendonner, 102

N.J. 21 (1985) (misuse of escrow funds). We recommended that the Court appoint a special prosecutor and a special master, both of whom should be well-versed in the law of knowing misappropriation.

On June 9, 2008, the OAE filed a "Notice of Motion for Leave to Appeal from the Decision of the Disciplinary Review Board." The OAE asked the Court for an "administrative extension [of thirty days] to file a Brief and Appendix" in support of its motion. The OAE announced its intention to argue that "the DRB exceeded its statutory authority in rendering its decision and applied incorrect legal standards to the facts of [the] case."

On June 11, 2008, respondent's counsel filed a "Notice of Motion for Leave to Appeal and Supplement the Record with Respect to the Decision of the Disciplinary Review Board." Counsel, too, asked for an extension to file a brief and appendix in support of his motion.

On July 24, 2008, the OAE filed a brief in support of its motion for leave to appeal. On July 28, 2008, respondent's new counsel filed his brief and appendix.

By order dated February 17, 2009, the Court denied the motions for leave to appeal and remanded the matter to the OAE "to designate a special investigator, who shall investigate the

issue of whether there was a knowing misappropriation of law firm funds and prosecute the matter through the filing of a formal complaint and hearing if determined to be warranted."

On March 6, 2009, Office of Board Counsel forwarded to the OAE the transcript of the April 17, 2008 oral argument before us and our decision, dated May 28, 2008.

By letter of March 16, 2008 addressed to James M. McGovern, Esq., the OAE designated McGovern as special investigator in the matter.

After the special investigator filed his report with the Court concluding that a formal complaint charging additional unethical conduct was not warranted, the Court, by order filed on January 31, 2011, remanded the matter to us "to determine the appropriate quantum of discipline to be imposed [on respondent] based on the parties' stipulation in DRB 08-051, and thereafter submit its decision to the Court pursuant to Rule 1:20-15(f)(3)."[1] The Court also ordered that, on remand, the matter was to be "presented by the Director of the Office of Attorney Ethics or his designee." Because we had already

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[1] A copy of the special investigator's report was not given to us.

entertained oral argument on this matter, on two prior occasions, on the same stipulated facts and RPC violations, we determined to review the matter on the written record. We gave the OAE and respondent's counsel an opportunity to file new briefs. Neither one decided to file new briefs.

The OAE and respondent request the imposition of a reprimand. We determine to impose a six-month suspension.

Respondent was admitted to the New Jersey bar in 1981. He is an attorney with Lowenstein Sandler, P.C., in Roseland, New Jersey. He has no disciplinary history. However, from October 20, 1988 through December 9, 1988 and from September 21, 1998 through October 22, 1998, he was ineligible to practice law for failure to pay the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection.

The stipulated facts are as follows:

From April 1998 to February 2000, respondent was a non-equity partner in the law firm of Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. ("the Ravin firm"), which disbanded in April 2000. On February 12, 2000, respondent joined Lowenstein Sandler.

While respondent was employed at the Ravin firm, he provided Chapter 11 bankruptcy advice to Milberg Weiss Bershad

Hynes & Lerach, L.L.P. (Milberg Weiss), lead counsel in a class action captioned In re Reliance (the Reliance matter). All legal fees generated by respondent were to be paid at the conclusion of the case.

When respondent left the Ravin firm, he had accumulated earned, but unpaid, fees for his services in connection with the Reliance matter. He also had an unresolved claim against the Ravin firm for $30,000, plus interest, in unpaid salary.

After respondent joined Lowenstein Sandler, he continued to provide legal services in the Reliance matter, thereby generating legal fees to which Lowenstein Sandler was entitled.

On February 27, 2003, Keith Park, an attorney at Milberg Weiss, forwarded directly to respondent a check for $217,639.50 for respondent's legal services in the Reliance matter, after it was settled. Park explained that the check had been made out to respondent because he was not certain about the division of the fees between the Ravin firm and Lowenstein Sandler.

The Ravin firm's portion of the fee was $148,935. Lowenstein Sandler's share was $68,704.50. Respondent did not notify either law firm of his receipt of the check.

Nineteen days later, on March 18, 2003, respondent deposited the $217,639.50 check in his personal bank account

(account number xxxxxxxx7965 with Chase Bank), which at the time had a balance of $13,143.48.

On April 1, 2003, about one month after respondent received the check, he gave Lowenstein Sandler a bank check in the amount of $68,704.50, representing its full share of the fee. He did not send to the Ravin firm the balance of the $217,639.50 payment, or $148,935, representing its portion of the fee.

Twenty days later, on April 21, 2003, respondent transferred $110,000 from his personal bank account (number xxxxxxxx7965) to his personal money market account, also at Chase Bank (number xxxxxx1575) (Ex.4).[2] Before the transfer, the balance in respondent's money market account was $430.05. According to the stipulation, $110,000 represented the approximate amount of the Ravin firm's fee, less respondent's claim for unpaid salary. The Ravin firm continued to be unaware of respondent's receipt of the fee.

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[2] Although the account is titled "Michael S. Etkin, Atty. At Law," it is not an attorney trust account.

As seen below, the funds remained in respondent's money market account until July 15, 2004, seventeen months after he had received the $217,639.50 check.

