SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 09-186
District Docket No. XIV-2006-0067E

IN THE MATTER OF

DAVID R. GROSS

AN ATTORNEY AT LAW

Decision

Argued: November 19, 2009

Decided: December 18, 2009

Janice L. Richter appeared on behalf of the Office of Attorney Ethics.

Justin P. Walder appeared on behalf of respondent.

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

This matter came before us on a recommendation for discipline (disbarment) filed by Special Master David S. Cramp, J.S.C. (Ret.). The first count of the complaint charged respondent with failure to safeguard funds (RPC 1.15(a) and (b)); knowing misappropriation of law firm funds (RPC 1.15(a) and (b), RPC 8.4(c), and the principles of In re Siegel, 133 N.J. 162

(1993)); and conduct involving dishonesty, fraud, deceit or misrepresentation, (RPC 8.4(c)). The second count charged him with failure to safeguard funds (RPC 1.15(a) and (b)); knowing misappropriation of client funds (RPC 1.15(a) and (b), RPC 8.4(c), and the principles of In re Wilson, 81 N.J. 451 (1979)); and conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)).

Because we find that respondent knowingly misappropriated funds from his law firm, we recommend his disbarment.

Respondent was admitted to the New Jersey bar in 1960. He has no disciplinary history. He currently is a partner with Saiber, Schlesinger, Satz & Goldstein ("Saiber").

Although the details of respondent's conduct are set out below, the essential acts that gave rise to this disciplinary matter against him are as follows. Respondent was employed by Budd, Larner, Gross, Rosenbaum, Greenberg & Sade ("Budd Larner" or "the firm") from 1960 to August 2002. He became a partner in 1965. In 1970, he was named managing partner, and remained in that position, or its equivalent, until 2002. Respondent served on Budd Larner's executive committee and board of directors and was president of the firm. On July 26, 2002, respondent and Budd Larner entered into a separation agreement resolving all of their financial issues.

While still at Budd Larner, respondent received $100,000 from a client, the Keene Creditors Trust ("Keene"). He neither disclosed nor disbursed these funds to the firm. He arranged for Keene to send $50,000 to himself and $50,000 to Stanley Levy, the New York attorney who had introduced respondent to Keene and who had worked closely with him on Keene's behalf. Respondent took steps to conceal from the firm his receipt of the Keene funds. The OAE alleged, and several Budd Larner members testified, that the firm had a long-standing policy that all gains received, directly or indirectly, from the practice of law belonged to the firm. Respondent and other former Budd Larner partners claimed that no such policy existed. The complaint charged that, by retaining these monies from Keene, respondent knowingly misappropriated law firm funds.

In a separate matter, respondent represented numerous distributors of handguns in several lawsuits that had been filed against handgun manufacturers and distributors. These cases were referred to as the "Hamilton gun litigation." The defendants had formed a joint defense fund for the payment of costs. About one year after that litigation ended, respondent received a check for $2,437.02 as reimbursement from a vendor that had been overpaid. After respondent submitted the check to the Budd Larner accounting department, it was returned because the case had been closed and no client had been identified. Several months later, respondent cashed the check and retained the proceeds. The complaint charged that respondent's conduct amounted to the knowing misappropriation of client funds.

The Keene Matter

Respondent and Stanley Levy represented the Keene Creditors Trust in a litigation matter involving a fraudulent conveyance. The Keene Creditors Trust was established, in accordance with a reorganization plan confirmed in bankruptcy court in New York, to compensate personal injury and property damage claimants against Keene Corporation, a manufacturer of asbestos products. Levy, an asbestos litigator with Levy, Phillips & Konigsberg, LLP, a New York law firm, had asked respondent to serve as co-counsel in the matter.

During the course of the litigation, respondent, Levy, and Keene representatives discussed an unrelated insurance matter pending in Washington, D.C. Keene had a claim against Employers Mutual Casualty Company involving insurance coverage and had rejected a settlement offer of one million dollars. Although respondent agreed, at Keene's request, to attempt to negotiate an expeditious resolution of the insurance coverage matter, no separate fee agreement was executed.

Budd Larner submitted invoices to Keene for respondent's services in both the fraudulent conveyance and insurance coverage matters. For the fraudulent conveyance litigation, the fee agreement called for Budd Larner to be compensated at one-half of its usual hourly rate, plus a contingent fee based on a formula dependent on the amount of the recovery. During a six-year period, the firm billed and received fees from Keene in excess of five million dollars for both matters.

