SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 97-491

IN THE MATTER OF

ROCCO F. SENNA

AN ATTORNEY AT LAW

Decision

Argued: April 16, 1998

Decided: November 2, 1998

Thomas J. McCormick appeared on behalf of the Office of Attorney Ethics.

Respondent appeared *pro se*.

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

This matter was before the Board based on a recommendation for discipline filed by Special Master Roger J. Desiderio. The amended complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with six counts of knowing misappropriation of client funds, in violation of *RPC* 1.15(a) and *RPC* 8.4(c). The special master granted the OAE's motion to dismiss one count; the ethics hearing proceeded on the remaining five counts.

Respondent was admitted to the New Jersey bar in 1942. He has no prior disciplinary history.

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Because respondent did not contest most of the evidence that the OAE presented, the facts are not substantially in dispute. There is no doubt that respondent invaded trust funds of clients to pay other clients. The issue is whether respondent did so knowingly or negligently.

On December 24, 1996 the OAE received notice from PNC Bank that one of respondent's trust account checks was returned on December 13, 1996 for insufficient funds. In a January 9, 1997 reply to a resulting inquiry, respondent explained to the OAE:

> [I] noticed that the balance in my trust account [sic] was over $4,000.00 and transferred $4,000 to my business account, without realizing that a check I had made on August 23, 1996 to Joseph & Nell Taylor, #1675, in the amount of $3,607.78, had not been presented for payment until about 4 months later on Dec. 12, 1996.

Not satisfied with the above explanation, on January 22, 1997 the OAE notified respondent that a select audit of his trust and business accounts would be conducted on February 11, 1997. On the scheduled date, OAE auditor Karen Hagerman performed the audit at respondent's law office.

The audit, covering the two-year period between February 11, 1995 and February 11, 1997, revealed that respondent maintained two trust accounts with PNC Bank: a checking account ("trust checking account"), designated as an attorney trust account, and a savings account ("trust savings account"), bearing no such designation. Respondent told Hagerman

that, although he held trust funds in both accounts, he commingled personal and client funds in the savings account. In his answer to the formal complaint, respondent acknowledged that he had failed to comply with *Rule* 1:21-6, which requires that the phrase "attorney trust account" appear on all such accounts.

According to Hagerman, respondent made the following damaging statements during the select audit: (1) he used funds from his trust account to assist his son's financially troubled business; (2) although he should not have taken client trust funds, he had replaced all withdrawals; (3) he had enough equity in his house to cover any shortages; and (4) he saved money by using client trust funds because he did not pay loan interest. Respondent denied making the last statement, although he acknowledged remarking during the audit that perhaps he should have obtained a loan, instead of using trust funds.

During the audit, Hagerman found twenty-nine instances of shortages in both trust accounts during the period from January 9, 1996 through January 2, 1997, inclusive. The shortages ranged from a low of $670.93 on August 21, 1996 to a high of $14,256.79 on July 10, 1996. Hagerman testified that the aggregate shortage during this time exceeded $22,000. Respondent created these shortages by writing checks payable to himself and by using an automated teller machine card. He used the withdrawn funds for his own purposes. When Hagerman asked respondent why he had an automated teller machine card for a trust account, he simply replied that the bank had given it to him.

The OAE audit disclosed that respondent failed to keep intact trust funds held in behalf of four clients and failed to pay accrued interest to another client. Details on the matters involved follow:

The Martinez Matter

On February 1, 1994 respondent received $25,750 on behalf of a client, Jose Martinez, Sr. According to the statement of disbursement that respondent prepared, he disbursed $3,953.29 to himself as legal fees and $13,213.37 to his client. Respondent was required to maintain $8,583.33 in escrow until the expiration of the statute of limitations applicable to a potential claim against the funds. The record does not reveal when the statute of limitations would expire. These were the only client trust funds held by respondent during the period from January 9, 1996 through March 11, 1996. However, from January 9, 1996 through March 2, 1996 respondent had a total balance ranging from $4,699.64 to $6,932.29 in both trust accounts, when he should have been holding $8,583.33 in trust for Martinez. For the *Martinez* account alone, thus, there were shortages ranging from $3,883.69 to $1,651.04.

Respondent eventually issued a business account check for $8,583.33 to Martinez on August 16, 1996 . The bank paid the check on August 26, 1996. Respondent explained to Hagerman that, because he had insufficient monies in his trust account, he disbursed the

funds to Martinez from his attorney business account. Had respondent not deposited $4,814.79 in his business account on August 23, 1996, the check to Martinez would have been returned for insufficient funds. The source of the $4,814.79 that respondent deposited in his business account was a $10,000 certificate of deposit that respondent had opened on February 22, 1995, with a maturity date of August 22, 1996.