In the interim, respondent did not keep the $110,000 intact. Although it is undisputed that he had no personal interest in the $110,000 funds, the balance in his money market account fell below $110,000 on twenty-three occasions between June 13, 2003 and June 24, 2004.[3] Respondent stipulated that the shortages, ranging from $280.10 to $34,100.83, were caused by checks written for his personal expenses, ATM withdrawals, and the transfer of funds to another personal bank account, which he shared with his wife.

According to the stipulation, "[a]t all times set forth above, respondent had enough money in both of his personal bank accounts when combined, to cover the Ravin firm's $148,935 share of the Reliance fee."

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[3] The stipulation erroneously lists those dates as April 21, 2003 and March 10, 2004. The OAE's spreadsheet analysis of those transactions shows that the correct dates are June 13, 2003 and June 24, 2004.

On January 30, 2004, almost a year after respondent received the $217,639.50 check, Stephen Dermer, an attorney at Lowenstein Sandler, wrote a letter to David Freeman, counsel for the Ravin firm, advising Freeman of the status of the Reliance litigation, among other matters. Dermer was unaware that the settlement of the Reliance case had been finalized. Dermer's letter stated, in relevant part:

> Reliance Acceptance Group. As previously reported, a settlement in this matter has been approved. The parties are waiting for the settlement to be fully funded at which point counsel shall be paid their respective fees. Mr. Etkin does not know nor will he speculate as to the expected timing of payment. A copy of the fee application filed on behalf of Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen ("Ravin") was provided to you in November 2002. Upon receipt of payment, Mr. Etkin will forward a check representing Ravin's share directly to Jeff Fisch.[4] Expenses, including Ravin expenses, have already been paid. Mr. Etkin previously forwarded Ravin a check representing reimbursement of expenses in this matter.
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> [Ex.6.][5]

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[4] Jeffrey Fisch, now deceased, was a partner at the Ravin firm and the original grievant in this case. Mark Baumgartner, another partner at the Ravin firm, is the current grievant.

[5] All exhibit references are to exhibits attached to the stipulation.

According to the stipulation, Dermer's letter contained misrepresentations about the status of the Reliance settlement, which had already been funded, and about the payment of the $217,639.50 Ravin firm/Lowenstein Sandler fee, which respondent had received on February 27, 2003. Dermer was unaware that his letter contained misrepresentations. Prior to sending the letter, Dermer consulted with respondent about its proposed contents. After reviewing a draft of the letter, respondent suggested one revision. Dermer then incorporated respondent's suggestion, submitted the revised letter for respondent's review, and asked him if additional changes were required.

Respondent stipulated knowing that the letter contained misrepresentations and that it would be sent to counsel for the Ravin firm in that fashion.

On July 15, 2004, almost six months after the date of Dermer's letter and seventeen months after respondent received the fee check, he sent to the Ravin firm an $110,905 cashier's check, drawn against his money market account. His cover letter to Jeffrey Fisch stated:

> Dear Jeff:
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> Enclosed please find a check in the amount of $110,905.00 representing the net fee to which Ravin Sarasohn is entitled in connection with the above-

referenced matter after setting off the unpaid salary owed to me in the amount of $35,400.00. The $35,400.00 set-off represents salary owed to me by Ravin Sarasohn (that you are aware of since that amount was confirmed with you personally) dating back to 1999, plus accrued interest.

[Ex.9.]

In addition to the facts set forth above, the stipulation provides "details regarding litigation commenced after the Ravin firm breakup," which, according to the stipulation, "are pertinent to this case." Those details are:

A. After the Ravin firm ceased the practice of law in April 2000, litigation was instituted by the Ravin firm against the firm's former partners, Kenneth A. Rosen, Sharon L. Levine and Steven E. Brawer. Respondent was not a party to the lawsuit. The remaining partners of the Ravin firm appointed a wind down committee to, among other things, handle the monies that were being collected in outstanding legal fees and to pay the firm's outstanding debts.

B. During the pendency of the lawsuit, the defendants filed a Motion to Appoint a Receiver to wind down the Ravin firm. In an opinion dated March 5, 2003, the Arbitrator in the case ruled that he had the power to appoint a receiver. **(Exhibit 11)**

C. The Ravin firm then moved for an injunction in the Superior Court to enjoin the Arbitrator from considering the motion to Appoint a Receiver. On May 9, 2003, the motion was denied. **(Exhibit 12)**

D. The Ravin firm appealed the Order. The Appellate Division reversed and remanded the decision on December 18, 2003. **(Exhibit 13)** Upon remand the receivership application was denied by the court on July 6, 2004. **(Exhibit 14)**

E. Nine days later on July 15, 2004, respondent remitted the Reliance fees less his claim against the Ravin firm to the wind down committee of the Ravin firm via a check and letter to former partner Jeffrey Fisch, Esq. **(See Exhibit 9)**

F. As of the execution of the within Stipulation, respondent's claim against the Ravin firm for unpaid salary is unresolved. Pursuant to a consent order entered by the Arbitrator, respondent has deposited into escrow, the sum of $45,676.47, representing his $35,400 claim for unpaid salary, plus $10,276.47 interest on the monies he held back from the Ravin firm. **(Exhibit 15)**

[S¶15.][6]

Although the stipulation does not detail the connection between the above statements and respondent's late disbursement of the Ravin firm's fee, the OAE's letter-motion for reconsideration stated that respondent "only intended to deprive [the Ravin firm] of the use [of the funds] until the receivership application was decided."

