Book

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-363

IN THE MATTER OF	:
TERRY SHAPIRO,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: February 10, 1994

Decided: May 27, 1994

John J. Janasie and Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Joseph J. Hayden, Jr. and Michael Perle appeared on behalf of respondent.

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

This disciplinary matter arose from a complaint charging respondent with knowing misappropriation of client funds (counts one and two), misrepresentation in an affidavit filed with the New Jersey Supreme Court (count two), and knowing misappropriation of trust funds by failing to promptly deliver to two other attorneys portions of legal fees to which they were entitled and by failing to segregate the disputed fees until a severance of their respective interests (counts three and four). The ethics authorities were notified of respondent's alleged improprieties by his non-equity law partners, Cynthia Craig, Esq. and Stephen Berardi, Esq., as well as by respondent himself, separately.

This matter was heard by Special Master Michael L. Kingman, who recommended public discipline.

* * *

Respondent was admitted to the New Jersey bar in 1974. At the time of the charged infractions, he was the sole equity partner in the law firm of Shapiro and Berardi, in Newark, New Jersey. In addition to respondent, Craig and Berardi, the firm had twenty-four other employees: four associates, three claims investigators, one office administrator and sixteen clerical and secretarial staff members.

There can be no doubt that the firm was highly successful, both professionally and economically. At the relevant time, mid- to late 1990, there were 2,500 to 3,500 open files, with approximately $6,000,000 in trust funds held in that year. From February through September 1990, 1,100 checks were issued from the firm's trust account and 2,600 from its business account. T756-57. As the recognized "rainmaker" in the firm, respondent generated eighty percent of its business.

Respondent is regarded as an excellent attorney, specializing in complex personal injury matters, medical malpractice, products liability and workers' compensation. His professional efforts brought him immense financial rewards, translated into a $1,000,000 annual income. His participation in other professional activities, too, is considerable. Through the years, respondent has been very active in the Vanderbilt Inn of Court, as one of its masters, as well as in the New Jersey chapter of the American Trial Lawyers'

Association ("ATLA"), occupying positions on its Board of Governors, the Executive Committee, and the Education Foundation. He has also lectured for the New Jersey State Bar Association, ATLA and the Institute for Continuing Legal Education, and has published numerous scholarly articles in legal periodicals. Peers in the profession regard respondent as an extraordinary lawyer, hard-working, diligent, with an excellent reputation for honesty and integrity.

In 1990, respondent's law firm maintained a trust account, a business account and a payroll account with the Broad National Bank ("The Bank"), in Newark, with which respondent had a long-standing banking relationship. By virtue of such relationship, respondent had quick access to commercial loans and lines of credit from the bank. There were also instances where the bank paid checks drawn against negative balances in the business account. T758. The bank always honored checks from the payroll account issued against insufficient funds. T603, 605, 724; Exhibit CP-16.

Although all three partners in the firm were empowered to sign trust account checks, they never involved themselves in the preparation of the checks. That task had been entrusted to the office manager/bookkeeper, Myrna Weissman. As to business account checks, in ten years respondent signed fewer than ten such checks. T796. Weissman prepared and signed the business account checks. T629. Neither respondent nor the other two partners involved themselves in the day-to-day recordkeeping activities of the firm. That responsibility had been delegated to Weissman since February

1990. Marie L. De Sena, C.P.A., the firm's accountant, had taught Weissman how to maintain the attorney books and records on a daily basis. Every month, De Sena visited the firm to review its records and to perform the reconciliations required by the rules.

Whenever a file was closed, the attorney in charge of that file would prepare a memorandum, normally on pink paper, computing and outlining the necessary disbursements. That file would then be entrusted to Weissman to draw the relevant checks, following the detailed directions on the memorandum. Pursuant to the firm's practice, Weissman would prepare checks once a week. She would then give them in bulk to one of the partners, who would sign all of the checks at once. At times, those checks were numerous. According to respondent, when given a pile of checks to sign, he would not review each check individually. He trusted that Weissman had properly discharged her bookkeeping responsibilities.

Occasionally, if it became necessary to tie some loose ends on a particular file after the initial disbursements, the attorney would not prepare a memorandum but, instead, give Weissman oral directions. On such occasions, the appropriate check would not always be accompanied by the file, when presented to the attorney for signature.

The formal ethics complaint charged respondent with misconduct in four separate matters, as follows:

A. THE CRAWFORD MATTER - (COUNT ONE)

1. THE VARIOUS VERSIONS OF THE EVENTS

This wrongful death case handled by respondent stemmed from a fire in which Connie Crawford, then pregnant, was fatally injured. Mrs. Crawford perished in the hospital, thirty-five days after the fire. She never regained consciousness. Her three infant children also sustained severe injuries in that fire.

Ultimately, respondent reached a structured settlement of a cost basis of $1,300,000. One child would eventually receive $3,000,000, another child would get $4,000,000, while the third child recovered $75,000 for smoke inhalation only.

Because the children were under the age of eighteen, the settlement monies had to be deposited with the Surrogate's Office and a guardian had to be appointed. Problems developed, however, after the court-appointed guardian withdrew, necessitating the search for a replacement. Respondent asked Berardi to become involved in the Crawford case because, according to respondent, Berardi handled all guardianship matters in the firm. Respondent also asked Berardi to forward the settlement monies to the Surrogate, after the appointment of a new guardian. For reasons not relevant to these proceedings, Berardi did not send the monies to the Surrogate until June 1990, some sixteen months after the case was settled. In the interim, however, the settlement monies had been invested into certificates of deposit ("CDs") to generate interest in behalf of the Crawford children. In addition, because of certain Medicaid liens held by the Department of Human Services

against Connie Crawford and the three children, the sum of approximately $90,000 had been set aside and invested into a CD because respondent intended to reach a compromise with the Department of Human Services on the amount of the liens. Exhibit CC-2.

In or about September 10, 1990, Weissman noticed that the funds for the Medicaid liens were still being held in trust in the form of a CD, even though respondent had informed her that the issue had been resolved with the Department of Human Services. Because the CD was about to expire, she consulted with respondent and Berardi about whether it should be rolled over. T633. According to respondent, he instructed Weissman to cash the CD and deposit the proceeds into the trust account. She did so on September 11, 1990. After cashing the CD, Weissman deposited $99,708.48 into the trust account, representing principal and interest. Exhibit CC-1A.

Weissman cashed the CD some three weeks before its maturity date of October 4, 1990. Respondent claimed that he was unaware that the CD had been cashed prior to its maturity date. He did not remember paying any penalties and doubted that there were any because of his special relationship with the Broad National Bank, which had issued the CD. Exhibit CC-1A.

Also on September 11, 1990, respondent sent a letter to Raymond Schumacher, a Medical Review Analyst with the Department of Human Services. Exhibit CC-4. The letter enclosed three trust account checks, in the total amount of $53,253.33, for the

satisfaction of the Medicaid liens against the three Crawford children. Those liens were not in dispute. The letter also stated as follows:

> With respect to the lien claim on behalf of Connie Crawford, this represented her hospital care while in a coma from the date of her admission March 17, 1986 to the date of her death April 16, 1986. There was no survival action, and no money was recovered for her conscious pain and suffering.
>
> In view of the payment made only under the Death by Wrongful Act Statute to the next of kin and no money being paid to the Estate of Connie Crawford or for her conscious pain and suffering, it continues to be my position that there is no money due the Department of Human Services as reimbursement of a Medicaid lien.
>
> I would appreciate your forwarding to me a letter confirming in writing that the alleged lien on behalf of Connie Crawford is being released and discharged, and that no money is due on the factual basis that Connie Crawford was in a coma from the time of her admission to the time of her death, sustained no conscious pain or suffering and the entire settlement of her case was solely for the benefit of her next of kin which will be distributed in accordance with the Laws of Intestacy.
>
> [Exhibit CC-4]

After the deduction of the $53,253.33 sum, there remained a balance of $46,455.15 from the total CD proceeds of $99,708.48. That balance was to be set aside until the final resolution of the Medicaid lien against Connie Crawford. According to respondent, he had given Weissman an audio tape containing the above letter to the Department of Human Services, as well as directions on the disposition of the $46,455.15 balance. Still according to respondent, he had instructed Weissman <u>not</u> to "distribute the Connie Crawford money." He had also given her a verbal instruction to hold the money "in our account." T849. Respondent explained

that, having requested a prompt response from the Department of Human Services about the Connie Crawford lien, he did not believe it appropriate to disburse the $46,455.15 balance immediately to the Crawford children because of the pending dispute about the lien.

It was Weissman's testimony that she mistakenly believed that "our account" meant the firm's business account. Accordingly, on that same day, September 11, 1990, she prepared trust account check number 11609 for $46,455.15, payable to Shapiro and Berardi. Exhibit R9-E. She then presented it to respondent for his signature and deposited it into the firm's business account, together with other deposits of $1,107.70 that rightfully belonged to the firm. On the next day, September 12, 1990, the bank posted the total $47,562.85 deposit into the firm's business account, of which $46,455.15 should have been held in trust for the Crawford matter. Exhibit CC-6. The bank statement shows that, before the $47,562.85 deposit on September 12, 1990, the business account had a balance of $20,156.87. Exhibit CC-14. With the $47,562.85 deposit, that balance increased to $67,719.72. Of course, of those funds only $21,264.57 ($20,156.87 + $1,107.70) legitimately belonged to the firm. At the close of business on September 12th, the firm had $20,256.32 of its own funds in the business account ($66,711.47 - $46,455.15 = $20,256.32). On September 13th, a deposit of $20,216.66 increased the firm's funds to $40,472.98. On that same day, the bank cashed a check for $13,068.60 for the firm's payroll taxes and another for $30,523.73 for the firm's

payroll. No further monies were deposited into the business account until September 17th. On September 13th, however, respondent deposited $46,465.00 of his own money in the trust account to cover the Crawford funds that had been transferred to the firm's business account (the deposit slip bears a September 14, 1990 date because the deposit was made after 2:30 p.m. on September 13th).

Parenthetically, the firm employed the services of an outside firm — Paychex — to handle its weekly payroll. Paychex issued all individual paychecks, which were cashed against funds from the firm's payroll account with the Broad National Bank. The funds deposited in the payroll account originated from business account checks, which, according to Weissman, were always signed by her.

The $30,523.73 business account check cashed by the bank on September 13th was deposited into the firm's payroll account on that same day. Forty-one withdrawals from September 13 through September 20, 1990 were backed by those funds. Not always, however, did the bank require a balance sufficient to cover the firm's payroll checks. Exhibit CP-16. The next twenty-five withdrawals, for instance, were consistently honored by the bank, notwithstanding the fact that the payroll account was overdrawn. Indeed, from September 20 through September 26, 1990, which included the following payroll week of September 20, 1990, the payroll account showed a negative balance that began at $2,184.44 and escalated to $12,127.36. It was only on September 27, 1990 that the $12,127.36 negative balance was cured and the payroll

account was brought back to a positive position. Exhibit CP-16.