Respondent explained at the ethics hearing that his wife had a $10,000 certificate of deposit that was due to mature. She wanted to obtain a higher interest rate. Consequently, after the maturity date respondent temporarily placed the $10,000 in his trust savings account until another certificate of deposit was purchased. This gave respondent the idea to take funds out of his trust savings account and purchase a certificate of deposit. It occurred to respondent that he could obtain a more favorable interest rate if he placed Martinez's money in a certificate of deposit, rather than leaving it in his trust account. Thus, on February 22, 1995 he bought two $10,000 certificates of deposit: one in his name, using the $8,583.33 belonging to Martinez plus other unidentified funds, and another in his and his wife's name, using his wife's money. Respondent contended that, although he placed the certificate of deposit in his name, he did not intend to keep the *Martinez* funds, but to obtain a more favorable interest rate from the bank. Respondent conceded that, rather than paying Martinez the interest earned on the certificate of deposit, he kept it.

Although the certificate of deposit purchased with Martinez's funds matured on August 22, 1996, respondent withdrew $6,000 from the $10,000 certificate of deposit on July 8, 1996, depositing those funds in his business account. On the maturity date, August 22,

1996, respondent withdrew $4,814.79, representing the $4,000 balance plus interest, and placed those funds in his business account on August 23, 1996. Thus, although respondent did not articulate this argument in detail, his position apparently is that he maintained the *Martinez* funds intact, albeit first in a certificate of deposit and then in his business account, rather than in his trust account. According to respondent, because he did not bring this extra $10,000 to Hagerman's attention during the investigation, he should have been credited with having $10,000 more than Hagerman's analysis revealed.

The presenter argued, however, that respondent did not purchase the certificate of deposit on behalf of Martinez, but for himself with proceeds received from a fee in the *Kuhlberg* estate matter. Hagerman testified that respondent made the following entries on his December 1994 trust savings account bank statement: an $11,127.92 deposit next to which respondent wrote "G.H. Senna," his wife's name, and a $10,000 deposit next to which respondent wrote "Kuhlberg." Additionally, in a March 19, 1997 letter to the OAE, in which respondent identified the source of the funds in his trust savings account, he asserted that the $10,000 represented his fee from the *Kuhlberg* estate matter.

Respondent's bank account records show that on February 22, 1995 he withdrew $20,000 from his trust checking account, apparently to purchase the two certificates of deposit. The trust checking account bank statements from February 1994, when respondent received the $25,750 *Martinez* funds, show no corresponding deposit. Thus, the absence of

a deposit supports the presenter's position that respondent did not purchase the certificate of deposit with Martinez' funds.

In turn, respondent testified that the information in his March 19, 1997 letter to the OAE was incorrect and that the certificate of deposit was purchased with funds he was holding in trust for Martinez.

The Brito Matter

Respondent represented John Brito in the purchase of real estate from Joseph and Nell Taylor. On August 20, 1996 respondent deposited in his trust checking account $9,400 received in Brito's behalf, presumably to be held in escrow until the real estate closing. The next day, August 21, 1996, respondent issued a $12,500 check from his trust checking account to another client, Dominick Ragozzine. The presenter argued that respondent used some of Brito's funds for Ragozzine's behalf.

As noted earlier, the genesis of these matters was the return of a check from respondent's trust account for insufficient funds. Specifically, on December 12, 1996 respondent's trust checking account for $3,607.78 bounced. The check had been issued to the Taylors, against Brito's funds. Respondent explained that, after noticing that the balance in his trust checking account exceeded $4,000, sometime in August 1996 he transferred that amount to his attorney business account, unaware that his $3,607.78 check to the Taylors,

issued on August 23, 1996, had not yet been presented for payment. However, respondent's bank records show that he transferred $4,000 from his trust checking account to his attorney business account on August 16, 1996, seven days **before** he issued the $3,607.78 check to the Taylors.