The stipulation did not address (1) whether respondent kept Lowenstein Sandler's portion of the fee ($68,000) intact during the two weeks between its deposit in respondent's bank account

[6] "S" denotes that disciplinary stipulation between respondent's counsel and the OAE.

(March 18, 2003) and his disbursement to Lowenstein Sandler (April 1, 2003); (2) whether he kept whole the Ravin firm's share between the date of its deposit in his bank account (March 18, 2003) and the date of its transfer to his money market account (April 21, 2003); and (3) why Lowenstein Sandler, as late as ten months after respondent turned over to Lowenstein Sandler its share of the fee, was still unaware of the receipt of its fee, as evidenced by Dermer's questions to respondent, in late January 2004, about when the Reliance settlement would be funded and when the fee payment could be expected.

As mentioned previously, the OAE recommended the imposition of a reprimand, comparing respondent's conduct to that displayed in what is commonly known as "self-help" cases: In re Spector, 178 N.J. 261 (2004) (after informing his firm that he was leaving, attorney had some of his clients forward all payments directly to him, intending to keep the funds in escrow until the resolution of a dispute between him and the firm for breach of employment agreement; instead, the funds were spent for operating expenses after the attorney's new partner inadvertently placed them in their business account); In re Glick, 172 N.J. 319 (2002) (attorney placed fees into his own attorney business account because he believed that his partners

had improperly calculated his profit share); and In re Bromberg, 152 N.J. 382 (1998) (attorney intercepted his law firm's funds under a reasonable belief of entitlement; in his mind, the attorney acted out of self-righteousness, believing that his partner had unilaterally breached their agreement on the division of fees).

Also in support of its recommendation for a reprimand, the OAE likened this case to In re Rosen, 192 N.J. 81 (2007), which resulted in a reprimand.

Like this respondent, Rosen was a former partner at the Ravin firm and, later, joined Lowenstein Sandler. In the Matter of Kenneth A. Rosen, DRB 07-030 (May 24, 2007) (slip op. at 2-3). Prior to Rosen's departure from the Ravin firm, the firm had borrowed $770,000 from Sovereign Bank. Rosen was one of seven partners who had personally guaranteed the loan. Id. at 3.

While at the Ravin firm, Rosen had represented Genesis Direct in a Chapter 11 bankruptcy proceeding. When Rosen went to Lowenstein Sandler, Genesis became one of Lowenstein Sandler's clients. Ibid.

In May 2000, Rosen received a $305,000 check, payable to the Ravin firm, to cover legal fees. Rosen neither notified the Ravin firm of his receipt of the check nor delivered it to the

Ravin firm. Ibid. His next course of action was to request his former partners for information about the loan and about the Ravin firm's financial status. He received no reply. Id. at 4-5.

One week after Rosen received the check, he turned it over to a senior vice-president at Sovereign Bank, knowing that the vice-president would deposit the check in a money market account in the name of the Ravin firm and then apply the $305,000 to reduce the balance of the loan that Rosen and other equity members of the firm had personally guaranteed. Id. at 4. At no time did Rosen disclose the above to the Ravin firm.[7] Id. at 4-5.

The OAE recommended a reprimand for Rosen, taking the position that he had not knowingly misappropriated the Ravin law firm's funds, but, rather, resorted to "self-help" by authorizing Sovereign Bank to apply the funds to the firm's indebtedness. Id. at 7.

We found that Rosen had violated RPC 1.15(b), as stipulated, by failing to promptly notify the Ravin firm of the

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[7] Rosen was not charged with having made a false endorsement on the check. The back of the unendorsed check contained the notation "for deposit," followed by the Ravin firm's business money market account number.

receipt of the fee check and to promptly deliver it to the firm. Id. at 8. Although Rosen had also stipulated a violation of RPC 8.4(c), we found no evidence of conduct involving dishonesty, fraud, deceit or misrepresentation. Ibid. We voted for a reprimand, id. at 12, which the Court imposed. In re Rosen, 192 N.J. 81 (2007).

Here, on February 27, 2003, counsel in the Reliance matter, Keith Park, sent directly to respondent a $217,000 check, representing the Ravin firm's and Lowenstein Sandler's legal fees. Park explained to respondent that the check had been made out to him because Park did not know the amount of each firm's respective shares. Park entrusted the $217,000 to respondent for a specific purpose -- the satisfaction of his client's fee obligations to the Ravin firm and to Lowenstein Sandler. Respondent, who received the funds in trust, became the fiduciary, the escrow agent in charge of distributing them in the manner directed by Park. Any other disposition of the funds would have been unauthorized.

Despite respondent's obligation under RPC 1.15(b) to promptly notify the Ravin firm and Lowenstein Sandler of the receipt of their funds and to promptly disburse them to their

owners, he did neither for about nineteen days. Apparently, the check lay in limbo for that period of time.

On March 18, 2003, respondent deposited it in his personal bank account. On April 1, 2003, a little more than a month after he received the check, he gave Lowenstein Sandler a bank check for $68,000. A balance of approximately $148,000 remained -- the Ravin firm's portion of the fee.

On April 21, 2003, almost two months after respondent was entrusted with the $217,000 check, he moved $110,000 from his personal bank account to his money market account, which had a balance of $430 at the time. He kept about $35,000 as compensation for unpaid salaries allegedly owed to him by the Ravin firm.

On July 15, 2004, seventeen months after respondent received the check in trust, he turned over $110,000 to the Ravin firm, by way of a cashier's check drawn against his money market account.