It was not until the day after the September 11, 1990 transfer of the Crawford funds to the business account that the impropriety was detected. According to Craig, on September 12, 1990, just before lunch time, she returned to the office after a court appearance in the morning. While looking for other records in Weissman's office, Craig came upon the Crawford ledger card. Her examination of that card revealed the disbursement of $46,455.15 from the trust account to the business account. Craig testified that she immediately became concerned because the firm had already received its legal fee one and one-half years before. Craig knew that the only funds that remained undisbursed in the Crawford matter were funds set aside for the payment of the Medicaid liens. Respondent was not in the office at the time of Craig's discovery. Craig then showed the ledger card to Berardi, exclaiming that the funds had to be put back in the trust account right away. Because Berardi was not feeling well on that day — he was wearing a portable monitor for a possible heart problem — he asked Craig to discuss the matter directly with respondent. In fact, Berardi already knew, since that morning, that there had been some disbursements from the Crawford account. Berardi testified that, when he walked into the office on September 12, 1990, Weissman announced to him, "we disbursed the Crawford money." According to Berardi, he was surprised because he believed that the firm should have sought the Surrogate Office's guidance or the court's direction about the disposition of the balance of the funds

remaining from the payment of the Medicaid liens. Berardi, respondent and Weissman had had several prior conversations about the subject.

According to Craig, on that same day, September 12th, she expressed her fear to respondent that the firm had taken a fee to which it was not entitled. Respondent replied that the transfer had been a mistake and assured Craig that he would instruct Weissman to correct it. Craig, however, began to develop a sense that something was wrong. She felt that respondent had sounded "glib" and "offhand" about a potentially serious matter. Craig had just been appointed a member of a district ethics committee on September 1, 1990, and knew that trust account violations could result in severe consequences. She telephoned her husband, who advised her to discuss the matter with another attorney, a former member of a district ethics committee. The attorney suggested that she talk to Weissman, which she did. By then it was 2:00 or 3:00 p.m. Craig asked Weissman whether respondent had directed her to correct the mistake on the Crawford account. According to Craig, Weissman replied "no" and added that the transfer had been no mistake. Craig testified that Weissman had volunteered "taking the blame for Terry, if that's what he wishes." Craig testified further that Weissman had indicated that "she had done it before and would do it again." T277.

Faced with Weissman's revelation, Craig once again confronted respondent. She accused him of having lied to her. According to Craig, respondent confessed that he had made a "business decision"

in helping himself to the Crawford funds; he had needed the money to cover the payroll checks for the September 13, 1990 week. Craig added that, when she insisted that the funds be put back into the trust account, respondent made no reply.

That evening, Craig telephoned Berardi at home several times. According to Berardi, Craig was very upset. They agreed to meet at the office at 8:00 a.m. the next day, September 13th, to discuss the matter. Craig testified that it was their intention to reverse the transaction, if possible. When they examined the business account deposit slip on the morning of September 13th, however, they discovered that it bore a stamped September 12, 1990 date. The transaction had already gone through. Exhibit CC-6.

When respondent arrived at the office at 9:00 a.m., Craig and Berardi steered him into an associate's empty office. According to Berardi, he told respondent that he was aware of the transfer. He also told him that the money would have to be replaced immediately. Respondent then turned to Craig and reproached her for having apprised Berardi of the transfer. Respondent's explanation, Berardi continued, was that he needed the money to meet payroll expenses. Respondent complained that the firm had been experiencing a cash flow crunch because Craig and Berardi had not been "pulling their weight." Berardi testified that respondent then expressed his intention to replenish the trust account in November, when the firm would be receiving certain legal fees from a structured settlement. T67-8. Berardi testified further that, following his insistence that the money be put back right away,

respondent agreed that he would do so the following Monday, September 17th, after he had an opportunity to ask his father for a loan. T68. Berardi again demanded that the money be replaced forthwith and respondent finally agreed. On September 13th, Weissman deposited $46,465.00 (slightly more than the $46,415.55 owed to Crawford) into the trust account. Exhibits CC-1A and CC-9. According to Berardi, not once that day, September 13th, and not until a conversation held on September 24th, did respondent refer to the transfer as a bookkeeping error by Weissman. T68-9, 78.

Berardi testified that he, too, had had a conversation with Weissman about the problem. Like Craig, Berardi asserted that Weissman had told him that she was willing to take the blame and to lie for respondent. T70.

Berardi also testified about the numerous conversations Craig had with respondent, from September 14th through September 23rd, about reporting the impropriety to the disciplinary authorities. Berardi participated in some of those conversations. According to Berardi, although respondent admitted that he had made a "mistake," an "error in judgment," he kept insisting that he had not committed an ethics violation. Respondent's contention was based on his attorney's view that this was not a "substantial" infraction within the meaning of RPC 8.3 (Reporting Professional Misconduct). In fact, respondent asked Berardi to meet with respondent's attorney, but, according to Berardi, "I didn't meet with them because I knew we were going nowhere, because I knew at that time it had to be reported." T81. Both Berardi and Craig believed that their

license to practice law would be jeopardized if they did not notify the ethics authorities.

Craig, too, testified about her numerous discussions with respondent on the duty to report respondent's conduct. In her conversations with respondent, Craig used words like "misappropriation" and "disbarment." She also assured respondent that she would not report him without first so informing him, a promise she kept. Craig had already announced to respondent that she was leaving the firm.

Like Berardi, Craig testified that, with the exception of the very first time when she confronted respondent, he never mentioned a bookkeeping error. According to Craig, during the week of September 13, 1990, respondent told her numerous times that he had had a lapse in judgment; that he had never made such a mistake in the past; that he would never make it again; and that he did not want to be disbarred. Throughout these conversations, Craig continued, respondent admitted that he had made a wrong business decision. Only once, during their first conversation on September 12th, did respondent mention to Craig that the transfer had been a bookkeeping error. Craig testified that respondent apologized to her "hundreds of times" and that respondent was very upset, sobbing constantly every time she saw him. T296-97.

Craig left the firm on September 21, 1990. Berardi stayed on for six more months, until April 1991.

By letter dated September 24, 1990, Berardi and Craig notified the Office of Attorney Ethics ("OAE") of respondent's conduct.

Exhibit J-3. On that same day, respondent also sent a letter to the district ethics committee, advising it of his transfer of the Crawford funds, which he labelled a mistake, and of the redeposit of the funds on September 13, 1990. Exhibit R-18.

Respondent's and Weissman's versions of the events were entirely different from Craig's and Berardi's. As noted earlier, respondent testified that he had instructed Weissman to write the checks for the Crawford children's Medicaid liens and to hold the balance "in our account," meaning the trust account; having requested a prompt reply from the Department of Human Services about the resolution of the lien against Connie Crawford, respondent had held off the distribution of the balance to the Crawford children. Weissman, however, had understood "our account" to mean the business account. She presented all four checks for respondent's signature, including the check transferring the $46,455.15 funds to the business account. According to respondent, he did not realize that the balance of the Crawford funds was being transferred to the business account because he did not review each check before signing them. Respondent explained that it was the firm's practice to have trust account checks prepared once a week, whereupon they would be submitted in bulk to one of the partners for signature. Berardi confirmed that that was the firm's practice. Respondent added that he would have never authorized such a transfer because it would have been a misappropriation of client funds. T850.

Respondent described the circumstances surrounding the signing of the checks as follows:

A. I had been speaking with Berardi, who hadn't been feeling well. We were walking by Myrna's office -- you heard her testify about this annoying habit that she has.

Q. Which is what?

A. She does this with her finger, like she's asking you to come into her office (indicating). So I remember that [Berardi and I] laughed about it, because we hate that annoying habit. We went into the office. She extended her pen, I took the pen and I signed those checks that were on her desk, while Mr. Berardi and I were in her office.

Q. I mean, did you review and analyze each check or did you just sign them?

A. I just signed them. They were loose. They were not with any files, they were on her desk.

Q. At the time that you signed the checks who were you relying on?

A. Myrna Weissman.

[T850-51]

Respondent testified that it was not until Craig showed him the ledger card, on September 12, 1990, that he found out about the improper transfer of funds. According to respondent, he told Craig that the transfer must have been a mistake, which would be quickly corrected. When Craig left his office seemingly satisfied with his reply, respondent went to see Weissman because he was concerned. Marie DeSena, the firm's accountant, was in Weissman's office. Respondent asked Weissman, "what the f_ _ _ is going on on Crawford?" T869. DeSena answered respondent's question: "Myrna made a mistake on Crawford, and I told her to correct the mistake." When respondent asked DeSena about the fastest way to put the money

back in trust, DeSena replied, "cash." T869. This exchange took place late in the afternoon of September 12th. According to respondent, "[r]ight then and there it was my intention to take my own personal funds and put it back into trust as fast as possible." T870. As respondent testified, he decided to use his own funds, as opposed to a commercial loan or a line of credit,

> [b]ecause I didn't want to wait. I have funds available to me that I can use immediately as cash, and I didn't want any money drawn against a trust account check that didn't belong in our business account. I wanted to put it back right away.
>
> * * *
>
> It was going to take until the next day, but I did call my wife and she wasn't home, it was around 3:30 or so, but the bank was going to close. I was going to do it the next day.
>
> * * *
>
> I went back to my office fully intending to put the money back as soon as possible using my own funds.
>
> [T870]

That is not, however, what respondent told Craig during their second conversation on September 12th. As described by respondent,

> [Craig] walks in and she says, 'What are you going to do about the Crawford matter' in an accusatory tone. And I was embarrassed, I was -- I downplayed it and I said to her stuff like, 'It is no big deal. I'll take care of it.' That seemed to get her more hysterical. I mean, the more I downplayed it, the more aggravated she got. So then she started making accusations like, 'What did you do, take the money so you could pay for your shore house and for payroll?' And again, in response to that, in a sarcastic way I said 'Sure, Cynthia, I jeopardized my own career just so I can build a house down the shore and pay everybody on Friday.' Then she said, 'When are you going to put it back?' I said, 'I don't know. I can't put it back right away, it is going to take some time, maybe when we get that check in on Infusino.' She

said, 'Infusino, that's not coming until the end of the year, like in November. You have to put it back right away.' At that point, I looked at her and she was now crying, and before I can say anything else she storms out of my office. That was the end of my conversation with her.

Q. When you were trying to downplay this and telling her you weren't going to put the money back for a long time, had you already formed a plan to have the money back by the next day?

A. I already spoke to Marie DeSena. I tried to call my wife, and the plan was to take my own personal funds as fast as possible and put it back into trust.

Q. Was part of your mindset kind of an ego that when an employee or a junior partner was accusing you of a mistake or a big mess-up, and you were kind of downplaying it?

A. She was called a partner, but her salary was fixed and permanent, and I call her a partner employee. I was very offended by what she was saying to me, based upon my relationship with her that had deteriorated to a point where it now seems that she's trying to intentionally take advantage of me. I was very upset.

[T870-72]

Respondent also described the conversation with Craig and Berardi on the following morning, September 13th:

A. I walked into my office on the 13th, Steve and Cynthia were there, no one else was there. I went into my office and Cynthia followed me into the office. She said, 'Steve and I talked last night.' Steve had never spoken to me on the 12th or on the night of the 12th. 'I called Steve last night and told him what happened. You have to put the money back right away.'

Q. Did you tell her about your intention to have the money back by the end of the day?

A. No. At that point I was so -- again, here is a person who is now bringing somebody else into a situation, Steve Berardi, where she's accusing me of wrongdoing, and I could see that our situation had deteriorated to this point, and I continued my sarcastic attitude. I was offended by the whole thing and -- go ahead.

Q. Despite what you may or may not have said to Cynthia and Steven, did Steve at some point in time come into the conversation?