The presenter argued that, if respondent had not transferred $4,000 to his attorney business account on August 16, 1996, the $8,583.33 check issued to Martinez on August 16, 1996 would have been returned for insufficient funds. According to the presenter, both this $4,000 deposit and the $4,814.79 deposited on August 23, 1996 were needed to cover the $8,583.33 check to Martinez. The business account bank statement for August 1996 shows that the account balance on August 15, 1996 – one day before respondent wrote the $8,500 check to Martinez – was $2,054.38. With the $6,225 deposit made on August 16 (part of which was the $4,000 transfer from the trust checking account), the balance rose to $8,279.38, which was still insufficient to cover the $8,500 disbursement to Martinez. It was only on August 23, with the $4,814.79 deposit from the remaining certificate of deposit proceeds, that the balance was elevated to $11,988.66, an amount sufficient to cover the $8,500 check to Martinez. That check was paid on August 26, 1996, ten days after it was issued.

* * *

Although there was no testimony about the purpose of the check to the Taylors, or what became of the remainder of the *Brito* funds, the *Brito* client ledger card shows that on August 23, 1996 respondent issued a series of checks that are typical of real estate closing disbursements. It appears, thus, that respondent completed the *Brito* matter and disbursed all of the escrow funds.

The Ragozzine Matter

As mentioned above, respondent represented Dominick Ragozzine in a real estate transaction. On April 2, 1996 respondent deposited $1,500 in his trust checking account on Ragozzine's behalf. The record does not disclose the purpose of these funds. On June 10, 1996 respondent issued to himself trust account check number 1670 for $1,500, noting on the check: "Transfer Re: Ragozzine." There is no corresponding deposit in any other account to cover this "transfer."

On June 13, 1996 respondent deposited $11,000 in his trust savings account to be held for Ragozzine. Again, the record offers no explanation for the purpose of these funds. Because the matter is identified as a real estate transaction, presumably the $12,500 represented funds to be held in escrow until closing.

Other than an existing balance of $866.49, only $11,000 remained in the trust savings account at that time. Two weeks later, on June 28, 1996, the balance in the trust savings

account was reduced to $9,766.49 by two automated teller machine withdrawals of $400 and $300 and a "counter check"[1] of $1,400. As a result, the *Ragozzine* account had a shortfall of $2,100. The balance of the trust checking account on the same date, June 28, 1996, was $10,744.72 for a combined amount in both accounts of $20,511.21. Although that total would have been enough to cover the $400, $300 and $1,400 ($2,100) withdrawals made by respondent, and still keep the $12,500 *Ragozzine* funds intact, the funds available in the trust checking account – $9,766.49 – were not.

On August 21, 1996 respondent issued $12,500 to Ragozzine by trust checking account check number 1680. At that time, the balance in the account was $17,735.72. Although that would have been sufficient to cover the $12,500 disbursement, at the time respondent should have been holding $31,900 in behalf of three clients, Ragozzine ($12,500, Cajigas ($10,000) and Brito ($9,400). The presenter argued that, in issuing the check to Ragozzine, respondent invaded Brito's funds, for whom he had deposited $9,400 into his trust checking account on August 20, 1996. According to the presenter, but for the August 20, 1996 deposit of the *Brito* funds, the August 21, 1996 check to Ragozzine would have been returned for insufficient funds. Prior to that deposit the trust checking account balance was $8,738.72; the balance in the trust savings account was $4,093.35, for a combined total of $12,832.07.

Respondent's explanation about the *Ragozzine* matter was far from clear:

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[1] Presumably, a counter check is a check given at the bank counter at the time that the account holder makes the withdrawal.

> And as far as the Ragozzine account, that was simply a mistake on my part as to where the funds were deposited. And it was made good by transferring the funds back into the right account.

Presumably, respondent was referring to the fact that, although he placed $11,000 of Ragozzine's funds in his trust **savings** account, he later issued a $12,500 check to Ragozzine from his trust **checking** account. It should be noted that, from April 2, 1996, when respondent received part of Ragozzine's funds, until August 21, 1996, when he paid Ragozzine, the combined balance in the trust savings and trust checking accounts exceeded $12,500 ($21,829.07 in both accounts on August 21, 1996), although respondent was significantly out-of-trust overall because of his obligation to Cajigas ($10,000) and to Brito ($9,400). Thus, while respondent had sufficient funds to pay Ragozzine, because of his practice of "lapping", respondent's combined bank accounts were short by more than $10,000.

The Cajigas Matter

In March 1996 respondent settled a personal injury matter for his client, Welesca Cajigas, an infant, depositing $15,000 in his trust checking account on March 11, 1996 and $1,750 on March 26, 1996. According to the settlement statement, of the $16,750 settlement proceeds respondent was entitled to a fee of $4,187.50 plus $1,118.17 as reimbursement of costs; Carmen Cajigas, the infant's mother, was to receive $1,000; $5,000 was to be paid to

a trustee, in trust for the infant; $5,000 was to be paid to Medicaid to discharge a lien; and $444.33 was to be held in reserve for expenses toward future prosecution of the case.

