IP

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 97-059

IN THE MATTER OF

LEWIS B. FREIMARK

AN ATTORNEY AT LAW

Decision of the
Disciplinary Review Board

Argued: April 17, 1997

Decided: June 30, 1997

Lee A. Gronikowski appeared on behalf of the Office of Attorney Ethics.

Kimberly Hintze-Wilce 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 filed by Special Master James F. Ryan, Jr. The complaint charged respondent with four counts of knowing misappropriation and one count of failure to notify the Office of Attorney Ethics ("OAE") of discipline imposed by the New York disciplinary authorities.

Respondent was admitted to the New Jersey bar in 1980. He maintained an office for the practice of law in Hoboken, Hudson County, New Jersey.

Respondent has no history of prior discipline. On November 9, 1993, the New Jersey Supreme Court denied the OAE's motion for respondent's temporary suspension, which was

prompted by a random audit that allegedly disclosed a pattern of misappropriation in personal injury matters. The Court, however, ordered that a proctor be appointed to supervise respondent's practice and gave the proctor exclusive check-signing authority over respondent's attorney accounts.

* * *

On July 13, 1992 and April 21, 1993, the OAE conducted a random compliance audit of respondent's books and records. The audit revealed that respondent had invaded client funds in several matters by advancing fees to himself and depleting client funds, which were subsequently replaced from funds received in connection with unrelated matters. On September 15, 1993, the OAE conducted a demand audit of respondent's books and records at his law office. The demand audit confirmed the findings of the random audit. At the demand audit, respondent was unable to account for all trust funds on deposit and could not produce the records required under R. 1:21-6.

According to a reconciliation prepared by respondent after the demand audit, as of the date of the demand audit there was a shortage in his trust account in excess of $21,000.

THE SNYDER MATTER (FIRST COUNT)

The complaint alleges that, in 1989, respondent represented Arlene Snyder in a personal injury action. After respondent received the settlement proceeds of $8,750 from the insurance company, he deposited that amount in his trust account on February 26, 1990. According to the retainer agreement, respondent was entitled to one-third of the settlement as legal fees, or no more than $2,916.67. Nevertheless, on February 28, 1990, respondent issued trust account check No. 1201 to himself for $3,800, drawn against the Snyder trust funds, which he then deposited in his personal

account. The complaint charged that respondent knowingly misappropriated $883.33 of the Snyder trust funds by overdisbursing his fee.

The complaint also alleged that, on March 5, 1990, respondent issued trust account check No. 1203 to himself for $1,000, which was charged to the Snyder trust ledger. Exhibit C-10. Although that check bears the notation "Dr. Viscounti on Snyder," the payee was respondent, who endorsed the check, wrote "for deposit only" and deposited it in his account. According to the complaint, respondent was not entitled to the $1,000 and, by taking that amount, knowingly misused his client's funds. Exhibit C-14 (copy of respondent's check stubs) shows that, after the $1,000 withdrawal, $370.66 supposedly remained on account of Snyder. The complaint alleged that, in fact, the $1,000 check caused an overdraft of $30.49, which was remedied by a deposit of $200 on March 26, 1990.

Between March 26, 1990 and May 4, 1990, respondent's trust account had no activity except for the monthly service charge. On May 4, 1990, respondent deposited $12,350 in his trust account on behalf of another client, Maria DesReis, who had no relationship to Snyder. On May 15, 1990, respondent issued trust account check No. 1209 to Dr. William Viscounti for $1,500 to pay for Snyder's medical expenses. According to the complaint, when respondent issued the $1,500 trust account check, he invaded the DesReis funds.

In his answer, respondent conceded that he was entitled to no more than $2,916.67 by way of legal fees. He claimed, however, that he did not know that he should have calculated his fee over the net settlement, as opposed to the gross amount. R.1:21-7(d). He professed no knowledge of the exact amount held at that time for the benefit of Snyder. He maintained that, because his books and records were not regularly reconciled, he was unaware of the overdraft in his trust account caused by the $1,000 check to himself. Respondent stated his belief that the funds had been paid over to Dr. Viscounti, but could not recall how or when. Respondent testified as follows:

> I can say that this check here was written to me. There's a reference that it was for Dr. Viscounti. Beyond that, I don't know. And this check was deposited into one of my accounts.

