SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 96-038

IN THE MATTER OF

DOUGLAS H. WEISS

AN ATTORNEY AT LAW

Decision

Argued: April 17, 1996

Decided: October 1, 1996

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Earl G. Kauffman, admitted pro hac vice, appeared on behalf of respondent.

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

This matter arose from a formal ethics complaint charging respondent with knowing misappropriation of legal fees that belonged to the law firms by which he was successively employed and with misrepresentation to a bankruptcy court by filing forms indicating that the fees had been paid to the law firms, when, in fact, respondent had retained them for his personal use.

Respondent was admitted to the New Jersey bar in 1984. He is also a member of the Pennsylvania bar. He has no history of prior discipline in New Jersey.

To give the backdrop against which respondent rests his defense, the facts are laid out in the form of a chronology of respondent's professional career.

After respondent graduated from college in 1979, he went to work for the law firm of Pincus, Verlin, Hahn and Reich, in Philadelphia. For the next eleven years, respondent remained in the firm, first as a messenger or law clerk, then as an associate, after he graduated from law school, and ultimately as a partner. From the outset, respondent was embraced by the partners in the firm and was welcomed in their social and professional world. After the first year, the partners in the firm reposed such confidence in respondent that they began to share with him certain details about the operation of their practices, particularly the collection of legal fees. Such conversations usually took place at numerous breakfast gatherings over the years. It was on those occasions,respondent contended, that he became privy to certain practices by those attorneys regarding legal fees. Specifically, whenever those attorneys brought clients into the firm, they exercised unfettered discretion on how to dispose of the legal fees paid by those clients; if they performed work on the "firm's own time," they turned over the fees to the firm; if, on the other hand, they worked on the file after their normal working hours, they kept the fee for themselves. Although, at the DEC hearing, respondent was capable of remembering the name of only one attorney who did such things, he claimed that the bankruptcy partners in the Pincus firm as well as other partners freely discussed their

retention of fees in such circumstances, a practice that they did not regard as irregular. According to respondent, such conversations were an ongoing occurrence over his eleven years at the firm.

In October 1990, after he was contacted by a recruiting firm, respondent had a meeting with Richard Flaster and Stephen Greenberg, partners in the law firm of Flaster, Greenberg, Mann and Wallenstein, in Marlton, New Jersey. Planning to change its structure from a corporate and tax law firm to a general practice office, the Flaster firm was looking for a bankruptcy attorney with substantial experience to service its existing corporate clients. The firm's search led to respondent who, after negotiations with the firm, agreed to join it to develop and head the bankruptcy department. Although respondent had been a partner at Pincus, he agreed to be an associate at Flaster with the understanding that, in one year, he would be considered for a partnership.

By letter dated December 5, 1990, the Flaster firm confirmed the terms of the respondent's employment: a $75,000 annual salary, to be re-evaluated in one year, in addition to other perquisites, such as medical insurance, retirement benefits and payment of professional association dues. Exhibit 2A. The letter said nothing about the disposition of fees generated by matters brought into the firm through respondent's efforts. That letter constituted the only writing of the terms of respondent's association with the firm. He was not given an employment agreement to sign, even though, according to Richard Flaster's

testimony, in 1990 all attorneys in the firm had employment agreements. Because, however, the firm did not do its "housekeeping" regularly, not all new attorneys had employment agreements. The existing employment agreements explicitly stated that all fees collected by the attorneys in the firm were to be turned over to the firm.

In 1985, all partners in the Flaster firm signed employment agreements. According to Richard Flaster, the purpose of such agreement was "* * * to embody the contractual terms of employment for the corporation and generally to reflect what everybody's understanding of their employment was with the law firm." Paragraph 6 of the agreement stated as follows:

> 6. FEES. The Corporation shall have the sole authority to fix all fees to be charged for legal services, witness, research or other services rendered by the Employee. Any fees or other remuneration received by the Employee for such services shall belong to and be paid over to the corporation unless otherwise authorized by the Board of Directors of the Employer.
> [Exhibit 13]

Respondent testified that this 1985 employment agreement with the partners was neither shown nor mentioned to him, a contention confirmed by Richard Flaster. In fact, respondent claimed that there were no discussions whatsoever about the disposition of fees from cases originated by him or any discussions at all about who was to keep what in any given case. For his part, respondent contended that he had not broached with the law firm the subject of keeping the fees generated by his own clients because it had never occurred to him. Flaster, too, testified that there had been no

specific discussion with respondent about fees generated from respondent's own clients:

> Q. Was there ever a discussion between you and Mr. Weiss after he came to the firm that all monies that he received were to be turned over for your billing and fees?
>
> A. I can't tell you that there was [sic] explicit discussions that I recall. It was an implicit understanding from everybody that those things would happen.