Respondent issued three checks to himself from the trust checking account, totaling $4,500: number 1664 for $3,000 on April 29, 1996, with the notation "Cajigas fee", number 1665 for $1,000 on May 2, 1996, with the notation "re: Cajigas" and number 1666 for $500 on May 8, 1996, with the notation "W. Cajigas." While it is true that respondent might be entitled to more than $4,500 for fees and costs together, the *Cajigas* client ledger card does not reflect these checks; if, in fact, the $4,500 was for fees and costs, proper recordkeeping required that they be registered on the ledger card. More significantly, despite the requirement that respondent pay $5,000 to a trustee and $5,000 to Medicaid, the total balance in respondent's trust checking account was only $4,147.68 on August 31, 1996, thereby causing a deficiency of $5,852.32. According to the bank statement, on December 31, 1996 only a balance of $122.12 remained in respondent's trust checking account, elevating the shortage to $9,877.88.

On February 3, 1997 and February 6, 1997 respondent issued two $5,000 business account checks in behalf of Cajigas: one for the trust and one to Medicaid. The presenter contended that to replace the *Cajigas* funds respondent had used a fee of $14,608.33 received on January 10, 1997 in an unrelated matter, the *Abindonte* matter. On January 15, 1997 respondent had deposited $15,128.33 in his business account. The bulk of that deposit was from the $14,508.33 *Abindonte* fee.

Unfortunately, respondent's testimony at the hearing did not address or explain the *Cajigas* problem. His answer to this count of the complaint does not shed much light on the matter:

> There was no Knowingly [sic] intentional misappropriation in the Cajigas matter. There remains on deposit a sum of $444.33 in the trust account. The transfer of the $10,000.00 to the Investors Savings Bank account caused the confusion in accounts which has been rectified with no injury to the clients.

Apparently, the $10,000 to which respondent alluded were the funds used to purchase the certificate of deposit.

The Fitzsimmons Estate Matter

Respondent did not dispute that he failed to pay interest of $289.53 to the beneficiaries of the Estate of Fitzsimmons. Because the record does not disclose respondent's role in that matter, it is presumed that he represented the estate. Although respondent maintained $26,239.53 in his trust savings account on behalf of the estate, he did not pay any of the accrued interest to the beneficiaries.

* * *

By way of a general defense to the charges, respondent testified that in 1995 he and his wife had helped their son establish a business in Wildwood, New Jersey. Respondent

stated that, because he went to Wildwood every weekend and holiday, he did not have sufficient time to devote to recordkeeping. He added that his declining practice did not permit him to afford a bookkeeper or accountant. His answer to the complaint states that he now has more time to maintain the required books and records.

At the ethics hearing, respondent testified that any overdrafts that might have occurred were unintentional, asserting that all of his clients have been paid in full. He admitted that his bookkeeping was sloppy and that he should have been more attentive to his records. Respondent gave the following testimony about his bank accounts:

> I admit that there was [sic] some funds transferred from the Trust Savings Account to my regular account. I did that not realizing that I was going down beyond the amount that the – in the accounts that were monies that were from my account, because there was a mixture of my funds in the account, in the Trust Savings Account and my personal funds, which I had not taken out of my fees until – I left them in the account, so there was a mixture of funds in the Trust Savings Account. And when I transferred funds from that account to my regular account, I thought at the time, without checking into it, that those funds were funds that belonged to me and not to my clients.
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> And much of that [sic] funds was used, as I stated before to Ms. Hagerman, for use in my son's business. He was in business, and I was going down to Wildwood, helping him out, giving him money, taking it from my Business Account from which I had transferred from the Savings Account, without realizing that maybe I was dipping into clients' funds. And as a result, the accounts became overdrawn at the one point. But everything was made up as soon as I realized that I had overdrawn funds – my personal funds from the Savings Account. As soon as I realized that, I made good. I transferred funds so that my clients were not hurt. They received all their money.
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> And I don't feel I have stolen any money from any account, and I never knowingly misappropriated any money from any of my clients.