Throughout that seventeen-month period, however, respondent did not maintain the Ravin firm's funds inviolate. He stipulated that, on twenty-three occasions between June 13, 2003 and June 24, 2004, he used the funds for the payment of his personal expenses, ATM withdrawals, and transfers to a personal bank

account that he shared with his wife. His use of the Ravin firm's funds caused shortages ranging from $280 to $34,000.

In ascribing no impropriety to respondent's use of those funds, respondent's former counsel and the OAE remarked that, during the seventeen-month period, "both of [respondent's] personal bank accounts" had a balance of more than $148,000. Moreover, counsel argued, "[m]oney is fungible. As long as there were funds in excess of the disputed funds available in the accounts, the disputed fees cannot be seen as invaded in any real or in even theoretical way . . . . You have him holding the full sum of money, albeit in two accounts, but the whole sum is always there."

Counsel's arguments must fail. Clearly, the funds were used not only "in a theoretical way," but in "a real way." Admittedly, respondent failed to safeguard the Ravin firm's funds by not remitting them promptly and then using them for himself. Respondent acknowledged that the funds were not his; they were given to him in trust for the benefit of the two parties to whom they rightfully belonged. Yet, he used the Ravin firm's money as if it was his own. He did not have the Ravin firm's permission to spend its money. Therefore, to the extent that respondent's counsel argued that respondent did not "use"

the money because money is "fungible," that was not so. What must remain intact is the very property entrusted to the lawyer, not a substitute. It is of no moment that another of respondent's bank accounts had a sufficient balance to cover the shortages that he caused in the Ravin firm's funds. As the escrow agent for the funds owned by the Ravin firm, he had an absolute obligation to maintain the integrity of those same funds.[8]

Respondent, thus, violated RPC 1.15(b) by failing to promptly deliver funds that third parties were entitled to receive. He violated that same rule by failing to promptly notify both the Ravin and the Lowenstein Sandler firms of his receipt of the $217,000 fee.

Additionally, by availing himself of $35,000 in allegedly unpaid compensation, respondent violated RPC 1.15(c). That portion of the funds, too, had to remain inviolate until the

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[8] It should be noted that, in almost every instance when respondent caused the balance in his money market account to fall below $110,000, he deposited funds in the account to bring the balance back to or very close to $110,000. This infusion of funds appears to belie respondent's argument that he believed it was proper to keep the $110,000 in two of his accounts, rather than in the same account in which the funds had been originally placed.

resolution of the salary dispute between respondent and the Ravin firm. Respondent had no right to make himself the arbiter of that controversy. In fact, pursuant to a consent order entered by the arbitrator in the Ravin firm's lawsuit against some of its former partners, respondent agreed to deposit in escrow the $35,000 that he held back from the Ravin firm, plus interest.

One of the most troubling aspects of respondent's conduct consisted of his lies that the Reliance settlement had not yet been funded and that he had not received the $217,000 fee for the Ravin firm and for Lowenstein Sandler. He lied to his Lowenstein Sandler partner, Stephen Dermer, about the status of the Reliance settlement and the payment of the legal fees, causing Dermer, in turn, to lie to counsel for the Ravin firm, David Freeman. By the time of Dermer's inquiry to respondent, respondent had been using the Ravin firm's funds for more than seven months.

And respondent's lie to Dermer was the product of thought and deliberation. He was not moved by the pressure or exigencies of the moment, circumstances that, at times, may prompt honorable individuals to fall prey to poor judgment. Twice Dermer asked respondent to review the contents of Dermer's

letter to Freeman; twice respondent lied to Dermer that Dermer's representations to Freeman were accurate.

Grievous, too, was respondent's involvement of his partner in his web of deception. As noted in In re Siegel, supra, 133 N.J. 162, 167 (1993), a law partnership is "an association that requires reliance, confidence and trust." Yet, respondent thought nothing of tarnishing his partner's reputation. Dermer had no inkling that his misrepresentations to Freeman were untruthful. He had no reason to doubt his own partner's assurances that the Reliance settlement had not been funded and that the legal fees had not been paid. Dermer obviously felt secure in making such representations to Freeman, just as Freeman felt confident that the representations were truthful, backed as they were by Dermer and, in fact, by the weight of the entire Lowenstein Sandler firm. Respondent's dishonesty toward Dermer and Freeman and his betrayal of his partner's trust showed a lack of moral character on his part.

Although the OAE compared respondent's conduct to that of his former partner in In re Rosen, supra, 192 N.J. 81, in many critical respects, the two cases are distinguishable. In Rosen, unlike here, there was no evidence of dishonesty, fraud, deceit or misrepresentation. Moreover, soon after receiving the fee

check, Rosen asked the Ravin firm for information about the loan and, being met with silence, allowed the funds to be applied toward a debt of the Ravin firm. Respondent, instead, waited three weeks, deposited the $217,000 in his personal bank account, transferred the Ravin firm's funds to other personal accounts, and then for one year spent them for his own benefit. As put by the OAE in its motion for reconsideration, respondent "intended to deprive [the Ravin firm] of the use [of the funds] until the receivership application was decided." He did so for seventeen months. Altogether, thus, respondent's conduct was a far cry from Rosen's.

What quantum of discipline is suitable for respondent's ethics offenses?