A. Yes.

Q. Was he with Cynthia originally or did he come in during?

A. He came in as I was repeating to Cynthia the -- actually we were walking out of my office towards Marie DeSena's office. I was repeating to her, I said, 'Cynthia, it is no big deal. I am going to get it back as soon as possible. It may take a while but I am going to get it back as soon as possible.' I looked up and I saw Steve standing there and Steve's response was, 'Terry, you have to put it back right away.' We had been partners for ten years, and now he never had the opportunity to speak to me, he has conversations with her on the phone that night, is in the office that morning before I get there, and is now adopting her view without ever having spoken to them, and I just dismissed them both.

Q. Despite what you told them about putting it back when you got around to it, by the end of the day did your wife do anything to provide the funds?

A. She did exactly what I told you was my intention the day before. She cashed a personal CD that we had, and I put the money back in trust immediately.

* * *

A. * * * I took the Certificate of Deposit and showed both of them, because I am concerned now about my sarcastic remarks. I want to show them what my intention was the whole time, so I showed them both the deposit slip.

[T873-74]

Respondent admitted having told Craig and Berardi that he had taken the funds to meet payroll expenses, but claimed that "[i]t was in a sarcastic utterance that couldn't be taken seriously by anybody listening to me." T941. Similarly, respondent continued, when he told Craig that he did not intend to replace the funds until November, that was not true. He had made that statement

sarcastically and angrily, reacting to Craig's repeated accusations and speculations. In respondent's own words, "[t]hat was one of the most absurd things I could think of at the time." He added that he "had already spoken to my accountant, I had already spoken to the office manager, I had already set in motion to put the money back before I had that conversation with Cynthia Craig." T942. Respondent denied that he had admitted to either Berardi or Craig, during the conversations that ensued on the week of September 14, 1990, that he had intentionally taken the Crawford funds. T875.

As to reporting his misconduct, respondent's position was that he had no obligation to do so under the rules, a position with which his lawyer agreed. In fact, respondent went on, Craig and Berardi were supposed to meet with his lawyer to discuss whether there was a duty to report, but they did not show up. He knew then that Craig and Berardi had decided to contact the disciplinary authorities.

Respondent also testified that Craig was insisting that his conduct had to be reported. In fact, Craig had already warned him that, if he did not report himself, she would. On September 19th, Craig proposed that "[i]f you write what I am going to ask you to write, I'll personally go with you when you deliver it to the Ethics Committee, and I want to tell you what to write." T877. Craig then started to dictate a letter, which he began to write. According to respondent, "[s]he seemed to enjoy the fact that I was on the defensive, and I started to write down her version of my sarcastic remark on the 12th about payroll and so forth. I

stopped, I said, 'Cynthia, this is bullshit. I am not writing this. This is not true.' I cast the letter aside * * * on my desk." T877-78. That letter reads as follows:

> Re:
>
> This is to advise you that on September 11, 1990 I transferred from the trust account into the business account $46,_____ to cover the lawfirms [sic] payroll and bills and returned the money from my own personal funds on September 13, 1990 with interest.
>
> [Exhibit CP-12A]

The letter's unfinished last paragraph, which was crossed out, stated, "I did this without intent to deprive. I felt this single transgression ." Exhibit CP-12A.

Craig denied any involvement in the drafting of that letter. Berardi, however, testified that there had been some discussions between Craig and respondent about what the letter to the disciplinary authorities should say. T210. Respondent, in turn, vigorously maintained that he had written those few sentences at Craig's insistence:

> Basically, she said to me, 'I am going to report you if you don't report yourself. Now, if you write what I think you should write and say that the money went back twenty-four hours later, everything is going to be okay. She didn't tell me ahead of time what she was going to write. What she said to me was, 'I'll tell you what to write and if you write this, everything will be all right.'
>
> * * *
>
> * * * We got down to the part about payroll and stuff, I said, 'this is not true, get out of my office.'
>
> [T1017-18]

Asked by the Special Master why he had actually jotted down the untrue statements, instead of telling Craig that they were not true immediately after she dictated them, respondent replied:

> I wrote another sentence, Mr. Kingman. You know, at that point when I wrote it, I knew in my mind that it wasn't true. I knew that this woman was going to report me anyway, and that I was going to have to write my own letter. I did want to hear what else my accuser had to say. I allowed her to dictate another sentence, and I stopped and I told her this is not true, I am not writing this, and I told her to get out of my office.
>
> [T1022]

The draft letter was provided to the DEC by Berardi, along with three other incomplete notes in respondent's handwriting. Those notes read as follows:

> coming due on a structured settlement 11/1/90
>
> 4. I did not tell her that I had already signed a loan card for $60,000 with BNB to try and get the money back quicker
>
> 5. I did not tell her that Susan was cashing a C.D. of <u>our</u> personal money
>
> [Exhibit CP-12B]
>
> * * *
>
> coming due on a structured settlement 11/1/90"
>
> 4. I did not tell her that I had already requested my wife to cash our personal savings to repay the trust since I blamed Cynthia for some of our firms [sic] financial woes (not bringing enough money into the firm).
>
> [Exhibit CP-12C]
>
> * * *

coming due on a structured settlement 11/1/90 sufficient to pay B

[Exhibit CP-12D]

* * *

Berardi testified that he had found the unfinished draft letter to the ethics authorities (Exhibit CP-12A) on his desk sometime long after September 24, 1990. T171,173. By then, Craig had already left the firm. In fact, by then Craig and Berardi had already denounced respondent to the OAE and respondent himself had reported his conduct to the DEC. Berardi testified also that he had retrieved the three handwritten notes (Exhibits CP-12B, C and D) from respondent's paperbasket.

Respondent, however, denied having put the draft letter on Berardi's desk. Respondent testified that he had cast the letter aside on his own desk and further denied having tossed the three handwritten notes in his paperbasket. Pointing to how neat the notes appear, respondent explained that he usually "crumples things up" or "rips them before throwing them in the basket." T880. Respondent surmised that someone must have rifled through his desk, because he had placed the notes in the desk drawer. He explained that the three notes, which had been written one week or so after the draft letter, but not all at the same time, were "portions of a larger whole" intended for discussions with his lawyer.

Weissman's version of the events corroborated respondent's. In an affidavit, Weissman explained the unfolding of the events leading to the disbursement of the Crawford funds as follows:

C. Mr. Shapiro had advised me that he had resolved with the DHS the matters of the Medicaid liens in the cases of the Crawford children. Around September 10, 1990, I noticed that the Crawford funds were still being held on deposit, even though I knew that the amounts of the liens as to the children had been determined. I had been previously instructed by Marie DeSena regarding the need to clean out from trust moneys that could be disbursed; because of this I had a discussion, I believe on the same day, with both Mr. Berardi and Mr. Shapiro as to whether the amounts of those Medicaid liens as to the Crawford children, which were not in dispute, could be disbursed to the DHS. They both agreed that these amounts should be disbursed at that time. Mr. Shapiro then dictated on a tape the letter dated September 11, 1990, to Raymond Schumacher of the Division of Human Services, a copy of which is attached to the Petition. Mr. Shapiro handed me the tape. He told me the disbursements for the Crawford children were on this tape, and to follow it as to the preparation of separate checks to DHS. At the same time, he told me with regard to the remaining balance to 'keep the money in our account.' Without giving the matter any real reflection I automatically interpreted the reference to 'our account' to refer not to the account the money was already being 'kept in,' but rather to the attorney business account, which was the principal account I had been responsible for handling during most of my employment by the firm. I believe that the instruction I had previously received from Marie DeSena about 'zeroing out' moneys that no longer needed to be held in trust somehow affected what I did at the time.

D. After I finished typing the letter, I presented it to Mr. Shapiro for his review; but there was no further conversation with Mr. Shapiro, Mr. Berardi, or anyone else on the subject of the Crawford checks. I then proceeded to draw several trust account checks, including three checks for the payment of the amounts of the Medicaid liens. When I drew the checks I was still laboring under the same interpretation as to what Mr. Shapiro had meant when he said to 'keep the money in our account...,' which is why I also prepared a check to the firm's attorney business account for the balance. I thought this is what Mr. Shapiro had meant 'keeping' the money in 'our account.'

E. The next thing I recall is that a short time later on that same day, Mr. Shapiro and Mr. Berardi both walked by my office in the midst of a conversation. I got their attention, and indicated I wanted one of them to sign the checks. Mr. Shapiro then proceeded to sign them without examining them, all the while continuing his conversation

> with Mr. Berardi. I gave the matter no further thought that day after the checks were prepared. I do not know if the letter to DHS dated September 11, 1990, enclosing the checks to DHS, was sent out that day or on September 12th. However the trust check in the amount of $46,455.15, together with three other checks representing fees, was deposited in the firm's business account at Broad National Bank on September 12th.
>
> [Exhibit J-6 at 6-8]

At the DEC hearing, Weissman reaffirmed that respondent had instructed her to keep the Crawford balance in "our account," and that she had understood that direction to mean that the funds should be kept in the business account. At first, Weissman believed that the $46,455.15 represented attorney's fees; she wrote an "F" on the front of the check. When she logged the funds in the firm's cash receipts book, however, she realized it was not a fee; the firm had already received a fee. She then moved the amount over to the "miscellaneous" column on the book. She never changed the "F" designation on the check, however. Exhibit R-12. Asked by the Special Master as to why she had not put the money back into the trust account when she realized it was not a fee, she explained that she did not think that the mistake had to be corrected because eventually she would have been instructed by respondent to write a check for a new CD. T674. Weissman agreed with the presenter, however, that there would be a risk that the funds would be spent, if they remained in the business account.

In any event, after Weissman prepared the four Crawford checks, she presented them for respondent's signature. At the DEC hearing, she recalled the circumstances surrounding the signing of

checks on September 11, 1990:

> Mr. Shapiro and Mr. Berardi were walking by -- I have a glass enclosed office, and I can -- I have an overall view of the office, of most of the secretarial area. Mr. Shapiro and Mr. Berardi had come in the door leading into the secretarial area talking, and I have a bad habit of motioning, putting my finger out, extending it and motioning it, and I asked him to please come in. They both came in through my door, and they were talking, and I extended my hand with a pen for either one of them to sign. Mr. Shapiro took the checks, he signed the checks. He never looked at the checks. They continued talking, and he gave me back the checks, and they walked out of my office. They were still talking, they just walked through the office.
>
> [T636]

Weissman forwarded the three checks for the Medicaid liens to the Department of Human Services and deposited the $46,455.15 balance in the business account, along with $1,107.70 in funds that belonged to the firm. The deposit slip bears a September 12, 1990 date stamped by the bank. Exhibit CC-6. On September 12th, according to Weissman, Craig came into her office, looked at the Crawford ledger card and accused her of disbursing funds to which the firm was not entitled. Craig then walked out of the office with the ledger card. Marie DeSena, who had been standing outside Weissman's office, came in and asked her what the problem was. Weissman replied that she had made a bookkeeping error. Weissman and respondent still had not talked about the problem at that point. DeSena's advice to Weissman was, "what's the big deal? Reverse it." It was then that respondent came into Weissman's office and asked, "what the f_ _ _ is going on here?" Weissman expressed her fear that she might have made a bookkeeping error. Respondent and DeSena then walked out of Weissman's office.

