SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-341

IN THE MATTER OF	:
SETH MININSOHN	:
AN ATTORNEY AT LAW	:

Decision

Argued: October 15, 1998

Decided:May 10, 1999

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

Andrew P. Napolitano 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 Susan Reach Winters. The complaint filed by the Office of Attorney Ethics ("OAE") charged respondent with knowing misappropriation of client and escrow funds, in violation of *RPC* 1.15(a) and (c), *RPC* 8.4(c), *In re Wilson*, 81 *N.J.* 451 (1979), *In re Warhaftig*, 106 *N.J.* 529 (1987) and *In re Hollendonner*, 102 *N.J.* 21 (1985). The complaint

also charged respondent with failure to maintain proper records, in violation of *RPC* 1.15(a) and (d).

Respondent was admitted to the New Jersey bar in 1985. He has no prior disciplinary history.

* * *

The OAE alleged that, before the closing of title, respondent disbursed from his trust account legal fees for real estate transactions. Respondent contended that (1) in anticipation of a demand audit he incorrectly reconstructed his trust records, (2) the OAE relied on this erroneous information in determining that he had committed knowing misappropriation and (3) the misappropriation, if any, was the result of poor recordkeeping.

On March 29, 1994 Hudson United Bank notified the OAE of a $391.70 overdraft in respondent's trust account. On April 6, 1994 the OAE requested that respondent explain the overdraft. Respondent and the OAE exchanged a series of letters, in which respondent presented the following explanations:

- Letter of April 22, 1994 - The overdraft resulted from a bank error. Respondent deposited personal funds in the trust account to cover the shortage. He is working with the bank to determine the cause of the overdraft.

- Letter of May 17, 1994 - Because almost all of his trust account transactions involved real estate closings, respondent analyzed those files and determined that, in a closing for a client, Hoang, respondent disbursed $400 more than had been deposited. Respondent deposited $445 of personal funds "to cover any discrepancy, bank fees,

and hopefully leave a small surplus," in addition to the deposit he made upon learning of the overdraft.

- Letter of June 17, 1994 - "This shortfall does not appear to have anything to do with recent transactions. I have discovered one error where, on a real estate closing which was canceled and in which I represented the seller, I returned all of the deposit to the buyer even though I held less that the total deposit in my trust account. I also discovered an error in another real estate transaction where my client was debited an amount that was never credited on the other party's column, so the credit was paid on my account but never credited to it." Respondent added that, because he was reviewing every bank statement, client ledger and monthly trust ledger for the past few years, he anticipated providing full documentation within one week.

- Letter of June 29, 1994 - Among other explanations, respondent offered: "I drew a trust check dated February 14, 1992, for $2,300.00; and despite weeks of searching I cannot with exactitude recall what the payment to me was for. It is clear that it was for one of two purposes. I was authorized that same day to release deposit monies on a real estate transaction, Visconti to Visconti, for which I had an agreement for fees for that and an additional transaction for the same client which was to net me approximately that amount in fees. On the other hand, I usually maintained funds of my own in the account in order to keep the balance up and the account open, so the account would not be closed should there be no client funds in trust. A few days prior, I had deposited $1,500.00 of my own funds for such purpose, and may have believed I was using that and $800.00 from my reserve balance".

Concerned about respondent's admission of commingling and about his apparent failure to keep required records, the OAE scheduled a demand audit of his books and records for the preceding three years. The audits took place on July 13, August 2, and September 1, 1994. Thereafter, the OAE filed an ethics complaint on March 30, 1995, alleging knowing misappropriation of client funds. Although respondent denied knowing misappropriation, he admitted that his recordkeeping was deficient.

OAE investigative auditor G. Nicholas Hall, a certified public accountant, was the only witness called by the presenter. Respondent and his expert, certified public accountant

William J. Morrison, also testified at the ethics hearing. In summary, the OAE placed respondent's knowing misappropriation in three categories: (1) in nine matters in which respondent represented the sellers in real estate transactions, respondent advanced his legal fees from deposit funds that should have been held in escrow until the closing; (2) in six matters in which respondent represented the buyers, he advanced his legal fees from other clients' funds; and (3) on six occasions, respondent disbursed to himself funds from his trust account, as recorded on a "Surplus Funds Client Ledger," knowing that he did not have sufficient monies to cover those disbursements and that, therefore, he was invading client funds.

A discussion of each matter follows.

A. Fees Taken From Deposits

1. The Schulte Matter

Respondent represented David C. Schulte in a matrimonial matter and in a real estate transaction in which Schulte was the seller. The standard realtor's contract provided as follows:

> All deposit monies paid by the Buyer shall be held in escrow in the NON-INTEREST BEARING TRUST ACCOUNT of seller's attorney, escrowee, until closing of title, at which time all monies shall be paid over to the Seller. [Original emphasis].

On October 9 and October 20, 1990 respondent received from the buyer $1,000 and $17,500, respectively, to be held in escrow. According to the HUD-1 Uniform Settlement

Statement (RESPA), the closing occurred on December 31, 1990. Respondent signed the RESPA "with power of attorney for David Schulte." On December 21, 1990, ten days before the closing, respondent issued a $1,600 check to himself, noting in the "memo" column the name of his client, Schulte. Respondent deposited the $1,600 in his attorney business account. At the closing, respondent disbursed $2,451 to himself for fees and costs and again wrote the name "Schulte" in the "memo" column of the check. Respondent sent a $4,051 bill to his client for the real estate and matrimonial matters, an amount equal to the two checks that he had issued to himself.