Ordinarily, failure to promptly deliver funds to clients or third persons will lead to an admonition. See, e.g., In the Matter of Craig A. Altman, DRB 99-133 (June 17, 1999) (attorney did not promptly pay a doctor's bill despite having signed a "letter of protection") and In the Matter of William E. Norris, DRB 97-400 (December 30, 1997) (after the cancellation of a real estate contract, attorney who held deposit in escrow returned it to the buyers minus his legal fee and one-half of the interest earned on the funds, which he turned over to his clients, the sellers).

Failure to keep separately funds in which the attorney and another person claim an interest, too, generally results in an admonition. See, e.g., In the Matter of Ronald S. Kaplan, DRB 01-031 (May 22, 2001) (attorney who came into possession of settlement funds in which he and a prior attorney had an interest did not keep the funds separately until there was an accounting and severance of their interests, a violation of RPC 1.15(c)).

For the so-called "self-help" infractions, usually a reprimand is the proper measure of discipline. The fundamental ingredient in "self-help" cases is the attorney's reasonable belief of entitlement to the funds, almost always because of an internal firm dispute over compensation. In all of those cases, the attorneys escaped a finding of knowing misappropriation because of their claim of entitlement to the funds.

In In re Bromberg, supra, 152 N.J. 382, the attorney intercepted and endorsed two checks payable to his law firm and then used them for personal purposes. In the Matter of Arthur D. Bromberg, DRB 97-129 (December 16, 1997) (slip op. at 2). The OAE alleged that such conduct constituted knowing misappropriation, while Bromberg contended that it was the result of a partnership dispute. Ibid. At the heart of this conflict was the interpretation of a letter-agreement governing

the professional association among Bromberg and two other attorneys. Id. at 3.

Specifically, when Bromberg and the two attorneys decided to end their association, Bromberg asked his major client to send him a fee check directly. Id. at 7. Aware that the client would be sending the check to the firm, Bromberg asked the firm's accounts receivable clerk if he could examine the mail received for the firm. Bromberg told the clerk that he was expecting mail from his prior law firm, which was untrue. Id. at 8. Bromberg then found and intercepted two fee checks, totaling $6,000. He endorsed the firm's name and his own name on the check and used the funds to satisfy personal obligations. Ibid.

We declined to find knowing misappropriation, as urged by the OAE, reasoning that Bromberg believed that he was entitled to the fees he had collected. Id. at 19. We noted that Bromberg had not received a salary for two months, that he had cash-flow problems, and that he believed that one of the attorneys had breached their letter-agreement. Ibid. We found that, "[i]n his mind, [Bromberg] was advancing to himself funds to which he was absolutely entitled. He acted out of self-righteousness." Id. at 20. Because, however, the manner in which Bromberg chose to

"make things right" was reproachable, we determined that he should be reprimanded. Ibid. The Court agreed.

In a similar case, In re Paragano, 157 N.J. 628 (1999), the attorney formed a professional association with another attorney. They agreed that the law firm's profits were to be divided as follows: one-half in accordance with the percentage of the parties' stock ownership and one-half based on each attorney's gross annual billings. In the Matter of Vincent D. Paragano, DRB 98-093 (September 28, 1998) (slip op. at 2).

A few years later, Paragano, as the majority stockholder, dissolved the firm. Ibid. After Paragano's partner filed a lawsuit against him, an arbitrator concluded that Paragano had spent $84,000 of the firm's funds on personal expenses, without the partner's consent. To hide some of those expenditures, Paragano had made improper entries in the law firm's records. Id. at 3.

In his defense, Paragano alleged that his agreement with the partner contemplated the payment of his personal expenses with the law firm's funds, an allegation that the partner denied. Ibid.

In a disciplinary stipulation submitted by Paragano and the OAE, Paragano contended that the expenditures had been proper. Id. at 6. Both parties agreed that Siegel was not applicable to

Paragano's conduct. Id. at 7. In essence, Paragano argued that he had his partner's consent to spend the firm's funds on personal expenses and, as a result, the partner had not been deceived by his conduct. Ibid.

In distinguishing Paragano's conduct from Siegel's, the OAE relied on Bromberg. We agreed that Paragano was not controlled by Siegel, not only because it had preceded the Siegel opinion but because, as majority shareholder, Paragano was entitled to most of the funds that he had spent. In addition, he had professed a conviction that he had an agreement with the partner for the payment of his personal expenses out of the firm's funds. Id. at 8.

We determined that a six-month suspension was required for Paragano's mischaracterization, in the firm's business account, of $16,000 of personal disbursements as the firm's expenses. We noted that Paragano had committed fourteen acts of deception over a sixteen-month period. Id. at 8-9. The Court agreed that a six-month suspension was appropriate.

In In re Glick, supra, 172 N.J. 319, the attorney entered into an agreement with a law firm, whereby he would receive a base annual salary plus benefits, reimbursement of expenses, and

profit sharing. In the Matter of Adam H. Glick, DRB 01-151 (January 29, 2002) (slip op. at 2).

From the outset, Glick and the firm disagreed on whether Glick had fulfilled his obligations under the employment agreement, a circumstance that would have affected his receipt of certain benefits contemplated in the agreement. Id. at 2.

At some point, Glick began to retain fees due to the firm as a form of self-help, to compensate him for what he perceived as the firm's failure to properly calculate his profit share. Id. at 4. Glick received a reprimand.