Weissman categorically denied having told either Craig or Berardi that she would take the blame for respondent. According to Weissman, Craig came into her office and began a "desk audit" of the open ledger cards. After seizing the Crawford card, Craig exclaimed to Weissman, "You took Crawford money that didn't belong to the firm." In her affidavit, Weissman described the exchange that ensued as follows:

> I. Though I was shaken by the accusation, I frankly did not understand immediately what she was accusing me of. My first reaction was that she was accusing me personally of some sort of embezzlement. It took a few moments before I began to understand that the general thrust of her accusations instead was that the disbursement of Crawford moneys from the trust account had been improper, and I replied, 'I didn't take money that belonged to the Crawfords.' But it was only as she continued to make accusatory statements, insisting that I 'did', that I began to understand the sense and thrust of what she was saying, namely that it was specifically the deposit into the firm's business account of the $46,455.15 check which had been improper. At that point I replied, 'If I did, it was a mistake.' By this I meant that if anything was handled improperly, it was because I had made a mistake, an honest mistake. But she never asked me to explain what I meant. Instead her response was, 'You can't take the blame for Terry. . .,' indicating she had made a judgment that there had been wrongdoing of some kind relating to Crawford by Terry Shapiro before she even came into my office. I replied to her reference to Terry Shapiro that, 'I am not taking the blame for anybody...' By this I meant there was nobody else to blame other than me for making an innocent error. When I insisted I had simply made a mistake, she stated 'You expect me to believe that!' Mrs. Craig then stormed out. She refused to listen to what I had to say; namely that Mr. Shapiro had never directed me to transfer those funds out of trust, but rather I had simply misinterpreted his instructions, and that preparation of that check was entirely the result of my mistake, based upon my misunderstanding of his instructions. [original emphasis].
>
> [Exhibit J-6 at 10-11]

Weissman added that she never told Craig that she would take the fall for respondent:

> I never made such a statement to [Craig] or anyone else, although she was accusing me of this and seeking to have me make such an acknowledgment. I tried to tell her then, and I repeat once again, that neither Mr. Shapiro nor anyone else asked me to assume responsibility for the conduct of someone else. I would not accept such responsibility. I myself made the mistake.
>
> [Exhibit J-6 at 11]

Weissman also described her conversation with Berardi as follows:

> M. I categorically deny the implication of the assertion in paragraph 13 of Mr. Berardi's affidavit in which he indicates that on September 14th I approached him to tell him that I
>
> > '. . . was willing to say that the transfer of funds in the Crawford matter was [my] . . . mistake and that Terry Shapiro had nothing to do with it.'
>
> What I did say to Mr. Berardi was that it really was my mistake and that Terry Shapiro had nothing to do with it. To this Mr. Berardi replied, '. . . don't do it - don't cover up for Terry.' I insisted again that I was not covering up for Mr. Shapiro, or any one else. It was at that point evident to me that Mr. Berardi himself was in a panic because of his concern that he was himself vulnerable to an accusation by Cynthia Craig with respect to any trust account errors. Accordingly at that point he was trying to put as much distance between himself and Mr. Shapiro as possible, and ally himself as closely as he could to Ms. Craig, to avoid being also the subject of her accusations. [original emphasis].
>
> [Exhibit J-6 at 12-13].

DeSena's recollection of the foregoing events matched Weissman's. She remembered that, on September 12, 1990, she arrived at respondent's law firm in the mid-afternoon. She

proceeded toward Weissman's office and then observed Weissman and Craig engaged in a conversation. Craig appeared agitated. When Craig left Weissman's office, DeSena walked in and asked Weissman what was wrong. "I think I made a bookkeeping error on the Crawford card," replied Weissman. DeSena retorted, "what is the big deal? You just correct it and reverse it." DeSena tried to calm Weissman down, who was very upset. A few minutes later, respondent came in and asked what was going on. DeSena told him that Weissman had made a bookkeeping error. Respondent said, "we'll correct it as soon as possible." DeSena then told respondent that the quickest way to correct the problem was to reverse the transaction by putting money back into the trust account.

On that same day, according to Weissman, respondent directed her to reverse the transaction as quickly as possible. Also on that same day, respondent instructed his wife, Susan Shapiro, to cash a CD. She did so the next day, September 13, 1990, prior to its maturity date of October 7, 1990. Exhibits CC-7, CC-8. (The CD had been originally bought on April 7, 1989, to mature in six months, i.e., October 7, 1989. It was rolled over twice for successive like periods). In the afternoon of September 13th, Weissman deposited $46,465.00 into the trust account to the credit of the Crawfords. Exhibit CC-9. Because, however, the deposit was made after 2:30 p.m., the transaction was posted on the next day, September 14th.

Recapitulating the relevant events, the check transferring the funds from the trust account was signed on September 11, 1990; the actual deposit to the business account took place on September 12th; the impropriety was discovered on September 12th; a business account check for $30,523 signed by Weissman was deposited into the payroll account on September 13th; although in the afternoon of September 12th, respondent had already begun action to return the funds to the trust account, by that time the bank was about to close; respondent's wife cashed the CD on September 13th; and that same afternoon, Weissman deposited $46,465 into the trust account.

2. THE ALLEGED MOTIVE: A TEMPORARY CASH FLOW PROBLEM

At the DEC hearing, the presenter attempted to show that the business account was experiencing a severe cash flow problem, which necessitated the transfer of the Crawfords funds in order to cover the firm's payroll and other business expenses. Relying not on the business account bank statement for September 1990, but on the account journal from September 11th through September 14th, 1990, the presenter argued that, without the $46,455.15, the account would have been overdrawn and, logically, respondent would have been unable to meet the $30,523.73 payroll expenses for the September 14th payweek, as well as other business expenses. Exhibits CC-10 and CC-11 (the latter is the OAE's reconstruction of the business account journal).

Parenthetically, Weissman did not keep a running balance each time she wrote a check. She listed the balance at the bottom of

each journal page only, a practice that DeSena and H. Charles Hess, a C.P.A. who testified on respondent's behalf, did not consider inappropriate or indicative of a cash flow problem. In fact, Hess testified that he usually advised bookkeepers to write a series of checks at a time for the sake of efficiency, and not to maintain a running balance unless the checks were written on a daily basis.

Returning to the business account journal, it shows that Weissman paid $13,068.60 in payroll taxes on September 13th and, on that same day, transferred $30,523.73 from the business account to the payroll account by check number 27200. Exhibit CP-16. As noted earlier, although the firm utilized the services of an outside payroll service, every week Weissman herself transferred equivalent funds from the business account to the payroll account to cover the payroll checks.

Respondent vigorously denied that the transfer of the Crawford funds had been motivated by the need to meet payroll and other business expenses. In his brief to the Board, respondent advanced several different mathematical calculations to show that the deposit of the Crawford money in the business account would not have been necessary to cover the payroll checks. Respondent's brief at 23-25, 29. Respondent also relied on Weissman's, DeSena's and Hess's testimonies that there was no cash flow problem. Hess testified that, in order to ascertain the availability of cash on any given date, it would be more accurate to review the bank statement for the particular account, instead of the entries on the journal. Hess pointed to a schedule he prepared, showing that,

although the journal displayed negative balances on six occasions between January and June 1990, the bank statements indicated positive balances. Exhibit R-13. Hess explained that it would be particularly significant to follow the bank statement if the bookkeeper did not maintain a running balance on the journal and if the bookkeeper delayed mailing checks that nevertheless had been written, as was the case here. T757. Indeed, Weissman acknowledged that she never kept a daily running balance of the business account, but only tallied each page. She also testified that she had not mailed the checks drawn on September 11, 1990 (the record is unclear as to the checks written on September 12, 1990), with the exception of check number 27187 to Rachlen & Company for $5,399.00, check number 27190 to State Farm Insurance Company for $2,508.00, and check number 27194 to Washington Florist, Inc. for $55.00, which were paid on September 14, 1990. T686, 691-92. Exhibit CC-14. With the exception of the above checks, all other checks written on September 11th and September 12th were cashed on September 17th and September 18th. By that time, the firm had made two deposits into the business account: one for $20,216.66, on September 13th, and another for $16,492.39, on September 17th. Also, at the close of business on September 13th, the unused balance of the Crawford funds remaining in the business account ($41,011.40) belonged to the firm, as respondent had already deposited $46,465.00 in the trust account to replace the Crawford funds previously withdrawn (it should be remembered that the deposit slip bears a September 14, 1990 stamped date only because

the deposit was made after 2:30 p.m. on September 13th). Weissman added that, if she had truly believed that there was a cash shortage, she would not have paid respondent his $15,000 monthly bonus on the payweek of September 13th and would not have issued a check for the payroll taxes for $13,068.68 because they were not due until September 19th, three business days later. In addition, Weissman continued, if she had felt that there was a cash flow problem, she would have informed respondent of the need for additional money. T688. Weissman explained that respondent always relied on her to notify him of the need for outside funds, such as a bank loan. T632. The record indicates that respondent availed himself of commercial loans from the Broad National Bank, when so required. In fact, shortly after the discovery of the improper transfer of the Crawford funds, when respondent unquestionably became aware of a cash flow problem with the business account, he applied for a commercial loan with the Broad National Bank. Exhibit CC-15A.

As to respondent's monthly $15,000 bonus, Weissman testified that, ordinarily, weekly payroll payments totalled $20,000. Once a month, however, respondent received a $15,000 bonus ($9,500 net), if the financial position of the firm so permitted. Weissman explained that, if there were no available funds for the bonus, she would apprise respondent of that circumstance, in which case he would forego receiving the bonus. If, however, there were sufficient funds, Weissman would write a check for the bonus, whereupon respondent would exercise his discretion as to whether to

take it. T682. Hence Weissman's contention that, if she had really believed that the firm was experiencing a cash crunch on September 13, 1990, first, she would have so informed respondent and, second, she would not have paid him the $15,000 monthly bonus.

As noted earlier, Weissman and DeSena also testified that the Broad National Bank invariably honored the firm's payroll checks, in the event that the balance in that account was insufficient to cover them. Indeed, between September 20 and September 26, 1990, the bank paid twenty-five checks from the payroll account, notwithstanding the fact that the account was overdrawn by as much as $12,127.36. Exhibit CP-16.

DeSena, too, maintained that there was no cash flow problem because of other resources available to respondent. She mentioned respondent's borrowing power and other personal assets that could be readily converted into cash, if needed. See Exhibit R-15 (Assets Convertible to Cash, as of July 1, 1990). She saw nothing unusual about Weissman's admitted practice of withholding business account checks that had already been drawn, a practice that not only was widespread but in accordance with acceptable accounting principles. T595-96. What counts, DeSena explained, is the availability of funds pursuant to the bank statement, not the entries on the journal.

* * *

The OAE filed a motion seeking respondent's temporary suspension pending the resolution of this ethics matter. The Court denied the motion, but required that respondent remove himself as

signatory on the trust account checks. Berardi agreed to sign all trust account checks. Berardi continued with the firm until April 1991. According to respondent, at one point Berardi approached him about taking control of the firm. It was respondent's testimony that Berardi had made him an "insulting" proposal by suggesting that he, respondent, take one hundred of his best cases, take one secretary, take Weissman, and leave, while Berardi would keep to himself thousands of cases originated by respondent. According to respondent, after his refusal, Berardi left the firm and rented an office in the same building without first informing respondent.

