SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-061

IN THE MATTER OF	
CHARLES S. EPSTEIN	
AN ATTORNEY AT LAW	

Decision

Argued: April 15, 2004

Decided: May 19, 2004

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Dominic J. Aprile appeared on behalf of respondent.

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 (disbarment) filed by Special Master David G. Eynon, J.S.C. The one-count complaint charged respondent with violations of RPC 8.4(c) (conduct involving deceit, dishonesty, and misrepresentation), and the principles of In re Siegel, 133 N.J. 162 (1993), for converting his law firm's funds.

Respondent was admitted to the New Jersey bar in 1985. At the relevant times, he practiced law as an associate of Dubois, Sheehan, Hamilton, and Levin ("the firm"), in Cherry Hill and Camden, New Jersey. Respondent has no history of discipline.

In November 2000, respondent was hired as an associate by the firm to handle primarily matrimonial, and some criminal, matters. Respondent operated out of the firm's Cherry Hill office.

It is undisputed that respondent did excellent work for the firm on the matters entrusted to him. In fact, one of the firm's partners, Fred Levin, testified at the hearing before the special master that he had a good relationship with respondent and found him to be intelligent, professional, and articulate.

According to Levin, he was reviewing the firm's bills in early June 2001, when it came to his attention that there was an outstanding $3,000 balance in the Valentina Malashkin matter. Levin questioned respondent about the bill, to which respondent replied that he anticipated obtaining a check in the matter. The following week, however, Levin learned that Malashkin had called the firm complaining that her bill was incorrect because it did not reflect a $2,000 check she had given respondent on May 24, 2001. Upon further inquiry, Levin learned that Malashkin's check had been cashed on that same date.

Prior to learning that respondent had negotiated the check, Levin questioned him about its whereabouts. According to Levin, respondent had told him that the check was lost or misplaced, and that he would attempt to locate it.

After Levin and his partner, Edward Sheehan, learned that the check had been negotiated, they decided to terminate respondent's employment with the firm. On Friday evening, June 15, 2001, after the other employees had left the firm, Levin and Sheehan confronted respondent with the information that had come to light. Respondent admitted that he had cashed Malashkin's check. He told them that he had placed the cash in his briefcase, but somehow it fell out and was lost. They did not accept respondent's explanation as a valid account of what had transpired.

The following day, the firm's attorneys were called in to review respondent's files to ensure that his clients were not compromised as a result of the termination. On that Saturday, respondent telephoned the office to schedule a meeting with Levin and Sheehan. The three met at the firm the next day, Sunday, June 17, 2001. At that time, respondent presented Levin and Sheehan with $6,800 in cash, in one hundred dollar bills, representing money respondent had received from six clients. Respondent also gave them a handwritten summary that identified

the six clients from whom the money came, the amount of money to be allocated to each client, and a brief description of the case. Respondent received funds from the following clients, which had not been previously turned over to the firm: Valentina Malashkin (May 24, 2001) - $2,000; Denise Zachary (May 14, 2001) - $3,000; Fulaine Jones - $500; Gary Wiggins (May 15, 2001) - $500; Maurice Davis - $300; and Raynard Aikens (April 16, 2001) - $500. According to Sheehan, $1,000 belonged in the firm's trust account, and the remainder in the firm's business account.

Levin testified that, although there was no written policy about the disposition of fees obtained from clients, it was unacceptable for associates or partners to negotiate the firm's checks for legal services. Sheehan explained that all attorneys were expected to turn over fees to the office manager immediately, within the same day of receipt, when possible. Although neither Levin nor Sheehan recalled specifically informing respondent of the procedure, they believed he was aware of it because of prior conduct. In addition, it was Sheehan's opinion that all employees knew of the policy because he had a "pet peeve" about the way money was handled; he wanted to ensure that the proper funds were deposited into the trust account and that the clients' accounts were properly credited.

Office of Attorney Ethics ("OAE") Assistant Chief Investigator, William Ruskowski, interviewed respondent in June 2002. Ruskowski's investigative report confirmed that respondent was aware of the office policy on fees. According to the report, "respondent stated that prior to May 2001 he always followed the firm's policy for receiving payments from clients."

Respondent admitted to Ruskowski that he cashed Malashkin's check. He told Ruskowski that after he received the check he went to his bank to get some money. When he opened his wallet, he noticed Malashkin's check and decided to cash it, intending to turn the cash over to the firm. He put the cash in his briefcase between the pouches, but it must have fallen out. He stated that it was a "spur of the moment thing" and that he had never done it before. According to Ruskowski, respondent told him that he thought that cashing the check would be more convenient for the firm.

Respondent also told Ruskowski that it was the first time he had cashed a check for the firm. However, when Ruskowski confronted him with two checks that he had cashed prior to the Malashkin check, respondent claimed that he had been mistaken. Respondent also told the investigator that he did not inform the partners about the missing funds because he was embarrassed about the situation, and intended to replenish the funds.