According to respondent, he was not even able to ascertain the amount of Dr. Viscounti's bill or how it was paid because of the poor records contained in the Snyder file. Respondent added that he did not keep a ledger card for the Snyder file. Respondent denied that he intentionally issued a check for $1,500 to Dr. Viscounti only after he had another client's funds deposited in his trust account, namely the DesReis funds. Respondent argued that he had made a mathematical error in the calculation of the amount payable to Snyder from the property settlement claim. In short, respondent contended, his actions in the Snyder matter were unmarked by any knowledge or intent to misuse trust funds and, therefore, not a knowing misappropriation.

THE ALONGI MATTER (SECOND COUNT)

According to the complaint, in 1990 respondent represented Amanda Alongi in two personal injury matters. On or about December 28, 1990, respondent received $7,000 in settlement proceeds for one of the matters, which he deposited into his trust account. On January 4, 1991, respondent issued trust account check No. 1220 to himself for $3,500 as legal fees for the Alongi matter, leaving $3,500 on deposit on account of Alongi. On January 25, 1991, respondent issued trust account check No. 1221 to "On Time Court Reporters" for $2,398.82 and trust account check No. 1222 to "Middlesex County Superior Court" for $2,334.24 to pay for litigation expenses associated with the Alongi matter. The complaint charged that respondent overdisbursed the Alongi funds by $1,233.06.

On February 5, 1991, respondent issued trust account check No. 1223 to himself for $800, causing the amount of the overdraft to rise to $2,033.06. On February 22, 1991, August 12, 1991,

October 10, 1991, December 10. 1991 and May 1, 1992, respondent issued five trust account checks to himself for legal fees in the Alongi matter for $700, $2,000, $300, $400 and $400, respectively. The complaint alleged that, at the time of these withdrawals, there were no trust funds standing to the credit of Alongi and that, consequently, respondent knowingly misappropriated other client funds, specifically Lamberti's, the only other client for whom respondent was holding trust funds at that time.

In his defense, respondent alleged that, during the course of the Alongi litigation, he had advanced monies for costs and expenses on behalf of Alongi and that, on one occasion, Alongi had requested a loan from him against the settlement proceeds. Respondent added that Alongi had authorized him to take one-half of the settlement proceeds as his fee. He claimed that, at the time that he wrote the checks to "On Time Court Reporters" and "Middlesex County Superior Court," he believed that there were sufficient monies on deposit to cover them. He blamed his lack of records for this erroneous belief. In short, respondent contended that he was unaware of the account balance and that, therefore, the invasions of other client funds were not knowing because he "at no time harbored the specific intent required to knowingly misappropriate funds."

THE CASO MATTER (THIRD COUNT)

In 1990 respondent represented George P. Caso in connection with a property damage claim. On August 14, 1990, respondent deposited in his trust account $1,700 in settlement proceeds on behalf of Caso. On August 22, 1990, respondent wrote trust account check No. 1215 to himself for $500 as a fee. Two days later, August 24, 1990, respondent issued trust account check No. 1217 to himself for $1,400, thereby causing the Caso account to be overdrawn by $200 and invading other client funds already on deposit. On August 29, 1990, after respondent had issued the Caso checks

to himself for $500 and $1,400, his trust account balance was $117.59. Exhibit C-38. The account carried a balance of $97.59 until September 1990. Exhibits C-38 and C-39. On September 5, 1990, respondent deposited in his trust account three checks for legal fees, totaling $1,238. With that deposit, the trust account balance rose to $1,335.59. The next day, September 6, 1990, Caso presented to the bank trust account check No. 1219 in the amount of $1,500, representing his share of the proceeds. That check was dishonored because of insufficient funds. The following day, September 7, 1990, respondent made a deposit of $300 to his trust account to cover the Caso check. Exhibit C-39. When the check was presented again, it was finally honored.