Respondent's testimony about Berardi's proposal was corroborated by Rochelle Moore Wilson, a legal secretary at Shapiro and Berardi since 1982, who worked as Berardi's secretary and, as of the date of the DEC hearing, continued to be Berardi's secretary at his new law firm (there is some reference, in respondent's brief to the Board, that Wilson left Berardi's employment after the DEC hearing). According to Wilson, Berardi told her that he had offered respondent one hundred of his best files, a secretary, and Weissman; Berardi then added that respondent would be "stupid" not to accept the offer, because Berardi had him "over a barrel." T742,751.

B. THE PALMISSANO MATTER - (COUNT TWO)

After respondent became certain that Craig intended to contact the disciplinary authorities, he asked DeSena to review all open ledger cards to ascertain that there had been no other mistakes.

DeSena recalled that respondent's request had been made on the evening of September 19, 1990, a fact that surprised her because it was Rosh Hashanah and she knew that respondent was a religious man. Sensing the urgency of respondent's request, DeSena and her husband, Raymond, also an accountant, arrived at respondent's office at approximately 8:00 p.m. The three proceeded to examine the individual transactions on each ledger card. During the course of DeSena's review of the Palmissano card, she noticed that, on July 17, 1990, a trust account check for $17,000 had been issued to the order of Shapiro and Berardi. DeSena had not seen that transaction before. Although it was her practice to reconcile the records for the preceding month, she had not reconciled the July records because she had been ill in August. The first opportunity she had had to review the records for the July transactions was September 19th. DeSena asked respondent what that check represented, because she knew that the firm had already received a legal fee on June 20, 1990. Exhibit CP-1. According to DeSena, respondent initially did not know the answer to her question. He then retrieved the Palmissano file and exclaimed "Oh, my God!," mentioning "something about PIP" that DeSena did not understand. Respondent immediately called Weissman, who was also celebrating Rosh Hashanah with her family. Respondent asked if Weissman could come down to the office right away. She did so. According to Weissman, when DeSena drew the card to her attention, she realized

that she had made a bookkeeping error in disbursing $17,000 to the firm, instead of to the client.

* * *

Respondent had settled the Palmissano matter in May 1990 for $131,650. There had been some questions about a clause on Mr. Palmissano's insurance policy requiring a twenty percent reimbursement for Personal Injury Protection ("PIP") benefits paid by State Farm Mutual Automobile Insurance Company ("State Farm"), in which case the reimbursement would have to be made out of the settlement funds. It appears, however, that Mr. Palmissano had formerly requested his insurance agent, Michael Scalera, to delete the reimbursement provision. Accordingly, to ascertain the extent of the actual medical benefits paid by the insurance company, respondent requested certain information from State Farm, which information was received by fax, on May 4, 1990. That sheet indicated that State Farm had paid $19,281.23 in medical benefits for Mr. Palmissano. On that same day, May 4, 1990, respondent sent a letter to Mr. Palmissano detailing the breakdown of the settlement funds and notifying him that State Farm was seeking a reimbursement of $19,281.33 in medical benefits. The letter also advised Mr. Palmissano that, because the insurance agent had neglected to delete the twenty percent set-off provision, the $19,281.33 payment should be withheld, pending the resolution of the claim either by agreement or by a lawsuit against the agent. Exhibit CP-4. For reasons not explained by the record, respondent kept $17,000 in the trust account, instead of $19,281.33.

On June 29, 1990, respondent forwarded to Mr. Palmissano a check for $71,131.88, dated June 20, 1990, representing the net proceeds of the gross settlement. The first paragraph of the letter read as follows:

Dear Mr. and Mrs. Palmissano:

> Enclosed herewith you will please find my trust account check in the amount of $71,131.28 representing the net proceeds on your gross settlement of $131,650.00 after first deducting actual out of pocket expenses of $1,000.00, attorney's fee of $43,550.00 and settling your outstanding P.I.P. set-off and reimbursement claim with the State Farm Mutual Automobile Insurance Company.

[Exhibit CP-5]

Because respondent was unable to decipher the shorthand notations contained on the May 4, 1990 fax sheet from State Farm, he telephoned a claims representative at State Farm sometime after June 29, 1990. Respondent had dealt previously with Dan Whalen, the representative who had been handling the Palmissano claim since December 1989. According to respondent, he believed, at the time of the above telephone conversation, that he was speaking with Dan Whalen. As it turned out — and as respondent allegedly found out only at the DEC hearing — he had actually talked with James Lawlor, a State Farm claims representative, who took over the file from Dan Whalen after May 1990.

Respondent testified that, based on his conversation with the claims representative, he understood that the twenty percent reimbursement feature had, in fact, been deleted (both Dan Whalen and Lawlor denied so advising respondent). Following that telephone conversation, respondent told some people in his firm —

including Berardi and Craig — that Mr. Palmissano would be very happy because of the favorable disposition of the problem. Berardi and Craig acknowledged having been so told.

Thereafter, according to respondent, he instructed Weissman to "release the money on Palmissano," meaning to disburse to the client the $17,000 still held in trust. T829. On July 17, 1990, Weissman presented seven trust account checks for respondent's signature, including the Palmissano check for $17,000. Exhibits CP-6; R-11A through G. The Palmissano check, bearing number 11400, was the last of seven unrelated checks that Weissman gave respondent (the other six checks are consecutively numbered 11394 to 11399). According to respondent, Weissman gave him all seven checks at once, as was her custom. He could not recall whether the checks had been presented to him in a precise numerical order. He testified, however, that he did not review the checks prior to signing them — relying on Weissman that all had been done properly — and that he did not see the Palmissano check in the pile. He also testified that neither the pertinent files nor the pink settlement memoranda accompanied the seven checks. T829-30. The $17,000 check was deposited into the firm's business account on that same day, July 17,1990. Exhibit CP-7.

It was respondent's and Weissman's contention, thus, that the deposit of the Palmissano funds into the business account had been an inadvertent bookkeeping error made by Weissman. Indeed, when questioned by Berardi, both respondent and Weissman stated that there had been a bookkeeping error, a statement that Berardi

acknowledged. T197.

Upon discovering the impropriety in the Palmissano matter, DeSena advised respondent to deposit $17,000 into the trust account and to draw a corresponding check to the client. On that same evening, September 19, 1990, respondent dictated a letter to Mr. Palmissano, forwarding him the funds.

On September 20, 1990, respondent cashed a $35,000 personal CD and deposited $17,000 in his trust account. Exhibits CP-10 and CP-11.

As it turned out, although it was true that State Farm had deleted the twenty percent reimbursement clause, it apparently had done so after Mr. Palmissano's accident. Hence, Mr. Palmissano ultimately had to return the $17,000. By letter dated April 30, 1991, respondent forwarded a $19,281.23 check to State Farm, in full satisfaction of the actual medical benefits paid as of May 4, 1990 only. Respondent refused to accede to State Farm's demand for a reimbursement of twenty percent of the amount of the settlement. Exhibit CP-14.

* * *

Weissman recalled the events leading to the disbursement of the $17,000 on July 17, 1990 as follows:

> A. I remember Mr. Shapiro earlier in July had given me instructions to release the Palmisano [sic] money, and I was doing something and I have a desk calendar, a month at a time desk calendar, and I wrote 'Palmisano [sic], $17,000' on my calendar. And why I didn't get to it that day, I don't know, I just don't remember, but on the day in question I remembered to get to it and I released $17,000 - - I don't remember my instructions, all I wrote down was 'Palmisano [sic] $17,000', and I wrote a check out for $17,000 to the firm.

Q. To the business account?

A. To the business account.

Q. Looking back at it, do you now realize it was a mistake?

A. Yes, I know it was a mistake.

[T652]

* * *

Count two of the complaint also alleged that respondent lied, in his affidavit filed with the Supreme Court in connection with the OAE's motion for his temporary suspension, that the person with whom he had discussed the deletion of the twenty percent reimbursement clause had been Dan Whalen. Respondent claimed, however, that it was not until the date of the DEC hearing that he learned, for the first time, that the individual with whom he had spoken on the telephone had actually been James Lawlor, another claims representative at State Farm. Respondent denied, thus, that he had knowingly made a false statement to the Court.

C. THE INFUSINO/GACHKO MATTER (COUNT THREE)

Joseph Gachko, Esq., worked as an associate in respondent's law firm from 1985 through 1987. During that period, Gachko brought into the firm the matter of Infusino v. World Truck Transfer, a wrongful death case that had been referred to him by an associate in the law offices of Harvey R. Zeller. According to respondent, Gachko had informed him that Zeller would not be seeking a referral fee.

Pursuant to an agreement respondent had with all attorneys in his firm, the attorney who originated a particular file was entitled to receive an amount equivalent to one-third of the legal fees.

The Infusino matter was settled for $600,000 in October 1989, when Gachko was no longer with respondent's firm. Gachko, however, remained on friendly terms with respondent and with other attorneys in respondent's office. Respondent testified that the settlement carried with it an unusual circumstance: the insurance company would only agree to pay the demanded settlement if respondent consented to receiving the legal fees in a structured fashion. Respondent agreed. Sometime in November 1989, respondent gave Gachko a scribbled note, showing the breakdown of the total legal fee of $186,132.01. Exhibit CI-5. According to respondent, the carrier would be paying an upfront sum of $55,000 plus three annual installments of $43,710.67, from November 1990 through November 1992. Gachko expected to receive a total sum of approximately $60,000 (one-third of $180,000).

It was Gachko's testimony that, in early 1990, he telephoned respondent to inquire whether the $55,000 upfront sum had been received; respondent replied that it had not. T411. Subsequently, Gachko asked Berardi if the firm had collected the $55,000 payment. Berardi replied that it was his recollection that the monies had already come in. He assured Gachko that he would look into the matter. Soon thereafter, Gachko received a copy of the Infusino ledger card in the mail, forwarded by Berardi. The card disclosed

that the $55,000 had been paid on November 15, 1989. Exhibit CI-1. According to Gachko, at the time of his telephone conversation with respondent, the $55,000 had already been received. T414.

Thereupon, on September 19, 1990, Gachko made a personal visit to respondent's office. Gachko testified that, when asked again, respondent replied that he still had not received the upfront monies. When Gachko showed respondent the ledger card, respondent countered that it was his belief that Gachko should not be paid one-third of the total fee because he had had no involvement whatsoever with the case. T416. Although unhappy with respondent's position, Gachko ultimately agreed to reduce his share of the fee to $40,000, to be paid directly to him by the carrier out of the three future installments. Exhibit CI-4.

Respondent testified that he had no recollection of the telephone conversation with Gachko. He conceded, however, that, if Gachko had stated so under oath, then it must have been true. T816. Similarly, respondent could not recall telling Gachko, on September 19, 1990, that the upfront monies had not been received. Respondent also testified that the reason why he did not feel that Gachko was entitled to one-third of the total legal fee of $186,000 was that the referring attorney, Harvey R. Zeller, had demanded a one-third referral fee, or $60,000. Ultimately, Zeller agreed to accept $55,000. Of the total $186,000 fee, thus, Zeller received $55,000, Gachko was paid $40,000 and respondent kept $91,000. Respondent explained that he kept the initial $55,000 payment because

> I had done all the work, I had taken all the risk, it wasn't -- it was a contested liability case. There was a high degree of comparative negligence, and I felt that the money that had gone into our account, that we would keep the $55,000 up front.
>
> * * *
>
> It was always my intention to pay Joe Gachko a third of our attorney's fee. I ended up paying him more, and it was always my intention to pay Mr. Zeller.
>
> [T819-20]

Citing RPC 1.15(a),(b) and (c) and RPC 8.4(c), the formal ethics complaint charged respondent with knowing misappropriation, for his failure to promptly notify Gachko of the receipt of the fee, to promptly deliver to Gachko his portion of the fee, and to keep the disputed fee separate and intact until a severance of his and Gachko's respective interests.