For his part, respondent explained that the closing had taken place in two stages: on December 21, 1990, when his client signed the deed, and on December 31, 1990, when the other seller of the property (apparently Schulte's former wife) signed and delivered a deed. Respondent claimed that, because his client had signed the deed on December 21, 1990, title had been transferred on that date and, hence, he was permitted to disburse his fee.

2. The Alongi Matter

Respondent represented Melva J. Alongi as the seller of real property. According to the real estate contract dated November 7, 1990, respondent was required to hold the buyer's deposit in his trust account until the closing of title. Respondent received $1,000 from the buyer on November 15, 1990 and $6,500 on November 19, 1990. On March 18, 1991, before the closing of title, respondent issued a trust account check to himself for $800,

writing the words "Alongi fees/costs" in the "memo" column. On that same date, respondent deposited the funds into his attorney business account. Respondent, thus, took his fee from the real estate deposit before the closing. At some point, apparently on June 6, 1991, the buyer's attorney notified respondent that the buyer had not obtained a mortgage loan because she had become unemployed. Consequently, the buyer's attorney declared the contract canceled and requested the return of the deposit. On June 11, 1991 respondent requested more specific information from the buyer's attorney to ensure that the buyer's job loss was involuntary. One week later, on June 18, 1991, respondent received $800 from his client to make up the shortage in the deposit monies. Respondent returned the entire deposit to the buyer on July 22, 1991. All of these transactions were reflected on respondent's client ledger sheet.

In his defense, respondent contended that, although he noted the name "Alongi" in the "memo" column at the time he issued the check for his fee, he erred in attributing the check to that client. According to respondent, he did not keep proper trust account records, such as a client ledger sheet for every trust client or a trust account receipts and disbursements journal, and he did not reconcile his trust account quarterly, as required by the court rules. Instead, he kept his trust account records by making entries in the check register and by jotting information on "Post-it"™ notes. Respondent described his banking and recordkeeping practices as follows:

Q. Tell us, please, in general terms, of the manner in which you kept books and records in your office with respect to clients' accounts where money had been entrusted to you.

A. [W]hen I first opened my trust account, I was given by the bank some sample checks and the type of little personal checkbook that one would normally get when they open a bank account.

. . .

And I kept records on pieces of paper in the file, like a piece of note paper in some cases. In some cases I neglected to keep the record in the file regarding what money came in and came out. I kept, next to my desk blotter under the flap, yellow Post-it pads, the larger size . . . and I'd write down notes about what monies came and what, what sorts of fees I would be doing at different times. It was essentially a way of me trying to keep track of my receivables on that little desk blotter page.

Q. Tell us how you went about paying yourself . . . the monies to which you were entitled as a consequence of the legal services which you were rendering.

A. Okay. Once the monies were earned by me, I would write out a check to myself out of the trust proceeds. Sometimes it might be at a closing table. Sometimes it might be when I got to the bank.

. . .

Q. What do you mean sometimes it might be when you got to the bank?

A. Well, I would keep those pocket checkbooks with me and, for example, always in seller transactions, and sometimes in buyer transactions, you would do the closing at the other lawyer's office. So if I was being the representative of the seller, after I might leave that lawyer's office . . . or out on some other client matter, I tried to get to the bank at a reasonable time and take the little checkbook out of my pocket, write a check thinking about that list on my desk, fees that I was due, and I would move the money from my trust account to my business account.

Q. How did you know that you had money in the account to which you were entitled, in the trust account?

A. Because I would try to make a mental picture of that little list, I'd think of the name that I was taking the money for. Whether I got around to writing my check to myself that day or another day, I'd eventually get around to paying myself for that particular closing. It's mostly based upon what I was remembering, or trying to remember what was coming to me, what I had earned.

. . .

Q. Would it be fair to say that you frequently had no records in front of you, no written records in front of you of what was in the trust account when you were drawing those checks?

A. That's correct.

Q. Did you always write in the lower left-hand corner of the check a name indicating the name of a client or the name of a case or the name of a closing from whose account you believed you were drawing funds?

A. No, sometimes I would try to remember it, write it down. Sometimes I would forget to write it down. No, I didn't always write it.

Q. When you did write it down, did you have any records in front of you to reflect from whose account it was being taken or did you use some other means to determine what name to write in the lower left-hand part of the check?

. . .

A. I would try to remember. . . And if I couldn't remember, I might not write it down. If I thought that I could remember, I would write it down. Sometimes I got mixed up, too.

[3T71-77][1]

With respect to the *Alongi* matter, although respondent acknowledged that he had written the notation "Alongi fees/costs" at the time that he issued the check, he speculated that he had written that name in error:

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[1] 3T refers to the April 15, 1997 hearing before the special master.

Q. You wrote that notation on March 18, 1991 when you wrote out the check, correct?

A. Oh, definitely. I didn't mark up any checks that I gave you. Whatever was originally on there that is what is on there. What I'm saying is that I miss-attributed [sic] to which client it was for.