There was much discussion at the DEC hearing about the date of the $1,500 check to Caso. The check bears an August 6, 1990 date. As stated earlier, Caso presented the check for payment on September 6, 1990. The OAE charged respondent with falsely writing the August 6, 1990 date on the check to give the impression that, when it was issued, respondent's trust account contained the Caso settlement proceeds. The OAE charged that, in fact, the check had been issued on September 6, 1990, the date it was presented for payment. The OAE pointed out that the true date of the check could not have been August 6, 1990 because at that time the settlement proceeds had not even been deposited into respondent's trust account. That deposit was not made until August 14, 1990.

For his part, respondent attributed the inaccuracy of the August 6, 1990 date on the check to a mistake. Respondent asserted that, because it was the beginning of the month, he had erroneously entered the prior month on all the relevant documents. Respondent denied any "clever crafting" attached to the wrong date on the check. Respondent pointed to the fact that, inasmuch as the proceeds had not been obtained until August 14, 1990, it was clear to everyone but him that no check

could have been issued on August 6, 1990.

With regard to the $1,400 check to himself from the settlement proceeds, respondent contended that Caso had agreed to advance him monies from the settlement proceeds. Respondent made this point in his certification in opposition to the OAE's motion for his temporary suspension. As an attempt to support the existence of an agreement with Caso for the use of the monies, respondent attached a letter from Caso to the OAE, dated October 21, 1993. Attachment B to Exhibit C-48; Exhibit C-36. That letter reads as follows:

> I am writing to you in connection with my retention of Lewis B. Freimark as my attorney in 1990.
>
> Mr. Freimark, in August of 1990, indicated to me that he had received settlement proceeds on my property loss case, however, I can't recall exactly when that date was. He did issue me a check around that time which did not clear. He had apologized to me for that and said he would be away from his office for a short time, but that when he got back he would make good on the check. I agreed to that and in early September, a few weeks later, he did fulfill his promise and paid me my fees.
>
> I was satisfied with his work on the case since this matter had been sitting for some length of time with the insurance company and no action from them was forthcoming. When Mr. Freimark got involved with the case, it got settled within a few months of its commencement.
>
> Having met Mr. Freimark, while I was in the employ of a small printing company nearby to his office and through a mutual friend, I understood that in small business operations where a person has to wear a lot of hats and service many small clients, sometimes a check may not clear banking channels.
>
> I hope that this answers any questions you may have on this matter.

In sum, respondent's defenses to the allegations of knowing misappropriation in the Caso matter were that Caso had authorized him to use $1,400 from the settlement proceeds and that,

because respondent was unaware of the funds on deposit in his trust account and the amounts held for each client, the invasion of client funds could not have been knowing.

THE LEON-MARKOV MATTERS (COUNT FOUR)

As noted above, the OAE conducted an initial random audit of respondent's attorney records on July 13, 1992. According to the OAE, that audit disclosed such serious deficiencies that the OAE issued a letter to respondent used only in the most serious cases, identifying ten violations. The OAE deemed them to be so egregious that it warned respondent that, if he failed or refused to comply with the OAE's request for information and records, his file would be referred to the OAE Director "for such disciplinary action as deemed warranted under the circumstances." Exhibit C-2.

On April 21, 1993, the OAE made a second audit visit. According to the OAE, between the first and the second visits, OAE auditor Mimi Lakind had subpoenaed and analyzed respondent's trust account records. That analysis had disclosed evidence of knowing misappropriation of client funds in several matters. In fact, the OAE claimed, the auditor had informed respondent in person, on April 21, 1993, that she believed that he was knowingly misappropriating client funds.

On September 15, 1993, the OAE scheduled a disciplinary demand audit as a result of the findings made at the random audit. At the demand audit, held in respondent's office, respondent produced no records and could not account for the funds that he was then holding for his clients. According to the OAE, a subsequent analysis of respondent's trust account undertaken by OAE investigator Nicholas Hall revealed that respondent continued to misappropriate trust funds and continued to maintain inadequate records even after being told by Lakind that, in her view, he had knowingly misappropriated client funds.

On September 27, 1993, respondent mailed to Hall a reconciliation of his attorney records showing a trust account deficiency of $21,916.01 as of August 31, 1993. According to Hall's analysis, $21,785 of the shortage had been caused by eight trust account checks that respondent had issued to himself from May 4, 1993 through August 18, 1993, in amounts ranging from $9,000 to $500. Exhibit C-32(a through h).