* * *

The special master found that respondent knowingly misappropriated client trust funds. He found Hagerman's testimony credible, noting that respondent had made damaging admissions to her during the audit, that is, that he should not have used the money in his trust account, that he was trying to help his son, that he was hoping he would not have to borrow money and pay interest on a loan, that he asked if he could retire from the practice of law, when confronted with Hagerman's findings, and that he knew other attorneys who had engaged in similar conduct. Although the special master did not discuss each count separately, he apparently determined that the presenter proved by clear and convincing evidence each allegation of knowing misappropriation. The special master also noted respondent's acknowledgment that he failed to pay interest to the client in the *Fitzsimmons* estate matter.

The special master further remarked as follows:

> I believe Ms. Hagerman's testimony concerning her conversations with Mr. Senna and I believe Mr. Senna did not intend to hurt any clients. Rather, he was functioning under the misguided principal [sic] that as long as the clients were ultimately made whole, he was doing no wrong.
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> . . .
>
> Notwithstanding the holding of *In re Wilson*, the Special Master respectfully requests that the Supreme Court consider a sanction short of disbarment. I sense Mr. Senna's lack of understanding of the requirements of our Court

> Rules and our Rules of Professional Conduct concerning clients' trust fund. While disbarment appears to be the required sanction, given Respondent's years at the bar, it may be appropriate that this Respondent be given the opportunity to permanently retire and surrender his license.

* * *

Following a *de novo* review of the record, the Board is satisfied that the special master's finding of unethical conduct is supported by clear and convincing evidence. Respondent did not dispute that he was out-of-trust. He denied, however, that his invasion of client funds had been knowing. Instead, respondent argued that, because he had commingled personal and client funds in his trust savings account, he was not aware that he had exhausted his personal funds and taken clients' funds when he withdrew funds from that account. Thus, the Board was required to determine whether respondent's acts of misappropriation were committed knowingly.

In *In re Konopka*, 126 *N.J.* 225 (1991), the Court reiterated the need to satisfy the clear and convincing evidence standard of proof of knowing misappropriation:

> We insist, in *every Wilson* case, on clear and convincing proof that the attorney *knew* he or she was misappropriating. Obviously, we consider the attorney's records, if relevant, along with all other testimony, but if all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment, no matter how strong the suspicions are that flow from that proof.
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> [*Id.* at 234]

Here, the proofs of respondent's knowing misappropriation consist of the following:

- In the *Martinez* matter, although respondent should have held $8,583.33 in trust, his trust accounts contained as little as $4,699.64. Before respondent issued a check to Martinez, he replaced $4,814.79 from a certificate of deposit in respondent's own name. Despite respondent's contention that he had placed the *Martinez* funds in the certificate of deposit to obtain a favorable interest rate, respondent failed to pay Martinez any of the earned interest.

The record supports the presenter's position that respondent purchased the certificate of deposit with his own funds, received from his fee in the *Kuhlberg* estate, and not with the *Martinez* funds. This view is confirmed by respondent's handwritten notes on his bank statement and by respondent's initial assertion to the OAE that he used the *Kuhlberg* fee to purchase the certificate of deposit.

Moreover, if respondent's defense is that he did not spend the $8,500 in escrow, but merely transferred the money to a certificate of deposit and then later to his business account, then the total due of $8,583.33 should have been held intact in that account. Yet, as noted earlier, the business account bank statement shows, for example, that the balance on August 15, 1996, the day before respondent issued the $8,500 check to Martinez, was only $2,054.38. It is clear, thus, at least after the transfer of the certificate of deposit proceeds to his business account, that, at a minimum, respondent borrowed the *Martinez* funds from his business account.

- In the *Brito* matter, respondent deposited $9,400 in his trust checking account in Brito's behalf. The next day, respondent issued to Ragozzine a $12,500 check from that account. The timing of these transactions allows the inference that respondent was aware that, without the *Brito* funds, his check to Ragozzine would not have been honored. Respondent explained that, not realizing that the $3,607.78 check he had issued to the Taylors from Brito's funds still had not been paid, in August 1996 he transferred $4,000 from his trust checking account to his business account. However, this explanation is not satisfactory because respondent transferred $4,000 to his account seven days before he wrote the *Taylor* check. Thus, the evidence that respondent knowingly misappropriated funds in the *Brito* matter is compelling.

- In the *Ragozzine* matter, respondent should have held $12,500 in trust. On June 10, 1996 he transferred $1,500 of those funds to himself, noting on the check "Transfer Re: Ragozzine." As noted above, there were no other deposits covering or justifying this draw. Two weeks after respondent received the $11,000 balance of the *Ragozzine* funds, he began spending them. At one point, the account in which the $11,000 was deposited (trust savings account) had a balance of only $9,766.49, resulting in a $2,733.51 shortfall. As noted above, although the funds in both trust accounts were sufficient to cover the $2,100 disbursements respondent made to himself and, at the same time, pay out the $12,500, the *Cajigas* and *Martinez* funds would have been at least partially invaded.