Q. What do you mean you miss-attributed [sic] to which client it was for? I don't understand that.

A. Okay. I kept a list of receivables on my desk on a little yellow sticky, a large one, stuck inside my desk blotter. And if I went to the bank knowing that I was due $800 on a particular client matter. While I was out doing all of my other stuff, I may have had that name in mind for a different reason. I don't know what other reason, maybe something else happened in this transaction, and I probably wrote the wrong client name on there when I was writing the check out.

[4T66-67][2]

In addition, respondent claimed that his client trust account ledgers had not been prepared contemporaneously with the transactions but, rather, reconstructed after he received notice of the OAE demand audit. According to respondent, although he had bought a computer in 1992, it was not until 1993 that he began to use the accounting software package known as "Quicken." He testified that, after he received the overdraft notice in May 1994, he entered information from his check registers into the computer to determine the cause of the overdraft. Respondent contended that, in this effort to reconstruct his records, he had erroneously attributed fees to another client. He stated that the client trust account ledgers were not entirely accurate. Respondent summarized his actions as follows:

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[2] 4T refers to the October 15, 1997 hearing before the special master.

> The point of it is I tried to take everything from the little checkbooks . . . put it together, with the true few transactions I had in the computer, and have all my entries in one place with categories so that it could help me figure out how this over-draft occurred. . . All of the unidentified items there were checks to myself as well as to other people that we had paid through the closings, title insurance companies, the county recording office. You know, you name it, there were a lot of unidentified items that didn't say in the memo portion which closing they pertained to.
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> It was – so it wasn't as easy as we had thought to help figure out this over-draft. We put them all in a separate category from the named client categories. We called that a surplus category, stuff that didn't seem to fit anywhere else, and then ran off the categories to see, by dollar amount, if any of those items in the unidentified or surplus categories that we had named could fit in to zero out particular client categories. . .
>
> A lot of this stuff that we stuck in that unidentified or surplus category, I could not figure out where it went. Some of it I could see related to my fees. So I marked it split, like the – I needed $750 for – to zero out one particular client category, 800 for another, and I see that one week I had written an amount somewhat similar to that. Some of it worked very evenly. Some of it didn't, because a lot of the closings, obviously, the fee was the same fee. I always charge the same fee and various costs for the most part. And it was still a big mess. I wrote a letter to OAE. They asked me to tell them how I think the over-draft occurred.
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> [3T80-83]

Respondent, thus, contended that the OAE had improperly relied on inaccurate records, in charging him with knowing misappropriation. Respondent claimed that, although he noted the names of clients at the time he issued checks for his fees, he often attributed the check to the wrong client because he was relying on faulty memory. Finally, respondent pointed out that, after graduating from law school, he had been in-house counsel for three years before starting his own law practice. Accordingly, respondent contended, although he

had completed an ICLE course on trust accounting, he had never learned how to maintain a trust account.

3. The Merrill Lynch Matter

Respondent represented the seller, Bucks County Bank & Trust Co., in a real estate transaction that, according to the RESPA, closed on April 26, 1991. On April 17, 1991 respondent received from the buyer a deposit of $24,000 to be held in escrow until the closing. The client ledger card showed that, on the same day the deposit was received, respondent disbursed $1,600 to himself: $150 by a trust account check and $1,450 by wire transfer. The wire transfer actually occurred two days earlier, on April 15, 1991. On that date, respondent deposited the $1,450 to his business account and immediately withdrew $950 from that account. It is clear that respondent's business account needed that infusion of funds because, before the $1,450 deposit, the business account balance was only $464.56. Thus, without the $1,450 deposit, respondent could not have withdrawn $950 from his business account. Respondent did not receive any additional fee at the April 26, 1991 closing because he had already disbursed $1,600 to his business account as his fee nine days before the closing.

Respondent alleged in his answer that the closing had taken place in two stages: April 17, 1991, when the parties met and executed the closing documents, and April 26, 1991, when the closing was completed "because of actions by the Buyer's attorney that did not

impact upon the services rendered by Respondent." Respondent argued that there was a "dry closing" on April 17, 1991, which was not finalized until the occurrence of certain events.

4. The Tax Matter

As attorney for Herman and Ruth Tax in the sale of real property, respondent received the buyer's deposit of $1,000 on May 23, 1991 and $14,000 on June 11, 1991, to be held in escrow until the closing. On June 17, 1991 respondent issued trust account check number 2072 to himself for $1,500, noting in the "memo" column "Rice/Tax." Respondent's client ledger card showed that $750 of this check was attributed to the *Tax* matter. The ledger contained an "S" next to the check number, indicating a "split" check. Thus, on June 17, 1991 respondent disbursed to himself $750 for the *Tax* matter, three months before the closing, and $750 for the *Rice* matter, discussed below. Again, respondent took his fee from the real estate deposit before the closing.

According to the RESPA, the *Tax* closing took place on September 16, 1991. On that date, respondent disbursed an additional $100 to himself and issued a fee statement to his client for $850, the total amount of his fee.

As in the *Alongi* matter, respondent claimed that, when he wrote the $1,500 check, he inadvertently inserted the wrong client's name in the "memo" column:

> Either it was for another client's matter and I misdesignated it on the reconstruction as being for the [T]ax client, or that it was misdesignated, like I explained to you on Alongi. When I wrote the check, it may have been

monies I had earned in there, left in there from another client and written at this time, and had the [T]ax name in my mind when I wrote it.
[4T74]

Respondent denied that the reason he had issued a $100 check at the closing was that he knew that he had already received $750 of his $850 fee before the closing.