Respondent did not dispute that there was a $21,000 shortage, but presented two different explanations therefor. In addition, the amounts quoted by respondent varied: at times he cited a $20,000 sum as the explanation for the deficiency and, at other times, he quoted a $18,000 sum. The two offered explanations were as follows. Initially respondent attributed the shortage to the fact that he was holding $20,000 in cash in a safe at his home for a client named Felipe Leon. According to respondent, some time before August 31, 1993 he withdrew the Leon funds from his trust account and held those funds at home until he opened a new trust account in September 1993, at which time he deposited the funds in the account.

However, on October 26, 1993, when respondent appeared before the Supreme Court to show cause as to why he should not be temporarily suspended from the practice of law, he told the Court that $18,800 of the $21,916.01 shortage in his trust account was due to two withdrawals made in July 1993 at the request of a client, Eleanor Markov, in the amounts of $9,800 and $9,000. The stated reason for Markov's alleged request to remove the funds from the trust account was her fear that the buyer of real estate she had sold in Croatia would be backing out of the deal; accordingly, respondent continued, Markow was so concerned about the $50,000 that she had wired into his trust account that she had instructed him to "protect" it.

At the hearing before the special master, Markov confirmed respondent's assertions. The OAE claimed, however, that respondent's claim was fabricated and designed to cover his knowing

misappropriation of trust funds. The OAE pointed out that, if respondent wanted to "protect" the funds, he would have removed the entire $50,000 sum. Instead, the OAE added, he "protected" only $8,000, leaving $42,000 in his trust account for a month until he finally disbursed the money to Markov. Exhibit C-41 at 7-9 of 19.

Markov ultimately received the $50,000 in two checks, one dated July 7, 1993 for $41,000 (Exhibit C-46) and the other dated July 9, 1993 for $9,000 (Exhibit C-47). According to the OAE, respondent covered $8,000 of the $9,000 by a $20,000 deposit that he had made to his trust account on July 7, 1993 to the account of Leon. In sum, the OAE argued, respondent took $8,000 of Markov's funds and replaced them with Leon's funds. According to the OAE, respondent felt free to misuse the $8,000 in Markov funds because he knew that the Leon funds were coming in shortly and that they would be sufficient to cover the Markov funds he had misappropriated.

At the hearing before the special master, respondent's wife testified that she had kept $18,000 in a rice bag at home until respondent opened a new trust account. The OAE, however, pointed out that, if the true purpose for holding the $18,000 in cash at home was to protect the funds, then it would make sense that they would be deposited in the new trust account as a whole, not in two separate deposits of $9,000 and $8,000. As to respondent and his wife's advanced reason for the two deposits, that is, the avoidance of Internal Revenue Service cash reporting rules, the OAE noted that it was difficult to believe that an attorney would defend a charge of knowing misappropriation by claiming that the transaction had been structured to evade IRS regulations. Moreover, the OAE added, there was no reason to evade the IRS if, as respondent claimed, the funds were to be merely transferred from one account to another.

In essence, thus, the OAE alleged that the trust account shortage of $21,000 was due to respondent's misuse of client funds for his personal benefit, rather than the temporary removal of the

funds from the trust account to protect them.

FAILURE TO NOTIFY THE OAE OF THE NEW YORK DISCIPLINE (COUNT FIVE)

According to the complaint, respondent, who is also admitted to the New York bar, was publicly censured on January 25, 1994 by the New York disciplinary authorities for releasing escrow funds to a party who was not entitled to such funds. The complaint alleged that respondent failed to answer the New York disciplinary proceeding and to notify the OAE that he had been disciplined in New York, as required by R.1:20-7(a), superseded by R.1:20-14(a)(1). The complaint charged respondent with violations of RPC 1.15 (failure to safeguard property), RPC 8.1(b) (failure to cooperate with disciplinary authorities), and R.1:20-14(a)(1) (reporting misconduct to ethics authorities).

In his defense, respondent argued that he believed that he had given the OAE a copy of the order entered in the New York matter. He denied any intent to avoid reporting his discipline to the OAE.