Within several months of accepting the case, respondent obtained a $7,500,000 settlement in the insurance matter. The Keene trustees were very pleased with this result. A March 30, 2007 stipulation of facts that the OAE and respondent signed provides that

> [i]n recognition for his work in achieving the settlement, the Trustees of the Keene Trust decided to give Respondent $100,000.00, over and above the fees paid to Budd Larner. The Trustees intended the payment for Respondent, personally.
>
> [Ex.J-1¶10.]

Respondent asked Keene to divide the $100,000 equally between Levy and himself. Respondent explained that he chose to share the $100,000 with Levy because Levy had given Budd Larner the opportunity to represent Keene in the fraudulent conveyance case, which had produced substantial fees for the firm.

On April 10, 1998, respondent sent the following letter, on Budd Larner stationery, to Jack Feinblatt, Keene's "in-house" accountant:

> As per our discussion, I enclose herewith a bill from Stanley and myself for the special consideration given to us by the Trustees. The bill as you know is in the amount of $100,000 as per our[1] direction.
>
> Please forward drafts from the Trust in the amount of $50,000 each made payable in the following manner:
>
> 1. Check in the amount of $50,000 made payable to Stanley J. Levy, Esq., marked Personal and Confidential, and sent to him, for his attention only, at the Levy Konigsberg New York firm address; and
>
> 2. Check in the amount of $50,000 made payable to David R. Gross, Esq., marked Personal and Confidential, and sent to me, for my attention only, at the Short Hills Budd Larner firm address.
>
> [Ex.P-53,Att.1]

Enclosed with the letter was an invoice, also dated April 10, 1998, and also on Budd Larner stationery, which stated:

> TO [sic] SERVICES RENDERED by Stanley J. Levy and David R. Gross:
>
> In the matter of Lippe/Keene Creditors Trust v. Employers Mutual Casualty Company, et al.
>
> Total <u>$100,000.00</u>
>
> [Ex.P-53,Att.2]

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[1] According to respondent, because of a typographical error, the word "our" appears in the letter, instead of the word "your".

In April 1998, respondent received a check for $50,000 from Keene, at his office at Budd Larner. He did not tell anyone at the firm that he had received $50,000 from Keene or that he had shared the $100,000 with Levy.

In March 2002, more than four years after respondent received the $50,000, his secretary, Claudette McCarthy, told members of the firm about it.[2] Thereafter, shareholders Mark Larner and Michael Rosenbaum confronted respondent about the Keene check. According to Larner, respondent denied receiving the Keene check.

Joseph Schiavone, a shareholder and member of the board of directors, who worked closely with respondent, testified that respondent had told him, at the time of the settlement, about the result that he had achieved in the Keene insurance case. Respondent did not tell Schiavone about the $50,000 that he had received. After the firm learned about the Keene payment to respondent, Schiavone told respondent that the members of the firm were very upset that he had received the $50,000 check and that they considered it a fee that he should have disclosed and remitted to the firm. Respondent told Schiavone that the $50,000 had nothing to do with the firm, that the funds were given to

[2] The manner in which McCarthy acquired knowledge of respondent's receipt of the $50,000 is detailed below.

him personally, and that they were in addition to the fees that the firm had received.

Schiavone told respondent that he could avoid a confrontation if he gave the firm a $50,000 check. Schiavone testified that respondent's reply was, "Tell them to go fuck themselves."

According to Schiavone, respondent asserted that he deserved the Keene check and that he was underpaid at the firm. Previously, respondent had complained that he believed his value was more considerable than his compensation, "vis-à-vis other senior partners in the firm."

Another Budd Larner shareholder, Susan Reach Winters, also testified that respondent had expressed dissatisfaction with his compensation at the firm. Winters served on the compensation committee with respondent. According to Winters, every year, respondent was extremely vocal about his unhappiness with his compensation and complained more than any other partner.

As previously mentioned, respondent's secretary, McCarthy, reported respondent's conduct to the firm. She began working for the firm in 1985, when she was assigned to respondent. She had previously worked for ten years for Carl Greenberg, at the law firm of Porzio, Bromberg & Newman ("Porzio"), and had been hired by Budd Larner when Greenberg had joined the firm. For many years, McCarthy enjoyed working with respondent, had a good relationship with him, and received excellent evaluations. The record contains eight performance evaluations of McCarthy that respondent completed from 1985 to 2001.

In these evaluations, respondent praised McCarthy for having an excellent memory, outstanding ability to communicate with clients, and willingness to help others, in addition to her general secretarial skills, which, respondent indicated, exceeded expectations.