5. The Fleet Funding Matter

Respondent represented Fleet Funding/Bank of New York in the sale of real estate. On April 6, 1992 and April 20, 1992 he received from the buyer $1,000 and $5,100, respectively, to be held in escrow until the closing.[3] In an April 16, 1992 transmittal letter enclosing the deposit, the buyer's attorney reminded respondent that "[t]hese monies are to be held in your attorney's trust account pending the closing of title". Nevertheless, on April 21, 1992, the day after respondent deposited the funds in his trust account and thirty-eight days before the closing, he disbursed $750 to himself. Although no notation appeared in the "memo" column of the check, respondent's client trust account ledger attributed the disbursement to the *Fleet Funding* matter.

At the May 29, 1992 closing, respondent disbursed an additional $250 to himself for fees and costs. Respondent's fee for this closing was $1,000.

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[3] As it turned out, respondent's bank credited his trust account with only $5,000, instead of $5,100, when respondent deposited the buyer's down payment on April 20, 1992. By an August 19, 1992 letter to the buyer's attorney, respondent requested an additional $100, which he received on August 27, 1992.

Again, respondent contended that the reconstructed ledger mistakenly attributed the $750 disbursement to the *Fleet Funding* matter. Also, respondent denied that the $250 check he had issued at the closing was the difference between the $750 he had already taken before the closing and his $1,000 fee.

6. The Gatton Matter

As attorney for the sellers, Debra and Gregory Gatton, respondent received the buyer's $12,850 deposit on June 2, 1992 and an additional $1,000 on June 19, 1992. On June 10, 1992, eight days after receiving the deposit and more than one month before the July 15, 1992 closing, respondent disbursed $700 to himself, as reflected on the client ledger card. At the closing, respondent issued another check to himself for $200. According to the RESPA, respondent's fee was $900. Notwithstanding respondent's June 10, 1992 disbursement of $700, on June 23, 1992 he informed the buyer's lender that he was holding the entire deposit in escrow.

Respondent speculated that the $700 fee taken on June 10, 1992 should have been attributed to another client, Cuadra, instead of Gatton. In turn, the presenter submitted the *Cuadra* client trust account ledger, indicating that respondent had received $1,400 as part of a larger "split" check on June 16, 1992. The presenter, thus, disputed respondent's version of the events. Respondent again denied that he had issued a $200 check at the *Gatton* closing because he knew that he had previously disbursed $700 of his $900 fee before the closing.

7. The Swan Matter

On September 17, 1993 respondent received $36,500 of the buyer's deposit in a matter in which he represented the sellers, William and Linda Swan. On November 9, 1993, two months before the closing of title, respondent issued a $1,000 check to himself, noting in the "memo" column "Fees/Costs Swan." Although the check was generated by computer, including the notation "Fees/Costs," respondent handwrote "Swan" when he signed the check. Respondent's fee for this real estate sale was $1,000. At the January 6, 1994 closing respondent did not disburse any additional funds to himself.

Respondent again claimed that the designation of "Swan" on the check was an error, attributing to coincidence the fact that he had written a check to himself for the exact amount of the *Swan* fee, $1,000, before the closing. Asserting that his customary fee at that time was $750, respondent stated that he could not have known, before the closing, that other services would be rendered to justify an increase of the fee to $1,000.

8. The Alexander Matter

Respondent represented Charles Alexander in the sale of real property. On January 12, 1994 respondent received the buyer's deposit of $16,800. On January 27, 1994, fifteen days prior to the closing, he disbursed $800 to himself as part of a $1,000 "split" check. The remaining $200 of the check was applied toward respondent's "surplus funds" ledger on the same date, January 27, 1994. At the February 11, 1994 closing, respondent disbursed $6,000 to his client, noting on the check "$16,800 escrow minus $10k to DJ minus $800 SM." The

"DJ" notation referred to a settlement of a claim paid to a Donna Jacobites. At the ethics hearing, respondent acknowledged that the note in the "memo" column was made when the check was prepared and that the "$800 SM" notation indicated that he had received an $800 fee. The client had previously paid respondent $200 toward his fee, as shown on a December 30, 1993 fee agreement letter on which respondent had written "pd. $200".

Respondent's total fee for this matter was $1,000. He did not disburse additional funds to himself at the closing.

Respondent testified that the $1,000 he took on January 27, 1994 "most likely" related to the *Swan* transaction, not the *Alexander* transaction. As noted above, the *Swan* closing had occurred on January 6, 1994, three weeks earlier. Respondent could not explain why he had not received a fee at the *Alexander* closing.

9. The Brown Matter

As attorney for the seller of real estate, James T. Brown, III, respondent received the buyer's $7,500 deposit on February 22, 1994. On that same date, respondent issued a check to himself for $750. The closing did not take place until three weeks later, on March 15, 1994. The client ledger card did not reveal any additional disbursements to respondent.

Although respondent surmised that the $750 check issued on February 22, 1994 related to the *Alexander* closing, not the *Brown* closing, he was unable to explain why he had not received a fee at the *Brown* closing.