[T120]

In January 1992, respondent became a partner of the Flaster firm. During the course of his employment with that firm, between January 1991 and June 1992, he kept for himself $46,455 paid by clients through thirty-three checks or cash, which he deposited in his own personal checking account and thereafter utilized for personal expenses. In all such cases, the fees had been earned and produced by matters that either pre-existed respondent's affiliation with the Flaster firm or had been subsequently brought into the firm because of him. It is undisputed that in all cases the funds retained were not client or trust funds but, instead, legal fees earned as a result of professional services already provided. It is also undisputed that all checks deposited by respondent had been made payable to him, instead of the firm. Hence, there is no allegation that respondent improperly endorsed the name of the firm on such checks.

Respondent's explanation for such practice centered on his alleged belief of entitlement to such fees because they had been generated through his own client matters and only for work

performed on his "own time." Respondent defined his "own time" as evenings after 8:00 P.M. and weekends. Although he had no records for the number of hours performed in each case, he contended that the funds kept always represented work already completed on behalf of his client, as opposed to retainers for future services. Respondent also explained that the fact that he would retain a fee in a particular case would not necessarily mean that all fee payments in such case would always go to him. Otherwise put, if in the future that same client were to pay for work performed by respondent during his normal office hours, then those monies would rightfully belong to the firm. Respondent claimed entitlement to compensation only for services that he had rendered after regular office hours. In short, respondent saw no impropriety in keeping payments for legal fees instead of turning them over to the law firm, so long as those fees had been generated by clients he had brought into the firm, so long as he had serviced the clients on his "own time" and so long as they covered past services, instead of future services. Respondent claimed that he was unaware of any law or ethics rule prohibiting the maintenance of outside legal work — and its consequent compensation — by either an associate or a partner in a law firm.

Not always did respondent keep for himself all fees to which he was entitled. In certain circumstances, he elected to remit the fees to the law firm, notwithstanding his belief of right to them. In fact, respondent explained, he only kept the fees when he

needed them for the payment of living expenses; otherwise, he gave them to the firm:

> * * * but let me clarify need -- the need of the money because it's a broad statement and my statements have been broadly stated and I think they were in response to questions. But I really want to explain what I thought that meant when I said it and what I mean now. When -- on those occasions when I deposited monies paid by clients of mine into my personal account, it was always on my belief that under the circumstances of those instances, I had the right and the entitlement and that it was perfectly honest and proper for me to do that. On those occasions when I did it, in every instance it went into my personal account and in my personal account I paid living expenses. When I said I needed it, that's what I meant then and that's what I mean now. I don't have -- I don't go on excursions, I don't have investments, I didn't then, I had no IRAs, I had no pension plans, I had no vacation home, I had no savings accounts, I had no -- there were no luxuries that these monies were going to. They were going to pay my living expenses. But there was never an instance as an adult, certainly not as a lawyer and not in any of the -- during any of the time period at issue in this case where I did not have an ability or an opportunity to obtain those funds elsewhere. At all times in this case, I had relatives who loaned me substantial amounts of money. I had tremendous credit until -- frankly until the three or four-month period preceding my personal bankruptcy which came about largely because of my spinal surgery which kept me out of work for a tremendous period of time. I had enormous credit capability, I could have borrowed funds to pay these same necessary items. When I said I did it when I needed the money or -- a number a times I was asked what did you do with it when you needed the money. I know there are places in that -- both in my deposition and in my statement where my response to that would be yes or with an explanation. But that is not to say that had I not used those funds, I would not have had any alternative, I wouldn't have had any alternate way to meet those necessary items or I would have, * * * * If I didn't have that necessity, I would have turned them over to the firm just because as I said previously, I could have -- furthered my reputation to the firm, I believe, as being someone continuing to bring valuable business to the firm. But I was -- it was my discretion to do that, my complete discretion, and therefore in my belief I

could have elected to remit those funds to the firm or not to remit those funds to the firm.
[T487-98]

When asked if he saw anything improper with the practice of retaining payment in cases where retainers had been signed between the client and the law firm, the files had been opened by the firm, the billing numbers had been assigned to the firm and the firm's offices resources were being utilized, respondent replied that it was his recollection that in none of the cases had the firm advanced monies for expenses and that he had done all the typing himself at his home computer. He acknowledged, however, that he had used the firm's stationery and that, in the event of a legal malpractice suit, the firm would have been legally responsible for his mistakes.