On April 10, 1998, at respondent's direction, McCarthy prepared the previously-mentioned letter to Keene, on Budd Larner stationery. Respondent told McCarthy to send it marked "personal and confidential." According to McCarthy, respondent directed her to delete the letter from her computer and to refrain from making any copies of it. McCarthy followed these instructions.[3] Although McCarthy acknowledged that she routinely sent Keene invoices in envelopes marked "personal and confidential," respondent had never previously instructed her to refrain from saving a document on her computer.

Pursuant to respondent's instructions, McCarthy prepared the April 10, 1998 invoice to Keene for $100,000. She testified that respondent told her not to send the invoice to Budd Larner's accounting department.

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[3] The OAE obtained a copy of the letter and invoice from Keene.

About one week later, the check from Keene arrived in a plain envelope marked "personal and confidential." After McCarthy gave the envelope to respondent and he opened it, she observed the check. Until 2002, when she reported respondent's conduct to the firm, McCarthy had not told anyone at Budd Larner about his receipt of the check because, she said, respondent had instructed her not to do so.

McCarthy explained why she had reported respondent's conduct to the firm. In 1999, respondent's wife, Heidi Gross, an attorney employed by Budd Larner, made demands on McCarthy to perform secretarial work for her at the firm, although McCarthy was not assigned to her. On a day when McCarthy was very busy, she informed Heidi Gross that she did not work for her. Thereafter, McCarthy detected that respondent had become cold and hostile toward her.

From that time until 2002, McCarthy continued to work for respondent, who was alternately "charming" and "nasty." According to McCarthy, he sometimes used profanity. One day, he called her a "fucking idiot." On March 15, 2002, McCarthy submitted a vacation request form to respondent. When she asked respondent for the return of the form with his authorization, he denied that he had received it. After respondent left his office, McCarthy found the vacation request form in his garbage basket, with the word "no" written across it in huge letters.

Thereafter, McCarthy asked Budd Larner's human resources office to reassign her. She was placed in the matrimonial department. McCarthy explained that she had reported the Keene check four years after respondent had received it because she was upset with his treatment of her from 1999 to 2002. She admitted that she wanted him to feel embarrassed and humiliated because she felt that he had demeaned, degraded, and abused her, and had ruined her reputation at the firm.

Christopher Finazzo, a Budd Larner shareholder with a degree in business administration and accounting, testified about the firm's accounting controls for the billing and receipt of fees. Attorneys were to submit a bill to the accounting department, which assigned a billing number. The accounting department retained a copy of the bill. Payments were directed to the accounts receivable clerk. The checks were to be sent to the mail room, not to the billing attorney. In 1998, when respondent sent the invoice to Keene, all checks were opened in the mail room. Only envelopes marked "personal and confidential" were sent directly to the particular attorney.

Finazzo asserted that the invoice that respondent had sent to Keene was not consistent with the firm's billing procedure because it did not have a billing number and because the letterhead did not contain the firm's taxpayer identification number.

Schiavone testified that deposit forms were required to be countersigned by a managing partner, so that the firm would know what money was going into its accounts.[4] Both Schiavone and Carl Greenberg, a member of the board of directors from 1990 to 2003, confirmed that, ordinarily, checks are opened in the mail room and sent to the accounting department.

The key dispute in this matter concerns whether Budd Larner had a policy about the receipt of gifts by its attorneys. On August 1, 1980, respondent signed a partnership agreement containing the following provisions:

> All gains from the work of the partnership shall be assets of the partnership;
>
> All receipts from the work of the partnership shall be deposited in the Midlantic Bank, or such other bank as the partners may agree upon, in the name of the partnership; and
>
> Work of the partnership shall be all services directly or indirectly related to the practice of law including, unless otherwise agreed to in writing by the Partners, acting in a fiduciary capacity (except for members of the said partner's family), teaching, honorariums.
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> [Ex.J-1¶3;Ex.P-40 at 4,8,31.]

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[4] In the context of the Hamilton Defense Fund case (count two of the complaint), another Budd Larner attorney, James Fitzsimmons, also testified that deposit forms had to be countersigned by another shareholder.

On September 30, 1980 (about two months after the execution of the partnership agreement), Budd Larner became a professional corporation.[5] The partnership agreement was to be used as a blueprint for further documents to be prepared after the firm became incorporated. The firm retained outside counsel, Emmanuel Oransky, to prepare the corporate documents. On October 14, 1980, Oransky submitted a draft employment agreement to Mark Larner, who distributed copies to all the shareholders, including respondent.