B. Invasion of Unrelated Client Trust Funds

1. The Rice Matter

Respondent represented Larry and Shirley Rice, the sellers of real estate. Respondent received from the buyers a deposit of $15,888 on June 27, 1991 and an additional $500 on July 1, 1991, to be held in escrow until closing. However, on June 17, 1991, ten days before his receipt of the deposit and more than two and one-half months before the closing, respondent disbursed a $1,500 check to himself, noting in the "memo" column "Rice/Tax," as discussed above in the *Tax* matter. Respondent's client trust account ledger did not reflect any transaction on June 17, 1991. Because respondent attributed $750 of the $1,500 to the *Tax* file, the $750 balance must have been attributed to the *Rice* matter. In advancing $750 to himself before the closing, respondent invaded other client funds on deposit at that time. Obviously, his action did not constitute an invasion of the *Rice* deposit, inasmuch as it had not yet been given to respondent when he withdrew the $750.

At the September 3, 1991 closing, respondent disbursed $100 to himself by means of a $965 "split" check. The following notation appeared in the memo column: "100 Rice 865 Larkin."

Respondent conceded that he had made the notations in the "memo" columns when the two checks ($1,000 and $100) had been prepared.

2. The Burnett Matter

As attorney for the buyer, Minetta Burnett, in a real estate transaction, respondent was not acting as the escrow holder. On August 22, 1991, because his client's mortgage application had been denied, respondent demanded that the seller's attorney return the $9,700 deposit, which respondent received on September 16, 1991. However, on September 12, 1991, four days earlier, respondent had issued a $1,350 trust account check to himself, noting "Burnett" in the "memo" column of the check. In so doing, respondent invaded trust funds that belonged to other clients.

Although in his answer respondent claimed that he was entitled to receive a $1,350 fee on September 12, 1991, he was unable to support this claim.

3. The Walter Matter

Respondent represented Gary and Marilyn Walter, the buyers in a real estate transaction. On September 17, 1991 respondent issued a $965 trust account check to himself, noting "Walter" in the "memo" column of the check. Respondent deposited these funds into his attorney business account. Respondent did not have any *Walter* funds on deposit in his trust account until the closing, which took place eight days later. At that time, respondent deposited $271,727.39 into his trust account, from which he made the necessary disbursements. According to the RESPA, respondent's fees and costs were $965. He did not disburse any additional funds to himself at the closing.

Respondent contended that he wrote the name of the wrong client when he prepared the check, stating that, during that same week, he had participated in several real estate closings in which his fees and costs had been $965.

4. The Zonenberg Matter

Respondent represented the buyers, Edward and Tolly Zonenberg, in a real estate matter. Although the closing did not take place until October 26, 1992, respondent disbursed $900 to himself on October 22, 1992. He did not have any *Zonenberg* funds on deposit when he took his fee. Respondent did not note the name of the client on the check. However, the disbursement appeared on the *Zonenberg* client ledger sheet.

At the closing, respondent disbursed an additional $130 to himself for a total of $1,030, the exact amount of his fee and costs.

Respondent asserted that he had mistakenly listed the $900 disbursement on the *Zonenberg* client ledger sheet, speculating that the fees related to a closing for another client, Mosa.

5. The Shapiro Matter

Respondent represented Andrew Shapiro in a mortgage refinance. It was not until December 22, 1992, five days after respondent took his fee, that he received a wire transfer of $66,997.60 into his trust account, relating to the loan closing. According to the RESPA, respondent's fee and costs were $770. Although the loan closing documents were signed on

December 17, 1992, because of the three-day right of rescission, respondent did not receive any funds until December 22, 1992. On December 17, 1992 respondent issued a $770 check to himself, writing "Shapiro" in the "memo" column.

Respondent claimed that, although he was aware of the three-day right of rescission, he believed that the funds had been wired into his account on December 17, 1992, when the documents were signed.

6. The Evans Matter

Respondent represented the buyer, Katherine Evans, in a real estate closing that took place on July 20, 1992. At that time, he received settlement funds of $95,700.98. On July 17, 1992, three days before the closing, respondent issued a $965 trust account check to himself, as reflected on the client trust account ledger. In addition, at the closing respondent issued another $40 check to himself, for a total of $1,005, the exact amount of his fee shown on the closing statement.

Respondent maintained that the July 17, 1992 check represented his fee for a closing for another client, Fox.

C. The Surplus Funds Client Ledger Matter

OAE auditor G. Nicholas Hall testified that, after analyzing respondent's trust account and business account records from May 1991 through June 1992, he concluded that respondent had knowingly invaded client funds and had contemporaneously recorded those

withdrawals on a document titled "Surplus Funds Client Ledger" ("the ledger").[4] Hall testified that, when respondent produced the ledger at the first OAE audit, July 13, 1994, respondent conceded that he had kept track of the surplus funds removed from his trust account. Although the ledger did not contain a running balance, the analysis that Hall prepared with a running balance showed that respondent's trust account was out of trust on numerous dates between February 5, 1991 and April 1, 1994.