* * *

In June 1992, respondent departed from the Flaster firm at the instance of its partners. The firm's decision to terminate respondent's employment had nothing to do with his retention of legal fees. The firm was still unaware of such occurrence. According to the partners, they had become disenchanted with what they perceived as respondent's unsatisfactory procedures in returning clients' telephone calls and monitoring the accounts receivable in the bankruptcy department. They were also concerned with respondent's frequent absences from the office. In turn,

respondent alluded to the firm's total lack of understanding and awareness of the way a bankruptcy practice is conducted, with daily court appearances, fee applications that are allowed to be made only every four months and the lack of luxury of returning clients' calls in a short turn-around time.

Soon after leaving the Flaster firm in June 1992, respondent was hired by the law firm of Krusen, Evans and Byrne, also a Philadelphia firm. Although the firm was not able to offer respondent a partnership, he was given the designation "of counsel," reserved for attorneys whose statuses were above those of an associate, but not yet those of a partner. Respondent was given an office in Westmont, New Jersey, staffed by him and a secretary only.

There, too, respondent continued to engage in the practice of retaining legal fees from clients of his own. From June 1992 to September 1993, when he left the firm, respondent kept $29,650 that had been paid by clients either by cash or by check. He also deposited them to his personal account and disbursed them to satisfy personal expenses. In total, thus, respondent retained $76,105 from fees while at the Flaster and the Krusen firms.

Respondent's compensation at the Krusen firm consisted of a $95,000 annual salary plus a ten percent bonus of any amount generated by his clients that exceeded $250,000. No details were discussed about the timing limitations on the accrual of the amounts over $250,000 that could trigger the payment of the ten percent bonus. Similarly, there were no discussions about

respondent's retention of fees from clients that he had brought into the firm. As with the Flaster firm, there was no employment agreement with respondent.

Unlike the Flaster firm partners, respondent's employers at Krusen were very satisfied with his performance. One of its partners, James Young, testified that respondent was doing a "superior job," working hard, keeping another excellent bankruptcy lawyer in the firm very busy and also keeping the firm's clients very happy with his work.

The Krusen firm, too, had no knowledge that respondent was retaining certain legal fees for himself.

* * *

The Flaster firm's discovery of respondent's retention of the fees came about in the Kemenash matter. In April 2, 1991, D. Kemenash and Associates, Inc. ("Kemenash") filed a voluntary petition under Chapter 11 of the United States bankruptcy code in the Bankruptcy Court for the District of New Jersey. Initially, Kemenash was represented by the law firm of Clark, Ladner, Fortenbaugh and Young, from Philadelphia. As a result of a conflict of interest, however, the Clark firm was unable to represent Kemenash in the bankruptcy proceedings. The firm then referred the matter to respondent who, at the time, was associated with the Flaster firm. The Clark firm sent respondent a check for a retainer in the sum of $5,000, payable to respondent himself.

The Flaster firm represented Kemenash from May 1991 through June 1992, when respondent left his employment. Respondent's subsequent employer, Krusen, Evans and Byrne, was replaced as counsel in the proceeding.

When the Kemenash proceedings were drawing to an end in late 1992, the Flaster firm began preparing its fee application to be submitted to the bankruptcy court. In the course of preparing that application, the firm discovered that, although there was a reference to a $5,000 retainer, the funds had never been deposited in the firm's trust account.