From 1980 to 1995, approximately fifteen drafts of the employment agreement were circulated among Budd Larner shareholders, including respondent. In each draft, the following clause appeared in a section under the heading "Duties":

> All gains from [the Employee's] work shall be the property of the Employer including services in a fiduciary capacity (except for members of the Employee's family), teaching and honorariums.
>
> [Ex.P-10 at 2.]

On various dates between 1982 and 1995, Mark Larner sent ten memoranda to several shareholders, including respondent, discussing the employment agreement and enclosing drafts of it.

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[5] Although the partners became shareholders after Budd Larner was incorporated, the record refers to the members of the firm as partners or shareholders. This decision uses the terms "partner" and "shareholder" interchangeably.

In the stipulation of facts and during his testimony, respondent admitted that, for several years after Budd Larner had become a professional corporation, proposed employment agreements were circulated, although they were never executed.

On June 19, 1990, respondent signed a certificate of amendment to Budd Larner's certificate of incorporation, which provided:

> No director shall have any personal liability to the corporation or its shareholderes [sic] for damages for breach of any duty owed to the corporation or its shareholders, except that this Article TWELFTH shall not eliminate or limit the liability of each director for any breach of duty based upon an act or omission (a) in breach of such person's duty of loyalty to the corporation or its shareholders, (b) not in good faith or involving in [sic] knowing violation of law or (c) resulting in receipt by such person of an improper personal benefit.
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> [Ex.P-36.]

Respondent testified that he did not know what the above provision meant, that the language had probably been taken directly from the Corporation Act, and that the Keene funds were not an improper personal benefit. He reiterated that the Keene check was a gift to him, that there was nothing improper about it, and that he had no obligation to disclose it to the firm.

As to the policy on gifts, the stipulation of facts between the OAE and respondent recited:

14. Robert Novack, if called to testify, would state that:

He was an attorney with Budd Larner for approximately twenty years, from 1979 to 1999. . . .

He would further testify that, during the last eight years of his employment at Budd Larner, Mr. Novack served on the Board of Directors and was its Managing Partner from 1996-1999. Mr. Novack was not aware of any firm policy requiring that gifts or things of value received by shareholders be reported to the Board for permission to retain them. Based on his experience serving on the Board and as Managing Partner, he does not recall any instance where a shareholder or employee submitted a gift or thing of value to the Board for its approval. He does recall that his then fellow shareholder, Peter Frazza, received from a client an all-expenses-paid trip to Hawaii. Mr. Novack learned of the trip, in a casual conversation with Mr. Frazza and does not recall any request by Mr. Frazza to the shareholders or the Board for approval to accept the trip.

15. Ken Apfel, if called to testify, would state that:

He was an attorney with Budd Larner from 1983 to 1997, becoming a shareholder in 1986. He served on the Board of Directors from 1986 to 1997 and served as Managing Partner from 1988-1992. . . .

He would testify further that during his years with Budd Larner, Mr. Apfel was not aware of any policy or guideline requiring approval to retain gifts or things of value. He does not recall any Board meetings in which the approval or disapproval of a gift or thing of value was raised or discussed. Mr. Apfel taught a graduate level course in taxation at Fairleigh Dickinson University from 1985-1989 and was paid by the University. Mr. Apfel kept his teaching fees.

16. Ed Matthews, if called to testify, would state that:

He was an attorney with Budd Larner from 1980-1988, and became a shareholder in 1983. . . .

He would testify further that during his years at Budd Larner, Mr. Matthews was not aware of any firm policy requiring gifts or things of value received by shareholders be reported to the Board or that such things be turned over to the firm. He does not recall any instance where a shareholder or employee submitted a gift or thing of value for shareholder approval. Mr. Matthews taught at Seton Hall for eight years for which he was paid. He did not remit his teaching fees to the firm, nor was he ever asked to do so.

17. Cynthia Matheke, if called to testify, would state that:

She was an attorney with Budd Larner from 1978-1995 and was a shareholder from 1983-1995 . . . and participated regularly in shareholder meetings. . . .

Ms. Matheke taught at Rutgers Law School beginning in approximately 1989, having taken over a course from Carl Greenberg, also of Budd Larner. Mr. Greenberg advised her that he had remitted his teaching fees to the firm, so Ms. Matheke did as well. After leaving Budd Larner, Ms. Matheke learned that others from Budd Larner did not remit their teaching fees to the firm.

She would testify further that, during her years at Budd Larner, Ms. Matheke was not aware of any policy or guideline relating to obtaining approval to retain gifts or things of value from clients or third parties. She

> does not recall any meetings in which the approval or disapproval of a gift or thing of value was raised or discussed.
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> [Ex.J-1¶¶14-17.]