D. THE BOZEK/SAGE MATTER (COUNT FOUR)

In February 1988, respondent was substituted as counsel in the Bozek matter, which had been previously handled by Ronald Sage, Esq., for approximately six months. Respondent was aware, when he received the file, that there was a court order for an attorney's lien in favor of Sage, the amount of which was to be determined at the conclusion of the case. Respondent was further aware that the order required him to notify Sage of the resolution of the matter within ten days of the settlement or verdict. Exhibit CB-2. In early May 1990, respondent settled the case for $153,000. On May 15, 1990, James Barry, Esq., counsel for the defendant, forwarded two settlement drafts to respondent, totalling $153,000. Exhibit

CB-5. Because Barry had overlooked, at that time, mentioning the attorney's lien, he telephoned respondent, on May 17, 1990, to remind him of the lien. By letter dated May 22, 1990, Barry confirmed that conversation with respondent:

> I just wish to confirm our telephone conversation of Thursday, May 17, 1990 wherein you advised that you were aware of Mr. Ronald Sage's Order to impress an attorney's lien entered by Judge Michael Farren on the 25th of February 1988. I wish to confirm your representation that you shall satisfy that attorney's lien prior to the disbursement of any counsel fees or costs to your office. It is furthermore my understanding that you will be contacting Mr. Sage forthwith and that you will notify me upon your working out this lien with him.
>
> [Exhibit CB-6]

Respondent denied assuring Barry that he would satisfy the lien before disbursing the fee to his office. He claimed that he merely represented to Barry that he would "take care of the lien." T895-96. It is undisputed, however, that respondent did not notify Sage of the settlement within ten days and did not satisfy the lien prior to depositing the total $51,667 one-third fee in his business account. In this regard, respondent contended that his violation of the court order had not been intentional — time had simply "got away from him" — and that it had always been his intention to pay Sage whatever sum the court awarded Sage.

The $51,667 sum was deposited in the firm's business account on May 22, 1990. Exhibit CB-11. On June 5, 1990, respondent wrote to Sage, advising him of the $153,000 settlement and offering him twenty-five percent of the total fee. Exhibit CB-13. Respondent reasoned that this was a fair offer, inasmuch as Sage had handled

the matter for a short period — six months — while he had worked on it for twenty-seven months. Respondent requested that Sage contact him about the proposed division of the fees. Sage received that letter on January 6, 1990. By that time, however, Sage had already filed a motion to fix the amount of his fee. Exhibit CB-12. By order dated September 28, 1990, the court awarded fifty-one percent of the fee to respondent and forty-nine percent to Sage. Exhibit CB-14. On September 24, 1990, respondent forwarded a trust account check in the amount of $24,826.83 to Sage, representing forty-nine percent of the fee. Exhibit CB-23. Respondent explained that he had issued a trust account check because, after he received a letter from Sage alerting him that the entire fee should have been kept in the trust account, he had reviewed RPC 1.15 and had realized that Sage had interpreted it literally. Accordingly, respondent transferred funds from his business account to the trust account and then disbursed the fee to Sage by way of a trust account check.

Because respondent had previously informed Sage that he would be filing an appeal from the September 28, 1990 court order, the letter contained the following paragraph:

> The enclosed check in the amount of $24,826.83 is being paid to you with the understanding that the appellate division may order the return of part or most of this money upon the successful conclusion of the case.
>
> [Exhibit CB-23]

Ultimately, the Appellate Division modified the lower court's order, by increasing respondent's share of the fees to sixty

percent and decreasing Sage's to forty percent.

Again relying on RPC 1.15 and RPC 8.4 (c), the formal ethics complaint charged respondent with knowing misappropriation, for his failure to notify Sage of the resolution of the Bozek matter within ten days, to honor the representation made to Barry that the lien would be satisfied prior to the disbursement of the fees to himself, and to keep the disputed fees inviolate in his trust account, pending a resolution of the amount of his and Sage's respective shares.

* * *

Respondent denied that his failure to segregate the Infusino and Bozek fees in his trust account constituted knowing misappropriation. He testified that it was only after he received Sage's letter, cautioning him that the entire amount of the fee should be kept in trust, that a question arose in his mind about the propriety of depositing the total fee in his business account. When he discussed this issue with other lawyers, however, they informed him that it had always been their practice to disburse shared legal fees through their business accounts, even in the face of a prior dispute as to the amount of such fees.

Richard Greifinger, Esq., was one of such lawyers. His testimony at the DEC hearing was that it has always been a matter of custom and usage among attorneys to write business account checks to pay fees that had been the subject of a prior dispute between attorneys. Greifinger's testimony was based on his experience in hundreds of fee disputes between him and a former law

partner and also based on his own experience in 800 other matters, as the court-appointed trustee of the law practice of a deceased attorney. Greifinger acknowledged, however, that he had not been aware of the language contained in RPC 1.15 until recently and that, in the future, he would hold all such disputed fees in trust.

* * *

The Special Master concluded that respondent had knowingly misappropriated the Crawford funds because of a temporary cash shortage in the business account. The Special Master found unconvincing the evidence offered by respondent to show that his financial resources made it unnecessary for him to resort to a misappropriation of the funds, in order to pay the firm's business expenses. The Special Master noted that, although the firm had taken in substantial sums of money in 1990, without the benefit of over $100,000 in loans and the use of the Crawford funds, the firm would have had a substantial deficit at the end of the year. The Special Master also noted that respondent's personal assets did not necessarily show that cash was readily available to him at any given moment and that the fact that he had to cash a CD prematurely tended to rebutt "respondent's claim that he had ready access to substantial cash assets making misappropriation unnecessary." Special Master's Report at 11. The Special Master's conclusions were also based on respondent's oral admissions to Craig and Berardi and on the handwritten draft letter to the disciplinary authorities. Lastly, the Special Master reasoned that respondent's conduct in the three other matters (Palmissano, Gachko/Infusino and

Bozek/Sage) had influenced his conclusion that respondent had been guilty of a knowing misappropriation, that is, that his finding in Crawford was predicated on the fact that this was not respondent's only instance of knowing misappropriation.

The Special Master further found that respondent had knowingly misappropriated $17,000 in the Palmissano matter. He noted that there was no correspondence drawn to Mr. Palmissano, to whom the funds should have been released if, in fact, the PIP reimbursement had been resolved in his favor. The Special Master also noted that there was no correspondence to State Farm confirming that the PIP reimbursement had been waived and that both Mr. Whalen and Mr. Lawlor, the claims representatives at State Farm, had testified that neither of them had told respondent that the PIP reimbursement provision had been deleted. The Special Master found incredible respondent's testimony that he had instructed Weissman to "release" the funds to Mr. Palmissano without, at the same time, dictating a memorandum to the file or any correspondence to Mr. Palmissano.

The Special Master further found that respondent had lied, in his affidavit submitted to the Supreme Court on November 4, 1990, that he had spoken with Dan Whalen, from State Farm, who had advised him that the reimbursement feature of Mr. Palmissano's insurance policy was inapplicable. The Special Master pointed to Dan Whalen's testimony that, at the time of the alleged telephone conversation, Dan Whalen was no longer in charge of the Palmissano file.

As to count three of the complaint, the Special Master concluded that respondent had made a misrepresentation to Gachko about the receipt of the initial payment of the upfront portion of the Infusino fees and that his conduct in appropriating for his own use all of the attorney's fees paid, when he knew that at least some portion of those fees was due to Gachko, had constituted knowing misappropriation, in violation of RPC 1.15(a) and (b).

Finally, with respect to count four of the complaint, the Special Master found that, while he was not convinced that RPC 1.15 was necessarily applicable to the issue of the division of fees between attorneys, respondent's failure to take certain actions in a certain period of time, as directed by a court order, and to honor his representation to Barry that he would satisfy the lien before disbursing the fees to himself had constituted conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of RPC 8.4(c), and knowing misappropriation, in violation of RPC 1.15(c). As stated in the Special Master's report:

> I emphasize that my finding as to misappropriation is predicated upon my conclusion that respondent knowingly violated both a court order and a representation he made to Mr. Barry, and then attempted to conceal his conduct by depositing funds into the trust account from which the payment to Mr. Sage was made, thereby evidencing his awareness that the initial disbursement of the entire attorney's fee to his own office was improper.
>
> [Special Master's Report at 23]

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the evidence clearly and convincingly establishes that respondent acted unethically in all four matters. The Board is unable to agree, however, with the Special Master's conclusion that respondent's actions amounted to knowing misappropriation.

A. THE CRAWFORD MATTER

Both respondent and Weissman testified that respondent had instructed Weissman to "keep" or hold "the money" in our account," meaning the trust account, until the receipt of a reply from the Department of Human Services about respondent's claim that no monies were due for the Connie Crawford Medicaid lien. According to respondent, had the Department of Human Services agreed, he would have distributed the balance of the funds, $46,455.15, to Connie Crawford's three children. In the interim, the monies were to be kept in trust. Weissman, however, had misunderstood his directions. She thought that "our account" meant the business account, instead of the trust account. Accordingly, she issued a trust account check for $46,455.15, payable to Shapiro and Berardi, on September 11, 1990, the same day that she drew three other trust account checks in the Crawford matter for the payment of the Medicaid liens against the three children. Weissman then gave the checks to respondent for his signature, unaccompanied by any file or pink disbursement memorandum. The checks were lying loose on

Weissman's desk. As respondent and Berardi testified, it was not unusual for either one of them to sign checks without the attached files, if there were "loose ends to tie" in a matter. Respondent and Berardi also testified that Weissman would ordinarily prepare checks in bulk, once a week, and then submit them for signature in a stack. In any event, respondent continued, when Weissman gave him the Crawford checks, he did not review each one before signing them. He and Berardi were walking by Weissman's office, engaged in a conversation, when Weissman summoned them to her office. Weissman gave him a pen to sign some checks that were on her desk. Respondent signed the checks without examining them, all the while talking to Berardi. Thereafter, Weissman mailed the three relevant checks to the Department of Human Services and deposited the $46,455.15 check into the firm's account. It was at that juncture, said Weissman, when she logged the funds into the account, that she noticed that the firm had already received a fee in the Crawford matter. She then entered the funds under the "miscellaneous" column. She reasoned that there was no need to transfer the monies back into the trust account because sooner or later respondent would have instructed her to purchase a new CD.

Respondent and Weissman vehemently denied that they had engaged in a concerted action to use the Crawford funds temporarily. They also denied that the firm was experiencing a cash flow crunch. Weissman testified that, although she wrote several business account checks for office expenses on September 11 and 12, 1990, she did not send them out (those are the same checks

that, according to the presenter, would have caused an overdraft in the account, if cashed by the bank).

The business account bank statement tends to support Weissman's testimony. Of the twelve checks written on September 11th and September 12th, all but three were cashed by the bank five to seven days later, on September 17th and September 18th. By that time, there had been two substantial deposits made to the business account: one for $20,216.66, on September 13th, and another for $16,492.39, on September 17th. Moreover, at the close of business on September 13th, the $41,011.40 unused balance of the Crawford funds rightfully belonged to the firm because, on that same day, respondent replaced the $46,455.15 Crawford funds previously withdrawn, by depositing funds of his own in the trust account (in the Board's view, fairness would dictate that the actual date of the deposit be deemed September 13th, instead of September 14th).