* * *

At the conclusion of the ethics hearing, the special master found that, in the Snyder matter, respondent withdrew $10,883.24 from the trust account on a settlement of $8,750 and put $4,800 of those funds into his own account. The special master noted respondent's contention that he had made an arithmetic error. The special master, however, gave greater weight to the testimony of the OAE auditor, Mimi Lakind, that respondent had to know that there were no equivalent funds in his

trust account at the time of the last two withdrawals (340.25 to the Snyders and $1,500 to Dr. Viscounti) precisely because there was very little activity in respondent's trust account. The special master found that "[r]espondent's assertions of a lack of awareness of the rule coupled with poor record keeping are weak and contrived at best and carry no weight." The special master concluded that the evidence was clear and convincing that respondent had knowingly misappropriated the Snyder trust funds. The special master found it impossible to reach a different conclusion "as prior to the last two Snyder checks respondent actually had to deposit a $200 fee check (C-16) into his Trust Account to cover an overdraft."

In the Alongi matter, too, the special master found that respondent was guilty of knowing misappropriation. The special master concluded as follows:

> The reconstructed client ledger of respondent's trust account (C-22 p2) introduced by Mimi Lakind demonstrates an even more flagrant misuse of the trust account than the Snyder case. Although Respondent testified that Amanda Alongi essentially gave up her case and allowed respondent to keep the proceeds of any settlement for his fees and expenses no authority existed to invade the trust funds of others. And, again, although Respondent and his paralegal testified as to the great time and expense invested in the matter, he had no right to use his trust account for personal funds whenever needed. Respondent presented no real defense to the reconstructed Alongi ledger (C22, page 2 attached to this opinion as Appendix A). It shows seven different checks for legal fees, totaling $8,100. One check went directly into Respondent's personal checking account to cover an overdraft in that account (See C-24, page 2). Even if this was to cover expenses, it does not justify the regular and systematic invasion of other's trust funds.
>
> The number of separate checks for fees, the fifteen month period of being consistently overdrawn on this account and the deposit of a check in his (the first for $3,500) personal, not business account to cover an overdraft therein are all quite damning. But a simple review of his check stub sheet shows three checks in a row all from Alongi, checks 1220, 1221, and a certified check which totaled $8,233.06, on the Alongi funds of $7,000. This points clearly to knowledge on the part of the Respondent. He further invaded the

> account by the next check for 1223 for $800 made to himself as a legal fee or even perhaps a reimbursement. It is further worth noting [ ] that the last three checks (1227, 1248 and 1252) were also cashed out and not deposited anywhere (C-31).
>
> It certainly appears as a known invasion of the trust funds, and it is so found as fact by clear and convincing evidence.

The special master also found clear and convincing proof that respondent knowingly misappropriated trust funds in the Caso matter. The special master found no evidence that Caso had agreed to lend respondent $1,400 and that, in addition, respondent's use of fees to cover shortages in his trust account required "the singular conclusion again of clear and convincing misappropriation of Trust Funds in the Caso matter."

As to the Leon-Markov matters, the special master found that respondent's and his wife's explanations for the temporary absence of the funds from the trust account were not credible. Worse yet, the special master labeled them as fabrications. With regard to the claim that $18,000 were being held in a rice bag, the special master remarked that it only takes the writing of a check to open a new trust account. Hence, the explanation that respondent was waiting to redeposit the funds until he opened his new trust account was, in the special master's words, implausible or even fabricated. According to the special master, the only conclusion that could be drawn from the evidence was that respondent used the funds for himself from May through August 1993 and then replaced them when he opened his new trust account in October 1993.

Lastly, the special master noted that respondent admitted both the imposition of the New York discipline and his failure to notify the OAE. As to respondent's allegation that he did not know that he had to report his discipline to the OAE and that, in any event, the OAE should have known about the discipline because there was a similar charge against him in New Jersey, the special master concluded that neither position "appear[ed] to provide respondent with the comfort of a defense."

The special mater found clear and convincing evidence that respondent had violated R. 1:20-7(a).