In In re Spector, supra, 178 N.J. 261, the attorney, dissatisfied with his employment arrangement with his law firm, announced his intention to leave and to set up his own firm with another lawyer. In the Matter of Brian D. Spector, DRB 03-041 (October 2, 2003) (slip op. at 3). Prior to his departure, Spector and the law firm attempted to enter into a separation agreement that was subject to some mutually agreeable modifications. Id. at 3-4.

At some point, Spector began to believe that the law firm would not honor their separation agreement. He then directed some clients to send payments for legal fees to his attention and to make the checks payable to him. Id. at 5-7.

The OAE did not seek Spector's disbarment, acknowledging that he had "an entitlement to an interest in the funds." Id. at 18.

We found that Spector had resorted to "self-help," believing that the separation agreement did not accurately reflect his prior discussions with the law firm's partners and that the law firm would not honor the separation agreement. We concluded that Spector truly believed that the law firm had breached their separation agreement, that his actions were, at least, defensible, and that, consequently, they did not amount to knowing misappropriation, although they were improper and unethical. Id. at 21-22. Spector received a reprimand.

Shortly after Spector, we reviewed In re Nelson, 181 N.J. 323 (2004). There, the attorney, a partner in a law firm, learned what he perceived to be numerous improprieties by his law firm. Specifically, Nelson discovered that legal malpractice lawsuits had been filed against the firm and had been concealed from him, that attorneys in the firm had made improper payments of referral fees to other attorneys, that one of his partners had been trying to "steal" his clients so that the partner would receive credit for generating the legal fees paid by those clients, and that, contrary to his expressed position, law firm

funds had been expended for such items as payment of sanctions imposed on individual attorneys in the firm or payment to an accountant to reconcile an individual attorney's accounts. In the Matter of Nelson, DRB 04-057 (May 19, 2004) (slip op. at 6-7). Nelson then disbursed $5,000 from his firm's trust account to cover personal expenses. Nelson believed that he was entitled to more than he took. Id. at 15.

As we stated in our decision, "[Nelson] require[d] us to determine the line between theft of law firm funds and an internal firm dispute. The central issue [was] whether respondent misappropriated funds from his law firm, or whether he reasonably believed that he was entitled to the funds." Id. at 2. We found that, under the formula used by Nelson's law firm to divide profits, he was entitled to a portion of the fees paid by the relevant client. Id. at 36. In addition, because Nelson felt that his partners' hands were constantly "in his pocket," when they spent the firm's funds on such items as malpractice deductibles, legal fees, and accountant's fees, he believed that he was entitled to retain the $5,000 balance in the trust account. Ibid. Nelson was reprimanded.

As indicated previously, the common thread running through the above "self-help" cases was the attorneys' claim of

entitlement to the funds. Although they were found to have behaved unethically, they escaped a finding of knowing misappropriation of law firm funds because of their belief -- conviction even -- that the funds rightfully belonged to them. The finding that they did not have the mens rea to steal was grounded on their entitlement to the funds. The two requirements, lack of intent to steal and claim of entitlement, defeated a finding of knowing misappropriation. Under Wilson and its progeny, the absence of mens rea alone, without at least a colorable claim of entitlement, would have required a finding of knowing misappropriation in Bromberg, Paragano, Glick, Spector, and Nelson.

Here, respondent's conduct was not as serious as that of Paragano (six-month suspension), who committed fourteen acts of deception, over a sixteen-month period, by making improper entries in his law firm's records. On the other hand, it was more serious than Bromberg's, Glick's, Spector's, and Nelson's, all of whom received reprimands, because respondent removed the $35,000 from trust funds, that is, funds that counsel in the Reliance litigation entrusted to him for the specific purpose of being remitted to their rightful owners, the Ravin firm and Lowenstein Sandler. By contrast, the reprimanded attorneys took

the funds from legal fees earned by their law firms, fees that did not have to be kept in trust, fees that could have been deposited in a business account and disbursed for either compensation or operating expenses. Furthermore, respondent's withdrawal of the $35,000 might have subjected counsel for Reliance and others to litigation by the Ravin firm for having entrusted respondent with its fee and, consequently, having facilitated his taking of sums that were in contention. Had this been respondent's sole impropriety, a censure or even a short-term suspension might have been the appropriate form of discipline.

But respondent's ethics transgressions did not stop there. He exercised full and improper control over funds that did not belong to him, funds that he had received in escrow for specific purposes; he violated his fiduciary duties toward the payor of the fee and its intended recipients by not placing the $217,000 in escrow; whatever his motivation was, he arbitrarily -- and secretly -- made himself the custodian of those funds for as long as seventeen months; on twenty-three occasions and for a period of one year, he used the Ravin firm's fees (at times, to the extent of $34,000) as if they were his own; and he engaged in a pattern of deception by hiding his receipt of the funds from parties that were entitled to them, by twice lying to

Dermer, and by allowing Dermer and, in turn, Lowenstein Sandler, to make misrepresentations to Freeman. In the process, he exposed the integrity of the Ravin firm's fees to great risk. Although the stipulation states that he had sufficient funds in both of his personal bank accounts to cover the $148,000 Ravin firm fee, it is possible that, for whatever reason, his personal funds might not have been available for reimbursement of the portion that he had spent.