In December 1992, the Flaster firm contacted respondent to inquire about the $5,000 retainer. Respondent indicated that the retainer had been paid and that it had been turned over to the firm. He requested that the Clark firm send him a copy of its canceled check as evidence of the retainer transfer. Ultimately, respondent discovered that the $5,000 check had been made payable personally to him and that he had endorsed it and deposited it into his personal bank account. Respondent professed no recollection whatsoever of any such action on his part. He acknowledged, however, that the check indicated that he had done so and attributed it to an oversight on his part. He conceded that he had no right to keep the fees in the Kemenash matter, as the work he had performed on the case had taken place during his regular office hours with the Flaster firm. In other words, he had not worked on the file on his "own time." He claimed, however, that he must have endorsed the check and deposited it into his personal account

through sheer inadvertence. He speculated that he might have intended to write a corresponding check to the Flaster firm.

By letter dated March 4, 1993, Richard Flaster reported respondent's conduct to the Office of Attorney Ethics ("OAE"). An investigation by that office ensued. When the OAE discovered that respondent had kept legal fees while employed by the Flaster and the Krusen firms, respondent acknowledged such conduct and promised to the OAE that he would search his records for the names of all the cases. Ultimately, respondent gave the OAE a complete list of such cases. Respondent also asked the OAE for an opportunity to personally disclose his conduct to the Krusen firm, by which he was still employed at that time. The OAE agreed.

In late July 1993, respondent contacted William Miller, a partner at the Krusen firm, with whom he had a very cordial relationship. After a private meeting with Mr. Miller, at which respondent informed him that he had kept some fees while employed by the firm, respondent asked for a meeting with the partners. At that meeting, respondent once again disclosed what he had done, whereupon the partners made a decision to discontinue his association with the firm. Respondent left that employment in September 1993.

At both firms, the partners' reaction to respondent's conduct was one of shock. Although admittedly there were no written employment agreements regulating the disposition of such fees and although no discussions had taken place in this regard at either firm, both firms emphatically maintained that no other attorney in

their employment had done such a thing and that such practice was not tolerated. Both firms asserted that one of the reasons for hiring respondent was his ability to generate fees for the firms from clients of his own. Mr. Miller, for example, pointed out that, had respondent been allowed to keep fees in the circumstances described, his compensation would have been higher than that of some of the partners.

* * *

The formal ethics complaint also alleged that respondent had made certain misrepresentations to a bankruptcy court and in documents known as 2016(b) forms. Those forms consist of disclosure statements by the attorney for a debtor on the total compensation for legal services agreed to be paid by the debtor for services rendered or to be rendered. The form must also reveal the amount of compensation already paid to the attorney.

According to the complaint, in at least eight instances respondent filed forms misrepresenting that fees paid by the debtor had been paid to either the Flaster or the Krusen firm, when, in fact, respondent had kept them. Exhibits OAE-6A through OAE-6H. At the DEC hearing, however, respondent testified that of the seven relevant forms in evidence two had not been signed by him, even though his name appeared on the form. Of the remaining five, two were accurate because they represented that the funds indeed went to respondent, and not to any firm. The balance of the forms,

Exhibits OAE-6A, 6C and 6D, allegedly misrepresented the facts related to the fee payments because they showed that such payments were made to the firm when, in fact, they were retained by respondent either partially or entirely. Respondent contended, however, that, although the forms did indicate that the monies had been paid to a firm, he truly believed, when he signed the forms, that he was representing that the fees had been paid to him. He denied, thus, any intent to misrepresent the facts to the bankruptcy court.

* * *

The Special Master found that respondent had made misrepresentations in the 2016(b) forms designated Exhibits OAE-6A, 6C and 6D. The Special Master remarked that OAE-6A shows that $1,000 was paid to the Krusen firm, when in reality respondent had retained $500; that OAE-6C shows that $5,000 was paid to the Flaster firm, when respondent retained the entire $5,000; and that OAE-6D indicates that $10,000 was paid to the Krusen firm when, in fact, respondent kept $7,000 and turned over $3,000 to the firm.

More significantly, the Special Master found that respondent's retention of the legal fees while at both law firms constituted knowing misappropriation of firm funds, relying on <u>In re Siegel</u>, 133 <u>N.J</u>. 162 (1993). The Special Master reasoned that respondent owed the law firms that employed him a duty of loyalty that required that he not act contrary to the interest of the employers.

The Special Master concluded that respondent's failure to discuss his plan with the law firms was deliberate and that he had proceeded in secret because he knew that the firms would never have tolerated such practice.

The Special Master recommended respondent's disbarment.