Weissman also testified that, had the firm been experiencing a cash flow problem at the time, she would not have included a $15,000 monthly bonus to respondent in that week's payroll. Weissman explained that respondent always exercised his discretion on whether to receive such bonuses at any given time. If Weissman believed that there was a temporary cash shortage, she would notify respondent, who would then forego the $15,000 bonus. An inference may, thus, be drawn that Weissman included the $15,000 bonus to respondent in that week's payroll because she believed that there were enough funds in the firm's account for that purpose. Another possible inference is that, even if Weissman believed that the

funds were insufficient to cover the $15,000 bonus, she did not apprise respondent of that circumstance.

It cannot be ignored also that Weissman seemingly did not have to transfer monies from the business account to the payroll account to cover a particular weekly payroll because Broad National Bank was willing to honor payroll checks, even if the payroll account lacked a sufficient balance. Not only did Weissman and DeSena testify that that was the case, but the bank statement for the account also showed that, between September 20 and September 26, 1990, Broad National Bank paid twenty-five payroll checks, despite a beginning negative balance of $2,000 that ultimately soared to $12,000. Exhibit CP-16.

In the face of the parties' considerable focus on the issue of motive for the misappropriation — the presenter pointing specifically to several business account checks issued against an insufficient balance (at least according to the journal) and respondent disclaiming the presence or the knowledge of a cash flow crisis — it becomes necessary to analyze the business account's economic posture immediately before the payweek of Friday, September 14, 1990. To conduct a proper analysis, however, one must review the business account bank statement for that particular period, not the account journal. Only the bank statement can furnish an accurate picture of the actual withdrawals and deposits and of the account's real balance for the relevant period. For it is conceivable, as Hess, DeSena and Weissman testified, that checks shown as drawn on the journal might not have been forwarded to the

payee, pending the occurrence of certain events, resulting in a higher actual balance in the account. It is possible, thus, for an account to have a positive balance, notwithstanding the fact that its journal might indicate a negative balance. Indeed, Hess demonstrated that this happened with respondent's business account on six occasions between January 29 and June 19, 1990. Exhibit R-13.

The Special Master concluded that respondent's business account would have been overdrawn without the deposit of the $46,455.15 and that respondent would have been unable to meet payroll expenses of $30,523.73 on September 13, 1990. The Board, however, was not persuaded that this conclusion was supported by clear and convincing evidence. The business account bank statement (Exhibit CC-14) for that particular period reveals that, on September 11th, just before the $47,562.85 deposit ($46,455.15 from the Crawford funds and $1,107.70 from the firm's legitimate funds), the account balance was $20,156.87. According to Weissman, the average payroll was approximately $20,000, exclusive of respondent's $15,000 monthly bonus. Weissman, DeSena and respondent testified that it was not pre-determined when respondent would receive his bonus. In other words, Weissman would add the $15,000 monthly bonus to respondent's regular weekly draw only if the account balance for that particular week so permitted. Presumably, if the account balance was insufficient, payment of the bonus would either be deferred or foregone. There was, thus, ample testimony that it was not imperative that respondent receive the

$15,000 bonus on the payweek of September 14th. On September 12th, the firm had $21,264.57 in the business account (the $20,156.87 beginning balance plus $1,107.70). That would have been sufficient to cover an average payroll of $20,000. In terms of the mechanics that were actually engineered each payday, that meant that the business account had enough funds to be transferred to the firm's payroll account on September 13th by way of a business account check, which Weissman, not respondent, always signed. According to Weissman, only three of all business account checks written on September 11th had been mailed out. These totalled $7,962.00 ($5,399.00 + $2,508.00 + $55.00). In addition, a deposit of $20,216.66 was made on September 13th, the same day that the $30,523.73 payroll sum was transferred to the payroll account. It appears, thus, that there were sufficient funds in the business account to meet an average payroll, not including the $15,000 monthly bonus to respondent. More significantly, however, there might have been every expectation, based on the firm's experience and relationship with the bank, that the bank would honor the entire payroll (including the $15,000 bonus), even if the balance in the payroll account was insufficient. See Exhibit CP-16. There is also Weissman's testimony that she would not have paid $13,068.60 for the payroll taxes on September 13th if she believed that there was a cash flow problem, because the taxes were not due until September 19th.

Lastly, there was no audit report or any other similar proof to show that the Crawford funds that were deposited in the business

account were actually used, either for payroll or for other business expenses. Although that might not be relevant to a finding of knowing misappropriation (the deposit of funds in the business account might be considered the act that completed the knowing misappropriation), it is relevant to the issue of motive — whether respondent needed the funds for payroll and other business expenses. The business account bank statement (Exhibit CC-14) shows that, at the close of September 12th, there was $20,256.32 in the account that properly belonged to the firm (the shown balance of $66,711.47 minus $46,455.15). Accordingly, the Crawford funds still remained intact by the end of September 12th. On September 13th, a deposit of $20,216.66 increased the firm's funds in the business account to $40,472.98 (the shown balance of $86,928.13 minus $46,455.15). On September 13th, a check for $35.00 was cashed, bringing the firm's balance to $40,437.98. Next, the check for the payroll taxes ($13,068.60) was cashed, bringing the firm's balance to $27,369.38 ($73,824.53 minus $46,455.15). The Crawford funds were still untouched. The next check presented for payment was the payroll check for $30,523.73. After that check was cashed, on September 13th, the actual balance in the account, including the Crawford funds, dropped to $43,300.80. That would mean that the $46,455.15 Crawford funds could have been partially used to cover the $30,523.73 check (specifically, to the extent of $3,154.35). But on that same day, September 13th, respondent deposited $46,465.00 in the trust account to cure the Crawford deficiency. So, on the same day that the payroll check was cashed, September

13th, the trust account was replenished. All funds in the business account now belonged to the firm.

In light of the foregoing, it may not be concluded, to a clear and convincing standard, that the business account would have been overdrawn, if not for the $46,455.15 deposit, and that respondent would have been unable to meet the $30,523.73 payroll expenses. Even if it might be properly concluded that there was a cash shortage, there is no clear and convincing evidence that Weissman so informed respondent and there is no clear and convincing evidence that respondent knew that he had signed a check transferring $46,455.15 from the trust account to his business account. It must be remembered that Weissman, not respondent, signed the business account check transferring $30,000 to the payroll account. It must be further remembered that respondent delegated the bookkeeping responsibilities to Weissman, confining himself solely to the practice of law. It could be concluded that Weissman made an inadvertent error by misunderstanding respondent's instruction. It could also be concluded that her action was the product of confusion or inexperience on her part. She had no bookkeeping experience before February 1990 and, at the time of the relevant events, September 1990, had been a bookkeeper for only seven months. Taking into account that she singlehandedly oversaw thousands of annual transactions in the firm's three accounts, involving millions of dollars, it is possible that she transferred the funds to the business account as a result of a bookkeeping mistake. This would be particularly plausible if Weissman's

removal of the funds was caused by her belief that the trust account for each client had to be "zeroed-out," as taught by DeSena. Also, if Weissman — not respondent — prepared the $46,455.15 trust account check, deposited that check into the business account, and then wrote and signed a business account check transferring $30,000 to the payroll account, it stands to reason that there was no foul play. Weissman did not benefit personally from these actions. Moreover, it seems unlikely that respondent would involve another in his wrongdoing, if bent on knowingly misappropriating client funds for the firm's purposes. Lastly, respondent's conduct immediately after the discovery of the impropriety — when he inquired of Weissman and DeSena, "what the f_ _ _ is going on on Crawford?" — is not reflective of a guilty state of mind. Instead, it is more indicative of surprise and agitation.

One of the points raised by the Special Master on the issue of motive for the misappropriation was that the evidence offered by respondent to show that he had sufficient personal assets readily convertible to cash was unconvincing. The Special Master found that "to describe those assets as readily available cash is at best disingenuous." Special Master's Report at 10. The Special Master alluded to, among other things, the fact that respondent had prematurely cashed a CD in order to replace the Crawford funds. The Special Master concluded that "[t]he need to take such action tends towards rebutting respondent's claim that he had ready access to substantial cash assets making misappropriation unnecessary."

Ibid. Although the Special Master's point has some merit, the Board noted that the CD that respondent closed out was not new; it had not just been opened. It had been first purchased on April 7, 1989, with a maturity date of October 7, 1989. It had then been rolled over for six months (to April 7, 1990) and, again, for another six months (to October 7, 1990). The CD, thus, had already generated considerable interest to respondent. Indeed, the original investment of $74,000 yielded $83,319.01 at the time that the CD was closed out on September 13, 1990. Exhibit CC-7. It is possible that that was how respondent kept readily available cash assets, instead of, say, cash in the bank, particularly in light of the higher interest rates generally paid out on CDs.

The Special Master also credited Craig's and Berardi's testimonies that Weissman had expressed to them her willingness to accept the blame for respondent, reasoning that Weissman may either "have believed that she was at fault in the Crawford matter, or may have been attempting to shoulder the responsibility for the misappropriation in order to protect her friend and employer." The Special Master then made the conclusion that "[r]egardless of which is correct, I find by clear and convincing evidence that a misappropriation occurred initiated by respondent * * * *" Special Master's Report at 10. The finding, however, that Weissman might have believed that she was at fault could belie intentional wrongdoing, as the recognition of a bookkeeping error. Moreover, it does not stand to reason that Weissman, allegedly so loyal to and protective of respondent, would confess to Craig and Berardi

that respondent had authorized the transfer of the Crawford funds. If Weissman had felt the need to confide in someone, she would not have chosen Craig, with whom she had a "rocky" relationship, as conceded by Craig.

The Special Master further found that the draft "confession letter" (Exhibit CP-12A) and the three other notes (Exhibits P-12B, C and D) "[could] only be viewed as consistent with respondent's admission of a knowing misappropriation with regard to the Crawford matter." Special Master's Report at 12. However, while it is true that the letter is most incriminating (more of this below), the three notes appear to be exculpatory. In them, respondent affirmed that he had not told Craig (during their second conversation on September 12th and their conversation early in the morning of September 13th) that, on September 12th, he had already requested his wife to "cash our personal savings to repay the trust since [he] blamed Cynthia for some of our firms [sic] financial woes * * * *" Exhibit CP-12C. These statements are consistent with respondent's testimony that, although he had already taken steps, on September 12th, to replace the funds, he had not informed Craig of this fact because he was outraged by her accusations and insubordinations; instead, he had told her that he would be putting the money back in November, when he was scheduled to receive a substantial legal fee.

The Special Master disbelieved respondent's testimony that his statements to Craig and Berardi concerning the need for the Crawford funds for payroll had been made in "hostile sarcasm."

Specifically, respondent's explanation was that those statements had consisted of "sarcastic utterances," "the most absurd things" he could fathom at the time, because he was outraged and indignant by their (especially Craig's) accusations, speculations and insubordinations. Respondent added that, at the time that he displayed this "hostile sarcasm" toward both, he had already begun action to deposit corresponding funds in the trust account forthwith, by having his wife cash a personal CD. He further explained that he did not divulge this fact to Craig on September 12th, because he was upset and offended by her accusations. Similarly, respondent continued, he withheld that information from Craig and Berardi on September 13th, when he again displayed the same reaction, because he was angry and hurt by the fact that Berardi, who had been first his associate and then his partner for ten years, had chosen to join Craig in her charges without first discussing this matter with him. It was only later that he realized that his sarcastic comments might be misconstrued and taken literally by Craig and Berardi. It was for that reason that he had given copies of the deposit slip of the replacement funds to both that same afternoon.