An attorney who, among other improprieties, did not safeguard funds that he had been ordered to escrow and who misrepresented the whereabouts of the funds received a three-month suspension. In re Hasbrouck, 186 N.J. 72 (2006). In the course of Hasbrouck's representation of a matrimonial client, the matrimonial judge had ordered the client to turn over to Hasbrouck $600,000, which Hasbrouck was required to maintain in escrow until the resolution of the matrimonial case "to ensure the money [was] housed in a safe facility". In the Matter of Bruce C. Hasbrouck, DRB 05-279 (December 14, 2005) (slip op. at 3-4). Instead, for a period of eight months, the $600,000 check remained undeposited, under a blotter in Hasbrouck's desk. Id. at 5. Both the judge and Hasbrouck's adversary, Thomas Hurley, were unaware that the funds had not been escrowed. Id. at 6.

After the judge awarded each party one-half of the $600,000 and Hurley's client, the wife, did not receive the monies within the deadline fixed by the judge, Hurley filed a motion to enforce litigant's rights. Id. at 9. Although, at that time, Hasbrouck had already distributed the $600,000 to his client, he did not disclose that development in his response to the motion. He did so only on the day before the oral argument on the motion. Ibid.

Hasbrouck's explanation was that the payment did not have to be made from "any particular fund" and that he had no reason to believe that his client would not comply with the final judgment of divorce because his client was trustworthy and had never lied to him. In other words, Hasbrouck asserted his trust that the client would not dissipate the $600,000 and that the wife would get her share of the funds. Id. at 12.

We rejected Hasbrouck's position that the $600,000 was "fungible" and found that he had failed to safeguard the $600,000 cashier's check, when he left it under his blotter for eight months; lacked candor toward the court by not apprising it that the monies were not in escrow; and made a misrepresentation by silence to Hurley by failing to disclose that he no longer had the $600,000 in his possession. Id. at 20-24.

As indicated previously, Hasbrouck received a three-month suspension for those violations and for recordkeeping irregularities. Like respondent, Hasbrouck had no prior discipline. Both attorneys had been practicing for a long time, before their misconduct: twenty-four years (Hasbrouck) and twenty-two years (respondent).

How does respondent's conduct compare to Hasbrouck's? Both failed to safeguard escrow funds and both made misrepresentations about the whereabouts of the funds. It is true that Hasbrouck also failed to disclose to the matrimonial judge that the monies had not been escrowed, but, on the other hand, twice respondent affirmatively and intentionally lied to his own law partner, thereby involving an innocent colleague in his deceptive tactics and possibly tarnishing his partner's reputation for truthfulness. Furthermore, Hasbrouck released the funds to a party to the escrow agreement, while respondent disbursed them to himself, having no claim of entitlement whatsoever to, at least, the $110,000. Moreover, respondent spent the funds that he was obligated to safekeep, whereas there is no indication that Hasbrouck's client failed to maintain the $600,000 whole. Finally, respondent also availed himself of $35,000 in funds that were under dispute and that were required

to be kept in trust. As mentioned previously, an aggravating factor was that respondent could have placed counsel for Reliance and other parties at risk of being sued by the Ravin firm.

Simply put, respondent failed to segregate money that was entrusted to him, took substantial portions of that money for his personal use, failed to notify the parties of his receipt of their funds and to promptly deliver those funds to them, and lied about the funds to both his former firm, Ravin, and to his current firm, Lowenstein Sandler.

Considering the totality of the circumstances, including that respondent's conduct was more serious than Hasbrouck's, who received a three-month suspension, we determine that nothing less than a six-month suspension is appropriate in this case.

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.

We are compelled to address three additional points raised both by the OAE and respondent's counsel. The first point requires clarification; the other two, although no longer relevant to this matter because of the special investigator's conclusion that a charge of knowing misappropriation was not

warranted, require correction, nevertheless, for being against firmly established principles of law.

First, in its motion for reconsideration to us, the OAE argued that respondent did not have to keep intact the funds entrusted to him because, in In re Shapiro, 138 N.J. 87 (1994), this Board speculated that there may not be a duty to segregate legal fees under dispute by attorneys and held that, even if there were such a duty, attorneys who fail to segregate the disputed fees are not guilty of knowing misappropriation, but of failure to keep those fees separate until the resolution of the dispute. The OAE placed great emphasis on dicta contained in the Board's decision in In the Matter of Terry Shapiro, DRB 93-363 (May 27, 1994).

In Shapiro, several charges of knowing misappropriation were leveled against the attorney, including allegations that he had not segregated disputed fees to which he and two other attorneys were entitled, until a severance of their interests. One of the attorneys was Shapiro's former associate, who was entitled to a percentage of the fee because he had brought the case into the firm. The other attorney had been replaced by Shapiro in a lawsuit.

In finding no misappropriation in the above conduct, the then-members of the Board opined that a reading of the relevant rule, RPC 1.15, as well as of the Annotated Model Rules of Professional Conduct authored by the Center for Professional Responsibility of the American Bar Association, did not persuade them that the rule was intended to govern the division of fees among attorneys. The Board determined that, "[a]lthough the better practice would be to segregate the amount in dispute until resolution of the [fee] controversy [between the attorneys]," it did not consider itself to be the "appropriate forum to determine the applicability of the segregation requirement of RPC 1.15 to fee disputes among attorneys." In the Matter of Terry Shapiro, supra, DRB 93-363 (May 27, 1994) (slip op. at 69).