According to Hall, on August 19, 1991 respondent issued a $1,716.67 check to himself, posting $1,450 of those funds to the ledger and causing the trust account balance to decrease from $125.24 to a negative $1,324.76. Three days later, on August 22, 1991, respondent's $850 disbursement to himself further increased the negative balance to $2,174.76. A November 5, 1991 check for $239.16 and a December 3, 1991 check for $8.33 resulted in negative balances of $2,413.92 and $2,422.25, respectively. In December 1991 respondent retained earned fees of $1,075 in his trust account and in January 1992 he deposited personal funds of $1,500, thereby bringing the ledger balance to a positive $152.75. However, on February 14, 1992 respondent issued a $2,300 check to himself, again resulting in a negative balance of $2,147.25. On June 16, 1992 respondent disbursed $4,250 to himself: $2,750 for fees in three client matters and $1,500 posted to the ledger, increasing the negative balance to $3,647.25. Thus, according to Hall, respondent posted six

[4] According to Hall, this ledger was a document that respondent created to keep track of his unauthorized withdrawals.

disbursements to the ledger when there were insufficient funds on hand, thereby causing a knowing invasion of client funds.

Hall presented the following summary of respondent's trust account practices:

> But my review of his trust account in conjunction with his business accounts, receipts and disbursement journals, his business accounts clearly – I see a pattern of, if he needs money and he doesn't go to a specific client matter, he doesn't have a specific client matter to go to, he just applies it toward the surplus funds ledger. He's keeping track of monies he's misusing from his trust account and keeping track of it with the surplus funds ledger.
>
> [1T88]

For his part, respondent denied that he had contemporaneously recorded items on the ledger. Instead, he claimed that, when he had reconstructed his records for the OAE audit, he had recorded unidentified funds on the ledger, that is, deposits and disbursements that could not be attributed to a specific client.

* * *

In his answer to the formal complaint, respondent admitted the following recordkeeping violations: (1) failure to prepare and quarterly reconcile to bank statements a schedule of clients' ledger accounts; (2) failure to sufficiently describe some deposit slips in order to identify each item of deposit; (3) failure to remove inactive trust ledger balances from the trust account for an extended period of time; and (4) failure to maintain a separate trust ledger for each trust client. As an affirmative defense, respondent asserted that any trust account shortage that occurred was the result of "inadvertent error or neglect in

Respondent's handling of his accounts and his funds." In addition, as noted above, respondent testified that he maintained records on "Post-it"™ notes that he affixed to his desk blotter.

Respondent's expert witness, William Morrison, testified that respondent's recordkeeping was "virtually nonexistent" [5T96].[5] Morrison opined that, because respondent did not maintain adequate records, he was not aware that he was out of trust. Morrison pointed out that respondent did not buy a computer until late 1992, after the trust account violations had occurred, particularly those pertaining to the surplus ledger account.

* * *

One additional point warrants mention. On the day before the Board hearing, respondent's counsel hand-delivered to the Board a certification containing stipulations of fact that were prepared after the ethics hearing and submitted to the special master as an appendix to respondent's trial brief. The stipulations were not signed by counsel from the OAE. At the hearing before the Board respondent's counsel argued that the stipulations of fact should be accepted by the Board because, although the OAE had never formally signed them, there had been an oral understanding that the stipulations would be signed. The OAE vigorously denied that contention. After the Board hearing, counsel submitted legal argument concerning the stipulation.

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[5] 5T refers to the November 3, 1997 hearing before the special master.

Following oral argument on this issue, the Board determined that the facts contained in respondent's proposed stipulation would be deemed to be part of respondent's statement of facts in this matter. The Board also determined to take this opportunity to advise the bar of the Board's strong disapproval of submission of unsolicited and repetitive argument on disputed issues, after the Board's hearing and deliberation of the matter.

* * *

The special master found that, with the exception of the *Schulte* and *Merrill Lynch* matters, the presenter had demonstrated by clear and convincing evidence that respondent had knowingly misappropriated client funds and had failed to keep required records. Although the special master found that respondent was grossly negligent in his recordkeeping, she determined that his poor accounting procedures were not the cause of his invasion of client funds. According to the special master, two factors showed that respondent knew that he had improperly advanced his fees: (1) his contemporaneous client designation on each check and (2) his calculations of the balance of his fee (or no fee) due at the closing based on the fee advances already taken. The special master rejected as not credible respondent's claim that he had "misdesignated" the names on the checks.

The special master reasoned that, in the *Schulte* and *Merrill Lynch* matters, respondent's mistaken belief that he was entitled to take his fee when the documents were signed supported a finding of negligent, but not knowing, misappropriation.

The special master's report did not address the matter of the surplus funds client ledger.

* * *

Following a *de novo* review of the record, the Board is satisfied that the special master's finding that respondent knowingly misappropriated client and escrow funds is supported by clear and convincing evidence. In nine matters, in which respondent represented the sellers in real estate transactions, he was entrusted with the buyers' deposits to be held in escrow until the closing of title. However, in all of those matters respondent violated his fiduciary duty as escrow agent by advancing his fees from the deposit funds before the closings, without authorization from his client and from the other parties to the transactions. In some of the transactions, respondent paid himself a fee two to three months before the closing. And he did so knowingly. When respondent issued the checks to himself in the *Schulte, Alongi, Tax* and *Swan* matters, he wrote the name of the corresponding client in the "memo" column of the check. Moreover, in the *Alexander* matter, respondent wrote "minus $800 SM" in the "memo" column of the check issued to his client, thereby acknowledging that he had previously disbursed his fees. These contemporaneous client designations support the conclusion that respondent was aware that he was taking fees that he had not yet earned.