Respondent asserted that during that time period he was under a lot of stress; his practice was extremely busy, his marriage was breaking down, he separated from his wife in mid- to late June, and he was wrapping up his personal bankruptcy proceedings around that time. As to his finances, respondent told the investigator that "he was in the process of trying to accumulate funds to separate – to move on to another residence." Respondent admitted to Ruskowski that he kept the money in his desk drawer in the office. Once he was terminated, he moved the funds to his residence.

At the hearing before the special master, Valentina Jefremow (formerly Malashkin) testified that respondent specifically directed her to make her fee check payable to him, rather than to the firm. However, an investigative report prepared by a former OAE investigator stated that, when Malashkin asked respondent to whom the fee check should be made, respondent replied, "It doesn't matter who you make it out to." Malashkin did not recall that statement, and in fact was positive that respondent had told her to make the check out to him. The other checks that Malashkin had written for fees were made payable to the firm, not to respondent.

Gary Wiggins also testified before the special master that respondent instructed him to make the check payable to "Charles

S. Epstein." The checks in the Denise Zacharay matter and the Raynard Aikens matter were also made payable to respondent.

For the most part respondent did not dispute what had transpired. As to the Malashkin check, respondent testified that he told her that it did not matter to whom the check was made. He claimed that that day (May 24, 2001), mid-afternoon, he went to the bank, endorsed the check, and cashed it. He testified: "I thought I would give the law firm the cash instead of giving them the check like this is a good thing to do, you know, here's real money, not a check, and probably used some bad judgment in doing that."

Respondent recalled the time of day it occurred because he had been in court, had not eaten all day, and did not feel well because of his diabetes. He remembered that after he cashed the check he put the money in his briefcase, and then went to get pizza "at three o'clock." He further claimed that his briefcase was new and he "simply was not that familiar" with it. He assumed that he had placed the money in the pocket of the briefcase, but because the pocket was not attached, he actually placed the money between the pocket and the briefcase and, unbeknownst to him, it fell out. When respondent discovered that the money was missing, he tried to find it by retracing his steps, to no avail.

During cross-examination, respondent admitted that the bank stamp on the Malashkin check showed that it was cashed at 9:53 on May 24, 2001. Respondent stated, "I believe that this check was cashed on 5-23 which was the date that I think I met Ms. Malashkin and that it was probably after hours at three o'clock and it was – the bank cashed it the next morning because it was after banking hours at three o'clock."

Respondent admitted that he understood that client money had to be turned over to the firm within a reasonable time, and that a reasonable time was within a few days. He admitted that he cashed the checks in the foregoing matters, that during that time period he had a very busy court schedule (about eighty to one hundred matrimonial cases, among other matters), and that he had a lot of personal problems. He claimed that he cashed the checks with the intention of turning over the money to the firm, but did not do so as quickly as he should have.

After cashing the checks, respondent placed the cash in an envelope, and kept it in his right top desk drawer. Respondent moved the funds only after he had been approached about the Malashkin check. He stated:

> Well, I did – I guess I hadn't told them or confessed to them about, you know, the money that was lost at that point in time; and obviously thereafter when they found out that the check had been cashed and that the money was withheld, that they would have

> become concerned and perhaps, you know, after hours, you know, found the other money in my desk and I would not have had time to properly explain to them the situation. So I simply removed it until I was going to turn it over and tell them about it a day later or whenever the time came.
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> [2T262.[1]]

Respondent further admitted that he did not tell the partners about the lost funds because he knew it had been a bad decision to cash the check, and he was embarrassed about losing the money. He maintained that he was not in need of additional funds at the time. Because he anticipated moving from the marital house, he had already saved some money to that end. Nevertheless, respondent had filed for bankruptcy in either March or April 2000.

According to respondent, although he withheld the firm's money he never used it. He did not think that there was any harm in what he was doing, because no one was hurt by it, and no one benefited from it. When the presenter questioned respondent about when he anticipated turning over the money to the firm, he replied: "[a]s soon as I got around to it. I mean as soon as I could but it just didn't happen as quickly as it should have."

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[1]1T denotes the transcript of the July 23, 2003 ethics hearing. 2T denotes the transcript of the July 30, 2003 ethics hearing.

Respondent admitted that, when Levin confronted him about the missing Malashkin check, he confessed that he had cashed it. As to his failure to mention the other checks and funds, he stated:

> I didn't tell them on Friday because I wanted to give them an accounting. It would have been disorganized. It would have been in disarray. I would have given them bad information, false information. It would have been just turmoil, and the way that I did it was a very orderly way of doing it so that everyone was calm.
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> [2T308.]

Contrary to an earlier statement, respondent alleged that, at the time Levin confronted him about the Malashkin check, he no longer had the cash in his desk drawer; he had taken the cash home on Thursday, in anticipation of turning it over to them and getting everything ready for them.

Respondent testified about the illnesses from which he suffered at the time, glaucoma and diabetes. He stated that during that time period his diabetes was "out of control," and he had to go on insulin. He was not feeling well, and was experiencing "certain types of mental lapses," and a lack of concentration. His physical and mental health was suffering. He was under a lot of stress not only because of his work situation, but also because of his marital problems. Respondent

left the marital home the same weekend he was terminated from his job.