* * *

Following a de novo review of the record, the Board is satisfied that the special master's findings that respondent knowingly misappropriated trust funds were supported by clear and convincing evidence.

In Snyder, respondent deposited an $8,750 settlement into his trust account. The first check that he wrote against the Snyder funds was for his legal fees, $3,800. He then wrote a check for $3,829.24 to the Snyders. Until then, there were enough funds in the Snyder account to cover the withdrawals. The problem was that respondent was not entitled to $3,800, or even $2,916.67, a figure mentioned several times in the record. Respondent could have taken only one-third of the net settlement. $2,916.67 is one-third of the gross settlement amount of $8,750. Obviously, one-third of the net would have been less. Accordingly, the Board rejected respondent's claim that he mistakenly took $3,800 because he calculated his fee over the gross amount. $3,800 is not one-third of the gross settlement; it is more than forty-three percent of the gross. A finding of knowing misappropriation here is unavoidable. Furthermore, on March 5, 1990, respondent withdrew $1,000 for himself. By then, his legal fee had been paid — in fact, overpaid. He was no longer entitled to any payments from the Snyder funds.

In his defense, respondent claimed that the $1,000 was for Dr. Viscounti, Snyder's doctor. There is no dispute, however, that the check was made payable to respondent, endorsed by him, and deposited by him in one of his accounts. Here, the evidence of knowing misappropriation is compelling as well. All respondent could say was that the check must have been given to Dr.

Viscounti, although he could not say how or when. Respondent's feeble explanation pales in the face of other overwhelming evidence that he intentionally misused the Snyder funds when he issued the $1,000 check to himself.

Respondent's second act of knowing misappropriation occurred as follows: After the issuance of the $3,800 check to respondent, the $3,829.24 to the Snyders and the $1,000 to respondent, for a total of $8,629.24, there should have been $120.76 in the Snyder account. Dr. Viscounti's bill of $1,500 remained to be paid. On May 10, 1990, only after respondent received $12,350 in connection with another matter, DesReis, respondent wrote a check to Dr. Viscounti for $1,500. At that time, the DesReis funds were the only funds held in respondent's trust account. Accordingly, the DesReis funds were invaded to the extent of $1,500. The issue was whether the invasion was negligent or knowing.

Respondent argued that his recordkeeping practices were so shoddy that it was impossible to know how much he had in his trust account. He attributed the invasion of the DesReis funds to a mathematical error and to sloppy accounting practices. The OAE auditor, in turn, argued that respondent had to know that he was invading other client funds because there was very little activity in his trust account; accordingly, he had to be aware of the amount of the funds in it. Here, too, the Board found that respondent knowingly misappropriated client funds, because he had to know that he was invading the DesReis funds by the $1,500 payment to Dr. Viscounti. The overwhelming weight of the evidence allows no other conclusion but that respondent delayed paying Dr. Viscounti until May 10, 1990, when the DesReis funds were available — despite the fact that the Snyder funds were received in late February. Moreover, regardless of respondent's poor maintenance of his records, a very simple mathematical computation would have alerted him that he no longer had $1,500 on account of Snyder. Indeed, by adding the first three checks ($3,800 to himself, $3,829.24

to the Snyders and $1,000 to himself) he had to know that $8,629.24 had already been disbursed. As the settlement amounted to $8,750 only, he had to know that the Snyder account did not have $1,500 to pay Dr. Viscounti. The evidence clearly and convincingly establishes that here, too, respondent knew that he was misusing other client's funds.

The Board further found knowing misappropriation in the Alongi matter, for the same reasons expressed in the special master's decision. As the special master noted, even if Alongi had given respondent authority to keep the entire proceeds of the settlement for his fees and advanced expenses, there is no explanation for respondent's invasion of other client funds to pay for respondent's fees in Alongi. All in all, respondent kept $8,100 for himself as fees ($3,500, $800, $700, $2,000, $300, $400 and $400). He could not reasonably have expected to be entitled to $8,100 against a $7,000 settlement. The only explanation respondent offered was that he believed that there were enough funds in the Alongi account to cover the withdrawals and that he was unaware of the account balance because of poor records. Such alleged belief was against reason, however. Again, basic arithmetic had to make respondent aware that he was improperly overdisbursing funds for his personal benefit. Here, too, the evidence against respondent is so overwhelming as to support a finding of knowing misappropriation on his part by clear and convincing evidence.