- In *Cajigas*, respondent should have held intact $10,000 – $5,000 to fund a trust for the minor client and $5,000 to discharge a Medicaid lien. However, nine months after receiving the funds, respondent had withdrawn all but $122.12. When respondent issued the two $5,000 checks, he funded the payment with fees he had received in an unrelated matter.

* * *

In addition to the documentary evidence described above, respondent admitted to the OAE auditor that he used trust funds to assist his son, that he should not have used the funds in that manner, that he wanted to avoid paying interest, that using trust funds is a common practice and that he knew other attorneys who engaged in similar conduct. These admissions signify that respondent was aware that he was using client funds, not just the personal funds that he kept in the same account.

Moreover, during the audit, after Hagerman questioned respondent about the depletion of trust account funds by counter checks and automated teller machine withdrawals, respondent asked if he could retire from the practice of law. Hagerman replied that respondent would not be permitted to retire while an ethics matter was pending.

Based on the overwhelming documentary evidence, as well as respondent's admissions, it is clear that respondent knowingly misappropriated client funds. Emerging from this record is the unfortunate picture that respondent was not aware that "borrowing"

money from his clients is prohibited. Respondent presents a sympathetic figure. He has practiced law since 1942, a period of fifty-six years. He has no prior disciplinary history. At the time of the Board hearing, respondent was seventy-nine years old. He must be, nonetheless, charged with knowledge of the applicable rules and caselaw.

Nearly twenty years ago, the Court announced the bright-line rule that knowing misappropriation of client funds will, almost invariably, result in disbarment. *In re Wilson*, 81 *N.J.* 451 (1979). *Wilson* places the highest priority on the maintenance of public confidence in the Court and in the bar, such that "mitigating factors will rarely override the requirement of disbarment." *Id.* at 461. Although the use of such terms as "almost invariable" and "rarely override" might raise the possibility of a departure from the automatic disbarment rule, since 1979 the *Wilson* rule has been applied without exception. Every attorney who has been found to have knowingly misappropriated client funds has been disbarred, even where the funds were "borrowed" for compelling reasons.

In *In re Noonan*, 102 *N.J.* 157 (1986), the Court defined the requirements for a finding of knowing misappropriation:

> The misappropriation that will trigger automatic disbarment under *In re Wilson*, 81 *N.J.* 451 (1979), disbarment that is 'almost invariable,' *id.* at 453, consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. It makes no difference whether the money was 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. While this Court indicated that disbarment for knowing misappropriation shall be 'almost invariable,' the fact is that since *Wilson*, it has been invariable. [Footnote omitted].
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> [*In re Noonan*, *supra*, 102 *N.J.* at 159-160]

Under *Noonan*, thus, intent to steal or defraud and dishonesty are not required. So long as the lawyer knows that the funds are not his or hers and knows that the client has not consented to the taking, the absence of evil motives, the lack of intent to permanently keep the monies, the good use to which the funds may be put, the lawyer's prior unblemished character and, moreover, the circumstances or pressures impelling the lawyer are all irrelevant. All that is needed to mandate disbarment is proof that the lawyer took the funds knowing that they were not his or hers and knowing that the taking was unauthorized. No amount of mitigation will be sufficient to excuse misappropriation that was knowing and volitional. Thus, it is of no consequence that respondent did not intend to permanently deprive his clients of their funds or that no client suffered any loss. It is enough that respondent used their money, without their consent, knowing that he had no authority to do so.

Despite the sympathy generated by respondent's plight, the Board unanimously determined to recommend his disbarment. Although the special master's suggestion of permitting respondent to retire and surrender his license is deserving of consideration, it is not permitted under existing caselaw. Attorneys with compelling circumstances have been

disbarred for the knowing misappropriation of client funds. *See In re Warhaftig*, 106 *N.J.* 529 (1987) (financial pressures caused by serious illness in attorney's family); *In re Lennan*, 102 *N.J.* 518 (1986) (extreme financial pressure of providing for attorney's family, including college education costs for two daughters); *In re Marks*, 96 *N.J.* 30 (1984) (severe financial pressure of providing basic support for attorney's family). Here, although respondent was faced with pressure, caused in part by his financial assistance to his son, respondent had access to other resources. He chose, instead, to use his clients' funds. Disbarment, thus, is mandatory. One member did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 11/2/98

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board