Even more telling was respondent's pattern of reducing his fees at the closing by the precise amount of the advanced fees. In the *Schulte* matter, respondent had received $1,600 before the closing; therefore, at the closing he disbursed $2,451 to himself, representing the balance of his $4,051 fee. In the *Tax, Fleet Funding* and *Gatton* matters, respondent issued the exact balance of his fee at the closing, thereby demonstrating his awareness that he had received part of the fees before the closings. In the *Merrill Lynch, Swan, Alexander* and *Brown* matters, respondent had advanced his fee in full before the closing; consequently, at the closing he disbursed no additional fees to himself, once again showing that he knew that he had already taken his fee. In the *Alongi* matter, although the closing did not take place because the buyer defaulted, respondent advanced his entire fee from the deposit funds in escrow.

As noted above, respondent admitted that, when he prepared the checks for his fees, he wrote the name of the respective client in the "memo" column. However, respondent maintained that his client designations should be disregarded because he had relied on his memory when he had prepared the checks. According to respondent, he wrote the checks while away from his office and tried to remember the names of clients for whom he had earned a fee. The Board rejected this claim. The client designations and the fact that, at the closings, respondent subtracted the exact amount of the fees paid to himself before the closings demonstrate that he knew that he was misappropriating the deposit funds. Moreover, while it is possible that a mistake might occur in a single matter, the great number

of instances here shows a pattern of premature fee disbursements that belies respondent's claim of inadvertence or oversight.

Similarly, in the other six matters in which respondent advanced fees to himself prior to the closings, there is clear and convincing evidence that respondent knowingly misappropriated client funds unrelated to each transaction. In the *Rice, Burnett, Walter* and *Shapiro* matters, respondent wrote the names of the clients on the checks that he issued to himself before the closing of title. In these matters, respondent invaded funds of other clients when he took his fees before the closings. In the *Rice, Zonenberg* and *Evans* matters, respondent issued the balance of his fee at the closing, while in the *Walter* and *Shapiro* matters, he did not disburse any additional fees at the closing. The fact that respondent considered the amount of fees he had taken before the closings in disbursing funds at the closings overwhelmingly demonstrates that he knew that he had advanced fees to himself. In the *Burnett* matter, although no closing took place because respondent's client did not qualify for a mortgage, respondent advanced his fee before he received the return of his client's deposit.

As noted above, the special master did not address the matter of the surplus funds client ledger prepared by respondent. According to OAE auditor Hall, respondent had mentioned during the demand audit that he had kept track of surplus funds in his trust account. Hall testified in detail that, on six occasions from August 19, 1991 through June 16, 1992, respondent had disbursed funds to himself from his trust account when he did not have sufficient funds on deposit, thereby invading client funds. There was also some

evidence that respondent deposited his own funds into the trust account and that he retained earned fees in the trust account. Hall theorized that, whenever respondent needed money, he would take escrow or client funds that he had on deposit and that, if he did not have specific client funds available, he would simply write a check from his trust account, keeping track of such disbursements on the surplus funds client ledger.

Respondent contradicted this testimony, maintaining that he had prepared the surplus funds client ledger when he tried to reconstruct his records for the OAE audit. Respondent also denied any knowledge that his trust account was out of trust. In turn, to show that respondent knew that he had insufficient funds on deposit, the presenter introduced respondent's September 1991 bank statement, on which respondent had written "short $560.84." Another indication that respondent was well aware of the amount of the funds in his trust account was the fact that, in the *Fleet Funding* matter, he noticed a $100 discrepancy when his bank credited his trust account with only $5,000, instead of $5,100, the amount of the deposited check.

The Board found that respondent's conduct in the surplus funds client ledger matter amounted to wilful blindness, as in *In re Skevin*, 104 *N.J.* 476 (1986), a ruling that the Court recently confirmed in *In re Pomerantz*, 155 *N.J.* 122 (1998). In those cases, the Court held that, when attorneys act without satisfying themselves that they are not misappropriating funds, such a state of mind goes beyond recklessness because the attorneys are aware that the clients have not authorized the taking. Knowing misappropriation may also be established by evidence that attorneys knew that invasion of client trust funds was a likely

result of their conduct. *In re Irizarry*, 141 *N.J.* 189 (1995). Here, according to the OAE investigative auditor, respondent admitted at the OAE audit that he maintained a ledger in which he kept track of funds that he removed from his trust account. Even by respondent's own admission, he prepared checks from his trust account when he was at the bank and did not have his records with him. In addition, as discussed above, respondent displayed a pattern of knowingly misappropriating both client and escrow funds. The Board, thus, concluded that respondent's preparation of checks from his trust account without regard to whether sufficient funds were on deposit to cover those checks constituted wilful blindness.

In the *Merrill Lynch* matter, the special master found that respondent's conduct did not amount to knowing misappropriation. There, respondent claimed that he was entitled to the fee on April 17, 1991, the date of the "dry closing." However, even if respondent had a good faith, but mistaken, belief that he could take his fee on that day, the fact remains that he paid himself a fee two days before, on April 15, 1991. Under these circumstances, the Board determined that respondent's advancement of the fee before the *Merrill Lynch* closing constituted knowing misappropriation. In the *Schulte* matter, however, the Board agreed with the special master that respondent's mistaken belief that he was entitled to his fee before the closing of title supported a finding of negligent, not knowing, misappropriation.