* * *

Following an independent review of the record, the Board is satisfied that the Special Master's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. For more than two and one-half years, respondent kept for himself legal fees that rightfully belonged to the law firms with which he was associated. All in all, he wrongfully deprived the firms of $76,000, which he deposited in his own bank account and used for his personal benefit. The law firms had no knowledge of respondent's plundering.

Nothing in the record allows the inference that respondent's employers agreed to this sort of practice or that respondent could have reasonably believed that the fees were his to keep because they were his clients. Although it is understandable that the clients who followed respondent from the Pincus firm to the Flaster firm and then to the Krusen firm might have regarded respondent, not each firm, as their own attorney, it is undeniable that the retainer agreements were signed between the firm and the client, files were opened by the firm and a billing number was assigned to

them. Moreover, in servicing those clients, respondent utilized some of the firm's resources, such as its stationary and its malpractice insurance coverage. Those circumstances clearly establish that respondent intended to bring those clients into the firm, as opposed to keeping them for his own "side practice."

By the same token, the record affords no support for a reasonable — albeit mistaken – belief of entitlement on respondent's part. His only explanation was that he thought that the practice was common and acceptable on the basis of his awareness of a similar culture prevailing in the Pincus firm. As pointed out by the Special master, however, respondent was able to come up with only one name when questioned about the identity of the lawyers who engaged in such practice at the Pincus firm. And even if this type of conduct was condoned by the Pincus firm, nothing in respondent's professional arrangement with his subsequent law firms gave him the slightest reason to believe that it was acceptable to them. Indeed, his employers later reacted with disbelief and shock.

In sum, the Board's careful de novo review of the record leaves it with no doubt that respondent acted with knowledge and deliberation in retaining for himself legal fees that rightfully belonged to his employers.

In light of the finding that respondent knew that his conduct was wrong in the matters that led to his misappropriation of $76,000, the conclusion is inescapable that he also knew that he was misusing the Flaster firm's funds in Kemenash. The Board

rejected as incredible respondent's testimony that he intended to write a corresponding check to the Flaster firm.

Lastly, like the Special Master, and for the reasons expressed in his report, the Board found that, in three of the eight instances cited in the complaint, respondent misrepresented to the bankruptcy court that the fees had been paid to his law firms, instead of to himself.

In In re Siegel, 133 N.J., 162 (1993), the attorney was disbarred after he stole $25,000 from his partners over a period of three years by falsifying disbursement requests and thereby withdrawing monies ultimately used for his personal benefit. Siegel's motivation was clear: because of certain perceived abuses by his partners, of which he strongly disapproved, he decided that he, too, would join in his partners' alleged improprieties. He, therefore, engaged in thirty-four separate and specific acts of deceit, spanning three years, designed to steal his partners' monies. In ordering the attorney's disbarment, the Court concluded that there was no ethical distinction between the prolonged, surreptitious misappropriation of firm funds and the misappropriation of client funds. The Court stated that, although the relationship between lawyers and clients differs from that between partners, misappropriation from the latter is as wrong as from the former. Here, there is no suggestion that respondent wanted to "get even" with the partners in the law firms and there is no admission, as in Siegel, that he knew that he was stealing from the firms. Unlike Siegel, respondent claimed entitlement to

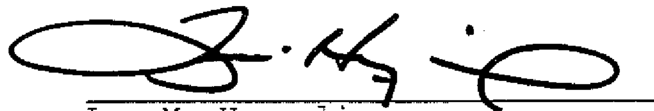
the funds, based on a belief that such practice was acceptable. Nevertheless, as stressed above, the only logical conclusion is that respondent knew that the practice was not sanctioned by his employers, as he had no cause whatsoever to form a reasonable belief that it was.

Like Siegel's, respondent's conduct was extended (two and one-half years) and extensive (it netted him $76,000). The fact that such practice might be exercised in a few law firm environments in no way serves to excuse or to mitigate respondent's wrongful actions. To steal from an employer is no less condemnable than to steal from a client. See In re Siegel, supra, 133 N.J. 162 (1993) and In re Spina, 121 N.J. 378 (1990).

The Board was convinced that disbarment is the only appropriate sanction for this respondent. The Board unanimously so recommends.

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

Dated: 10/1/96



Lee M. Hymerling
Chair
Disciplinary Review Board