For several reasons, the OAE's reliance on Shapiro is misplaced. First, the Board made it clear that it was merely expressing its opinion that there was no duty to segregate in such circumstances. Second, the Board did not view itself as the proper tribunal to determine whether the rule applies to fee

disputes amount attorneys. The Board recognized that it was up to the Court to make that determination.[9] Third, in the case involving the former associate, Shapiro took no more than the amount of his own share, that is, he spent no more than what he was entitled to receive. Id. at 43-44. Fourth, in the case of the replaced attorney, there was an ongoing dispute over Shapiro's and the attorney's respective shares of the fee. Shapiro believed that he was entitled to a larger portion because he had performed the lion's share of the work. Id. at 45-46.

Here, respondent had no personal interest in the $110,000 that he deposited in his money market account and spent to a considerable degree. Although there was a dispute going on among the Ravin firm's former partners, it was not respondent's dispute; he was not involved in that conflict.[10]

Unquestionably, thus, respondent had a duty to maintain in escrow the funds that were entrusted to him by counsel for

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[9] The Court did not issue a separate opinion, but only an order.

[10] As indicated previously, respondent's partner at Lowenstein Sandler, Kenneth Rosen, also a former Ravin firm member, was a defendant in a suit filed by the Ravin firm's former partners.

Reliance for the specific purpose of distributing to Lowenstein Sandler and the Ravin firm their respective shares of the legal fees. In fact, at the January 17, 2008 oral argument before us, respondent's then-counsel acknowledged that the monies should have been placed in a trust account.

As to the second point, both the OAE and respondent's former counsel argued that mens rea to steal is a necessary element of a knowing misappropriation offense. Intent to steal, however, is never a requisite to a finding of knowing misappropriation. The lawyer's state of mind is irrelevant in situations involving the unauthorized use of trust funds. As the Court held in the context of the unauthorized use of client funds,

> [m]isappropriation . . . 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 of some kind intent to defraud or something else is required,

> that is not so . . . . [T]he presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" — all are irrelevant. [Emphasis supplied].
>
> [In re Noonan, 102 N.J. 157, 159-60 (1986).]

This principle applies with equal force to the knowing misuse of escrow funds. In 1985, the Court decided the Wilson counterpart for the knowing misappropriation of escrow funds, In re Hollendonner, 102 N.J. 21 (1985). There, the Court held that "[t]he parallel between escrow funds and client funds is obvious. So akin is the one to the other that henceforth an attorney found to have knowingly misused escrow funds will confront the disbarment rule of *In re Wilson*, *supra*, 81 *N.J.* 451." In re Hollendonner, supra, 102 N.J. at 28.

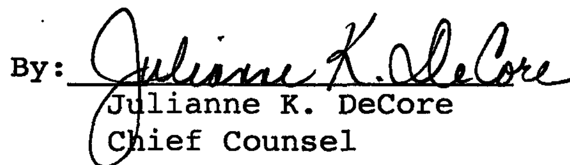
Counsel's argument in this respect appears to have been grounded on our finding, in the "self-help' cases, that the attorneys did not have the mens rea to steal. As mentioned previously, however, the absence of mens rea alone is not sufficient to spare a finding of knowing misappropriation. The second essential ingredient is a claim of entitlement to the funds that were taken. In short, lack of a mens rea to steal and a belief of entitlement, together, will save an attorney from disbarment.

The final point pertains to OAE counsel's argument that "knowing misappropriation of client funds requires a different analysis than cases involving knowing misappropriation of attorney's fees or law firm funds. They're two different animals. They're apples and oranges." Counsel's position is substantively incorrect. Knowing misappropriation is knowing misappropriation, regardless of the character of the funds at stake. There are some situations in which a lawyer's improper taking of law firm funds does not rise to the level of knowing misappropriation (the "self-help" cases) but, once knowing misappropriation is found, the nature of the funds does not convert the misappropriation into a lesser offense, or a different offense, as suggested. Simply stated, since 1993, knowing misappropriation of law firm funds and knowing misappropriation of client or trust funds are no different. In In re Siegel, supra, 133 N.J. 162, the Court expanded the Wilson/Hollendonner concept to the unauthorized use of law firm funds. The Court held that, "[a]lthough the relationship between lawyers and clients differs from that between partners, misappropriation from the latter is as wrong as from the former." Id. at 170. See also In re Greenberg, 155 N.J. 138, 140 (1998) ("We reaffirm the rule set forth in *In re Wilson,* 81 *N.J.* 451, 409 *A.*2d 1153 (1979), and extended in *In re Siegel*, 133 *N.J.*

162, 627 *A.*2d 156 (1993), that misappropriation of client or law firm funds will almost invariably result in disbarment").

Member Baugh did not participate.

Disciplinary Review Board
Louis Pashman, Chair

By: 
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

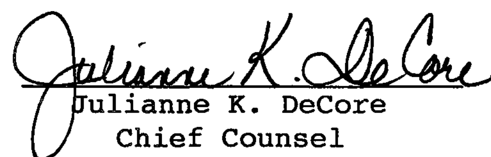
In the Matter of Michael S. Etkin
Docket No. DRB 11-049

Argued: April 21, 2011

Decided: July 28, 2011

Disposition: Six-month suspension

Members	Disbar	Six-month Suspension	Reprimand	Dismiss	Disqualified	Did not participate
Pashman		X				
Frost		X				
Baugh						X
Clark		X				
Doremus		X				
Stanton		X				
Wissinger		X				
Yamner		X				
Zmirich		X				
Total:		8				1



Julianne K. DeCore
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