As to the recordkeeping allegations, respondent admitted that his procedures were deficient. In fact, respondent asserted his sloppy accounting procedures as a defense to the knowing misappropriation allegations.

Based on the foregoing, the Board found that respondent committed knowing misappropriation of both escrow funds and client funds, in violation of the principles of *In re Wilson*, 81 *N.J.* 451 (1979), and *In re Hollendonner*, 102 *N.J.* 21 (1985). Respondent's misconduct was similar to that of other attorneys who advanced fees in real estate matters before the closings had taken place. In *In re Warhaftig*, 106 *N.J.* 529 (1987), on twenty-two occasions the attorney advanced fees before the real estate closings had occurred. After each closing, the attorney deleted the client's name and fee from a list that he maintained. If the closing did not occur, the attorney would replace the fee. The Court rejected the attorney's argument that, because he had a colorable interest in the funds, he did not perceive his advance of fees as misappropriation of client funds. Instead, the Court reiterated that, under *In re Noonan*, 102 *N.J.* 157 (1986), whether the lawyer's subjective intent is to borrow or to steal is irrelevant; knowing misappropriation consists of the simple act of taking money entrusted to the attorney, knowing that the client has not authorized the taking. The attorney was disbarred.

Similarly, in *In re Lennan*, 102 *N.J.* 518 (1986), the attorney took trust account funds held as deposits on real estate closings, replacing the monies before the closings occurred. The attorney issued seven checks to himself from deposits in four real estate matters. He was disbarred. In yet another case, an attorney advanced fees to himself in nineteen real estate matters before the real estate closings had taken place. *In re Houston*, 130 *N.J.* 382 (1992). In two of those matters the fees were drawn against funds on deposit, while in the remaining seventeen matters the attorney invaded other clients' funds. Houston, too, was disbarred.

Respondent argued that, before an attorney is disbarred for knowing misappropriation of client funds, *Wilson* requires proof that the attorney intended to steal from his clients. He further contended that such intent to steal may be established through circumstantial evidence, primarily by showing an attorney's need for money due to financial obligations, drug addiction or other similar situation. Respondent maintained that the evidence failed to establish that his need for money was so great as to impel him to steal from his clients. Respondent's interpretation of *Wilson* is mistaken, however. As observed earlier, in *In re Noonan, supra*, 102 *N.J.* at 159-160 (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].

Under *Noonan*, thus, neither intent to steal or defraud nor dishonesty are required for a finding of knowing misappropriation. 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 affecting 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. *See also In re Pomerantz*, 155 *N.J. 122* (1998) and *In re Greenberg 155 N.J. 138* (1998).

As the Court observed in *In re Roth*, 140 *N.J.* 430 (1995):

> The line between knowing misappropriation and negligent misappropriation is a thin one. 'Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission.' *In re Johnson*, 105 *N.J.* 249, 258, 520 *A.*2d 3 (1987). However, this Court has noted that 'an inculpatory statement is not an indispensable ingredient of proof of knowledge, and that circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded.' *Ibid.* In this case, that circumstantial evidence includes repeated invasions of client funds that were required to be held inviolate. The testimony adduced convincingly suggests that respondent 'knew' or 'had to know' that he was invading client funds.
>
> [*In re Roth, supra*, 140 *N.J.* at 445]

Here, too, respondent either knew or had to know that he was invading client funds when, on numerous occasions, he adjusted his fee at real estate closings to take into account the fees that he had advanced to himself before the closings.

Respondent also pointed out that his expert witness, William Morrison, offered the opinion that respondent may have committed either a knowing or a negligent misappropriation, testifying that both were plausible theories. Relying on *In re Johnson*, 105 *N.J.* 249, 259 (1987), respondent contended that, according to the Court, if two plausible misappropriation theories are presented, the *Wilson* rule does not apply. Again, respondent

misperceives the law. In *Johnson*, the Court found that, under the particular facts before it, the evidence of knowing misappropriation fell short of the clear and convincing standard. Recognizing that each case is fact-sensitive, the Court cautioned the bar as follows:

> We should add that if in fact the record demonstrated, by the requisite degree of proof, that respondent 'had to know' of the misuse of clients' funds, we would not hesitate to disbar. Proving a state of mind – here, knowledge – poses difficulties in the absence of an outright admission. We accept the complementary propositions that an inculpatory statement is not an indispensable ingredient of proof of knowledge, and that circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded; but the record before us falls short of the requisite proof in that regard.
>
> [*In re Johnson, supra,* 105 *N.J.* at 258]

Here, the proof that respondent "knew" or "had to know" that he was misappropriating client and escrow funds was clear and convincing. Thus, for respondent's knowing misappropriation of escrow and client funds, a five-member majority of the Board determined to recommend that he be disbarred. Four members dissented, voting to suspend respondent for three years for negligent misappropriation and reckless bookkeeping, finding insufficient evidence of knowing misappropriation.

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

Dated: 5/10/99

By: _____
LEE M. HYMERLING
Chair
Disciplinary Review Board