According to respondent, right around the time he began working for the firm, he started seeing "a psychologist – a psychiatrist and a social worker." He claimed that he was diagnosed with clinical depression. The psychiatrist prescribed the antidepressant medication, Celexa. Two months prior to his termination, however, he unilaterally stopped taking the medication. As a result, he felt that his "body was going through changes, [his] mental state was going through changes, and [he] was under a lot of stress." Although respondent asserted that he had medical records to support his claims, he neither submitted any reports, nor had anyone testify in his behalf.

The special master noted that respondent admitted that he received the payments, cashed the checks, and failed to turn over the funds once received. The special master reiterated that the Court has regularly disbarred attorneys who have violated the economic trust of their clients, and that the knowing misappropriation of trust funds will result in disbarment under In re Wilson, 81 N.J. 451 (1979). He noted that, in Wilson, the Court defined misappropriation as "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only

stealing, but also unauthorized temporary use for the lawyers' own purpose, whether or not he derives any personal gain or benefit therefrom." It is the taking of a client's money, knowing that the client has not authorized the taking. In re Noonan, 102 N.J. 157, 160 (1986). Factors such as whether the misappropriated funds are disposed, or kept, or returned are not considered as mitigation.

The special master found that respondent's conduct mirrored that in In re LeBon, 177 N.J. 515 (2003). In LeBon, the attorney instructed his firm's client to make checks for legal fees payable to him. Once the misappropriation was noticed, the attorney repaid all the monies to the firm. The Court disbarred the attorney, despite his good reputation and unblemished career.

The special master concluded that respondent, too, had misappropriated his firm's funds. Because respondent failed to raise a viable defense, the special master recommended that he be disbarred.

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

The special master correctly concluded that respondent failed to raise a viable defense for his conduct. Respondent admitted that in at least four of six instances he cashed checks payable to himself, and in the remaining two instances, may have received cash from the clients. In all instances, he failed to turn over the funds until he was caught. Respondent's conduct in this regard occurred at least as early as mid-April 2001, when he received the Aikens check, and went undetected until Malashkin called the firm in mid-June to complain about a problem with her bill.

Respondent's rationale for cashing the checks was not believable. He claimed that he thought it would be more convenient for the firm to get the cash. In addition, he was unable to explain why this conduct occurred for only an isolated period of time, approximately two months, when both before and after that time period he complied with the firm's policies on client funds.

As to the Malashkin check, respondent claimed that he "lost" the money. First, he asserted that he cashed the check, mid-afternoon, before he went to get some pizza at three o'clock, and then the cash slipped out of his briefcase. After the presenter confronted him with the time stamp on the cashed check (9:53 a.m.), he revised his explanation and claimed that

he must have met with Malashkin a day earlier, on May 23, and cashed the check so late in the day that it did not clear until the following day.

Respondent's attempts to cover his tracks failed. Neither his testimony nor his feeble attempt at justifying his conduct was credible. It is true that there is no clear and convincing evidence in the record that respondent used the money as a loan or for any specific purpose. What is undeniable, though, is that the cashing of client checks was not authorized by the firm; neither was retaining the firm's funds. In so doing, respondent deprived the rightful owners of their funds. He wrongfully diverted the funds to his own control. The reasons that respondent diverted the firm's funds, or whether he used the funds for his personal use, are irrelevant.

Respondent misappropriated his firm's funds in a manner strikingly similar to that of the attorney in In re LeBon, 177 N.J. 515 (2003). LeBon instructed his client to make the check for legal fees (almost $5,900) payable to him, rather than the firm, and deposited the check into his personal account. When an accounting department employee from LeBon's firm contacted the client about the outstanding fee, the firm discovered LeBon's wrongdoing. Afterwards LeBon resigned from the firm, repaid the fee, and reported the incident to the OAE. LeBon was,

nevertheless, disbarred. See also, In re Greenberg, 155 N.J. 138 (1998) (attorney disbarred for converting $7,500 of his law firm's funds by requesting that his clients make their fee checks payable to him; the attorney also obtained $27,025 of the firm's funds for his personal use by submitting false disbursement requests over a one-year period); In re Weiss, 147 N.J. 336 (1997) (attorney disbarred where, for more than two and one-half years, he kept for himself $76,000 in legal fees that rightfully belonged to the law firm with which he was associated); and In re Siegel, 133 N.J. 161 (1993) (attorney disbarred where, over a three-year period, he converted $25,000 of his law firm's funds by submitting false disbursement requests).

Based on the foregoing, we find that respondent knowingly misappropriated his firm's funds and unanimously recommend that he be disbarred. Two members did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Disciplinary Review Board
Mary J. Maudsley, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Charles S. Epstein
Docket No. DRB 04-061

Argued: April 15, 2004

Decided: May 19, 2004

Disposition: Disbar

Members	*Disbar*	*Suspension*	*Reprimand*	*Admonition*	*Dismiss*	*Disqualified*	*Did not participate*
Maudsley	X						
O'Shaughnessy							X
Boylan	X						
Holmes	X						
Lolla	X						
Pashman	X						
Schwartz							X
Stanton	X						
Wissinger	X						
Total:	7						2

Julianne K. DeCore
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Chief Counsel