In the Caso matter, respondent's defenses and claims of innocence also strain credulity. Respondent received $1,700 on behalf of Caso on August 14, 1990. On August 22 and August 24, 1990, respondent issued two checks to himself for $500 and $1,400 respectively. These disbursements totaled $1,900, against a $1,700 settlement. Respondent had to know that he was invading other client funds to the tune of $200, even if his claim that he was unaware of the balance in his trust account is to be believed. Regardless of whether respondent had a sufficient or insufficient balance in the trust account before he received the $1,700, he could not have reasonably

believed that he had enough funds in the Caso account to support a disbursement of $1,900. That belief could not have been reasonable because the settlement amounted to $1,700 and respondent made the $1,900 withdrawal only ten days after the $1,700 deposit. Not much time had elapsed to erase respondent's memory of the amount of the settlement.

Not only did respondent create a negative balance of $200 in the Caso account by overdisbursing the settlement proceeds, but he was unable to show by any competent proof that he was authorized to use the $1,400 in the first place. The letter from Caso to the OAE makes no mention of a loan to respondent. Once respondent asserted the defense of a loan, he had to sustain the burden of proving that Caso had authorized the use of the $1,400. Not only did respondent not produce Caso for testimony, but the letter on which he relied is silent about any loan. Under these circumstances, the special master properly concluded that respondent invaded the Caso funds when he availed himself of the $1,400. In addition, as noted above, a finding of knowing misappropriation of $200 belonging to other clients is required, as respondent disbursed $1,900 against a $1,700 settlement and offered no plausible or credible explanation for his actions.

The special master's finding of knowing misappropriation in Leon-Markov was sound as well. It is undisputed that respondent's trust account had a $21,000 shortage. What caused the shortages was the subject of disagreement between the OAE and respondent. The OAE argued that respondent used the funds for himself and then replaced them when he opened a new trust account. Respondent, in turn, claimed that the absence of the funds from his trust account was (1) because he was holding $20,000 at home for his client Leon, or (2) because he had removed $18,000 at his client Markov's request to "protect" the funds. Respondent's and his wife's testimony, however, was not credible and, at times, was almost fantastic. The more credible evidence is that respondent availed himself of the funds for his temporary use and then replaced them when he opened a new

trust account. And even if respondent's defenses were to be believed, there is still the issue of $3,000 ($21,000 minus $18,000) that were unaccounted for and for which respondent offered no explanation. Here, too, a finding of knowing misappropriation is unavoidable, as is a failure to maintain required attorney records.

Lastly, it is undisputed that respondent did not notify the OAE of his discipline in New York. The center of the dispute was whether respondent acted with evil motives or innocently. In light of the finding of knowing misappropriation in four counts of the complaint, the Board found it unnecessary to reach a conclusion in this regard.

Under In re Wilson, 81 N.J. 451 (1979), respondent must be disbarred. As pointed out by the special master, "[w]ere the case limited to sloppy records, perhaps there could be a way to resolve the matter short of disbarment. But when one 'takes from Peter to pay Paul,' the dictates of In re Wilson, 81 N.J. 451 (1979) must be invoked."

Finally, as to respondent's claim of mitigating circumstances contained in his answer, namely, his father's and his wife's illnesses, no amount of mitigation will be sufficient to save him from disbarment when knowing misappropriation is involved. In re Noonan, 103 N.J. 157, 160 (1986).

The Board unanimously recommends that respondent be disbarred for his knowing misappropriation of client funds.

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

Dated: 6/22/97

LEE M. HYMERLING
Chair

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Lewis B. Freimark
Docket No. 97-059

Hearing Held: April 17, 1997

Decided: June 30, 1997

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	x						
Zazzali	x						
Cole	x						
Lolla	x						
Maudsley	x						
Peterson	x						
Schwartz	x						
Thompson	x						
Total:	8						

Robyn M. Hill 7/9/97
Robyn M. Hill
Chief Counsel