To be sure, the Board is troubled by respondent's uncommon reaction to Craig's and Berardi's inquiries. His bellicosity defied all notions of prudence, especially because of the gravity of the subject of their discussions and the perilous consequences that could flow therefrom. Nevertheless, the Board is unable to reject the possibility that respondent's improvident reaction was

truly rooted in rancor or wrath over a perceived betrayal on the part of his law partners.

As to the draft letter to the disciplinary authorities, respondent testified that Craig had proposed, on September 19th, that, if he were to write down what she was about to dictate, she would personally accompany him to the ethics committee and "everything would be all right." T877,1018. Appearing friendly, Craig sat down and began to dictate the letter. According to respondent, Craig seemed to enjoy the fact that he was on the defensive. Respondent then began to write down Craig's version of his sarcastic remarks to her of September 12th. He had not reacted indignantly, immediately after Craig dictated the incriminating portion of the letter, and had actually written it down because he wanted to hear what "his accuser" had to say. Craig had already announced to him her resolve to report his conduct to the ethics committee as an intentional act. He knew that, although the act had not been intentional, Craig "[had gotten] it in for [me] * * * this [was] her opportunity to get [me] and she won't back off. Here, too, the Board cannot ignore the possibility that respondent's initial willingness to write down the damaging statements in the draft letter to the disciplinary authorities, prior to his subsequent indignant reaction, was the product of his need to hear what his "accuser" had to say, as respondent contended.

In light of all of the foregoing, the Board is unable to find that respondent was guilty of knowing misappropriation in the

Crawford matter. The Board's conclusion is not by any means intended as an assault on the credibility of respondent's former law partners. Although the Board was left with the unavoidable feeling that respondent's relationship with his partners was not free of disharmony — even strife — the Board's decision was grounded on the lack of clear and convincing proof that respondent's misuse of the trust funds was intentional. The insufficient evidence of an economic motive, the testimony of Weissman and DeSena, the colossal volume of bookkeeping transactions, and respondent's reputation for honesty and integrity all have persuaded the Board that the deposit of the funds in the business account was the product of inadvertence, instead of knowledge and deliberation. Before recommending disbarment, the Board must be "totally satisfied that the proofs [of knowing misappropriation] are clear and convincing. In re Konopka, 126 N.J. 225, 231 (1991). As the Court noted in that case, before an attorney is disbarred,

> [w]e insist * * * on clear and convincing proof that the attorney knew he or she was misappropriating * * * * If all we have is proof from the records or elsewhere that trust funds were invaded without proof that the lawyer intended it, knew it, and did it, there will be no disbarment no matter how strong the suspicions are that flow from that proof.
>
> [Id. at 234]

It is unquestionable, however, that respondent negligently misappropriated the Crawford funds, by signing the check transferring the money out of his trust account, and also impermissibly abdicated his bookkeeping responsibilities to

Weissman. Considering Weissman's relative inexperience in such matters at the time and the high volume of trust and business account transactions that she oversaw, the fact that additional incidents of serious bookkeeping errors did not take place is not only fortuitous but miraculous.

B. THE PALMISSANO MATTER

Here, too, the Board cannot find clear and convincing evidence that respondent knowingly misappropriated trust funds in July 1990. Respondent testified that he had spoken to a claims representative at State Farm (respondent thought it was Dan Whalen; he subsequently found out it was James Lawlor), who had informed him that the twenty percent reimbursement provision had been deleted from Mr. Palmissano's insurance policy. Accordingly, respondent instructed Weissman to release to Mr. Palmissano the $17,000 that had been set aside from the settlement funds. Although respondent could not recall the precise date on which he gave that instruction to Weissman, he knew that it had to be after June 29, 1990, when he forwarded the net proceeds of the gross settlement to Mr. Palmissano. Weissman acknowledged having received such direction from respondent. She remembered writing down "Palmissano $17,000" on her desk calendar. She did not, however, attend to that matter right away. When she was finally able to turn her attention to it, she looked at the entry on her calendar and subsequently wrote a check for $17,000 to the business account. Although she now realizes that that disbursement was a mistake, she interpreted her

notation "Palmissano $17,000" to mean that she should deposit the funds in the firm's business account.

Respondent testified that he had not reviewed the Palmissano check prior to signing it. Weissman had given him at least seven other checks for his signature. At the bottom of the stack was the Palmissano check (the record shows that the first six checks presented to respondent are numbered 11394 to 11399; the Palmissano check is numbered 11400). On July 17, 1990, the check was deposited in the business account. Respondent testified further that, upon being apprised of the Crawford transfer, he gave DeSena all open ledger cards to review in order to determine if there had been other mistakes. In fact, it was DeSena who detected the Palmissano impropriety. On the same day that DeSena brought that matter to respondent's attention, he dictated a letter to Mr. Palmissano, forwarding him the $17,000.

There is no allegation in the record that respondent used the Palmissano funds because of financial straits. There is no evidence that, in July 1990, the business account was in need of an infusion of funds for either payroll or other business expenses. There is nothing in the record, thus, pointing at any motive for the alleged knowing misappropriation. Furthermore, respondent never acknowledged to Craig or Berardi that he had done anything improper in the Palmissano matter. On the contrary, Berardi testified that, when he questioned respondent about the Palmissano impropriety, respondent's reply was that it had been a bookkeeping mistake. Lastly, although Lawlor denied informing respondent that

the provision had been waived or deleted, he acknowledged having had some conversations with respondent about the PIP reimbursement. (The provision had, in fact, been deleted, but after Mr. Palmissano's accident). In short, the Board is not persuaded, to a clear and convincing standard, that respondent intentionally misused the Palmissano funds by directing Weissman to deposit them in the business account. As with the Crawford matter, however, the inadvertent deposit of those funds in the firm's business account amounted to negligent misappropriation, for which respondent should bear full responsibility.

Similarly, the evidence is not clear and convincing that respondent lied in his affidavit to the Court when he stated that Dan Whalen had advised him that the provision had been deleted. Respondent testified that, at the time that he prepared that affidavit, he was under the impression that he had had a telephone conversation with Dan Whalen. It was only at the DEC hearing that, allegedly, respondent found out, for the first time, that he had actually talked with James Lawlor, not with Dan Whalen. (Although the identity of the individual with whom respondent spoke might appear irrelevant, the allegation that respondent lied in the affidavit is grounded on the fact that respondent could not have spoken with Whalen at that time because by then the file had been transferred to another office and Lawlor had taken over its handling). In light of the above, the Board is unable to conclude that respondent intended to deceive the Court by means of a false affidavit.

C. GACHKO/INFUSINO AND SAGE/BOZEK

The Special Master found that respondent had lied to Gachko about the receipt of the upfront portion of the fee, in violation of RPC 8.4(c). The Board agrees. In fact, respondent testified that, although he could not recall two conversations with Gachko about the receipt of the fee, if that was Gachko's testimony, then it must have been true.

The Special Master also found that respondent was guilty of knowing misappropriation because of his use of the entire upfront payment, knowing that Gachko was entitled to a portion of the fee. The Special Master concluded that respondent's conduct in this regard violated RPC 1.15(a) and (b). (The Special Master made no reference to a violation of RPC 1.15(c), as alleged in the complaint.)

RPC 1.15 (Safekeeping Property) provides as follows:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.
>
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
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> * * *

A reading of the rule, as well as of the Annotated Model Rules of Professional Conduct authored by the Center for Professional Responsibility of the American Bar Association, does not persuade the Board that it was intended to govern the division of fees among attorneys. Although, in the Board's view, the better practice would be to segregate the amount in dispute until resolution of the controversy, the Board does not consider itself the appropriate forum to determine the applicability of the segregation requirement of RPC 1.15 to fee disputes among attorneys. Should it be ultimately found, however, that the rule is controlling in such circumstances, then, in the Board's opinion, respondent's conduct in both matters might have amounted, at most, to a violation of the duty to segregate imposed by the rule, not to knowing misappropriation. In that event, fairness would dictate that he be spared from any discipline for his conduct in this matter because of the lack of prior notice of such duty to the bar.

On the other hand, respondent undoubtedly acted deceitfully, in violation of RPC 8.4(c), when he lied to Gachko that he had not received the first installment of the fee from the carrier.

In Bozek, the Special Master found that, although he was not persuaded that RPC 1.15(c) (duty to segregate) applied to the issue

of the division of fees among attorneys, respondent was nevertheless guilty of knowing misappropriation because he failed to comply with the court order requiring notice of the settlement to Sage within ten days, failed to honor his representation to Barry that he would satisfy the lien before disbursing the fees to himself, and attempted to conceal his conduct by redepositing funds into the trust account before paying Sage with a trust account check. The Special Master did not mention which section of RPC 1.15 respondent violated.

The Board disagrees with the Special Master's conclusion that respondent was guilty of knowing misappropriation in the Bozek matter. Although it is undisputed that respondent did not notify Sage of the settlement within ten days, his conduct in this regard did not constitute knowing misappropriation. Instead, it violated RPC 8.4(d), by respondent's failure to comply with the court order. The Board is also unable to find that respondent assured Barry that he would satisfy the lien before disbursing the fee to his firm, as found by the Special Master. Although Barry made reference to such representation in his letter to respondent confirming their prior telephone conversation, respondent contended that he had merely assured Barry that he would "take care of the lien." Even if the evidence clearly and convincingly established that respondent made that promise to Barry, the failure to honor it would not constitute knowing misappropriation, as the Special Master concluded.

Lastly, the Board cannot find that respondent tried to cover up the disbursement of the entire fee to his office. Respondent

testified that he had deposited funds in the trust account and issued a trust account check to Sage only because he began to question the propriety of the deposit of the entire fee in the business account, after Sage's literal interpretation of RPC 1.15(c). Even if that were the case, however, such conduct would constitute dishonesty or deceit, in violation of RPC 8.4(c), and not knowing misappropriation, as concluded by the Special Master.

* * *

Respondent's ethics breaches, thus, amounted to negligent misappropriation of trust funds in two instances (Crawford and Palmissano), in violation of RPC 1.15, conduct involving deceit and misrepresentation (Infusino/Gachko), in violation of RPC 8.4(c), and conduct prejudicial to the administration of justice (Bozek/Sage), in violation of RPC 8.4(d).

Upon consideration of the relevant circumstances, which include, on one hand, respondent's improper delegation of his bookkeeping responsibilities to Weissman and, on the other hand, his timely effort to rectify the inadvertent misdeposits, the absence of injury to clients, the fact that the amounts involved were not astronomical, and his cooperation with the ethics authorities, a five-member majority of the Board recommends that he be suspended for a period of six months. See In re Librizzi, 117 N.J. 481 (1990) (six-month suspension for negligent misappropriation of client funds as a result of extremely serious recordkeeping violations; attorney did not reconcile trust account records for twelve years). Three members dissented, voting for

disbarment. One of those members agreed with the Special Master's findings in all four counts of the complaint, while two members believed that respondent was guilty of knowing misappropriation in the first two counts only. Those two members concurred with the majority that respondent's actions in the third and fourth counts violated only RPC 8.4(c) and (d), respectively. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 5/27/1994 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board