Contrary to the statements of the former Budd Larner attorneys contained in the stipulation of facts, several Budd Larner shareholders testified that the firm had a policy requiring the disclosure of gifts to the board of directors, which would then determine the disposition of the gift.

Carl Greenberg asserted that, under the policy, attorneys were permitted to keep nominal gifts, such as bottles of wine or tickets to sporting events, but could not keep money. Greenberg received a case of wine from a client and shared it with some of his partners, including respondent. Although Greenberg recalled that, at board meetings, instances of the receipt of gifts by attorneys were discussed, he could not recall any specific examples.

While still employed at the Porzio firm, Greenberg was an adjunct faculty member at Rutgers Law School and continued this position when he joined Budd Larner. He remitted his teaching stipend to Porzio and, later, to Budd Larner. When Greenberg decided that he no longer wanted to teach, he arranged for Cynthia Matheke to succeed him at Rutgers Law School. He informed her that he had turned over his teaching stipend to the firm and she did the same.

Greenberg also arranged for Robert Novack to teach at Rutgers Law School. Although Greenberg told Novack to remit his teaching fees to the firm, Greenberg later learned that Novack had retained them.

Greenberg was also aware that Budd Larner partners Kenneth Apfel, Edward Matthews, Susan Reach Winters, and respondent taught at various schools, but did not know that they had kept their teaching fees; he knew that respondent and Winters had separately written books, but did not know that they had kept the proceeds from those endeavors; he did not know that Winters had received a diamond necklace and a Bloomingdale's gift certificate from clients; and he did not know that Peter Frazza had taught at Seton Hall Law School and had retained his fees, or that Frazza had received a trip to Hawaii from a client. Greenberg did not recall any of these issues being brought before the board of directors for approval.

At some point, Greenberg signed both an employment agreement and a shareholders agreement. However, he was not able to locate copies of the signed documents. Indeed, Budd Larner was not able to produce a signed employment or shareholders agreement.

Christopher Finazzo also joined Budd Larner from Porzio, in 1985, and became managing partner after respondent left the firm. His understanding of the firm's gift policy was that any gift of more than a de minimis amount was required to be reported to management in the following manner: associates reported to their supervising partner, partners reported to the managing partner of their group, and board of directors members reported to the board. The policy was explained to Finazzo when he joined Budd Larner. In addition, the policy was described in the employment agreement that he was asked to sign, when he became employed by the firm. Finazzo's understanding of the policy was that Budd Larner attorneys who received fees from teaching or publishing were required to disclose and remit those funds to the firm.

Finazzo recalled that the shareholder agreement and employment agreement were discussed at shareholder meetings. He testified that there was never any question that anything received from the practice of law belonged to the firm. According to Finazzo, instead, the discussions concerned the extent and operation of the "gifts" clause, not its existence.

Although Finazzo asserted that, on one or two occasions, gift disclosures had been made to the board, other than recalling that one of them involved Peter Frazza, he could not remember the details of the disclosures.

On cross-examination, Finazzo was asked whether there was a negative history between him and respondent. Finazzo replied that, although there was one incident, he bore no ill feelings toward respondent and that the incident had no effect on his testimony.

Peter Frazza, who joined Budd Larner in 1981 and was a member of the board of directors and co-managing shareholder for seven years, testified that, during the course of his employment at Budd Larner, copies of employment and shareholder agreements were distributed to himself and to other shareholders from time to time, as the firm was finalizing those documents. The documents were discussed at numerous shareholder meetings, board meetings, and firm retreats. Shortly after Frazza joined the firm, in 1981, a representative of Seton Hall Law School asked him to teach legal research and writing. When Frazza asked his mentor, Michael Rosenbaum, whether he could accept the teaching stipend, Rosenbaum replied that, because Frazza had brought it to his attention, Frazza could retain the stipend. According to Frazza, at that time, respondent, Rosenbaum, and Mark Larner were the heads of the firm.

About a year or two later, one of Larner's clients offered to pay for a trip to Hawaii for Frazza and his wife because Frazza had won a case for that client. Frazza approached Mark Larner because he was the head of the firm and was on the board of directors. He received Larner's approval to accept the trip.

Frazza testified that Susan Reach Winters, Andy Miller, and others whom he did not specifically remember, had received gifts that they had disclosed to the firm.

Frazza was aware that firm partners Robert Novack, Kenneth Apfel, Ed Matthews, Susan Reach Winters, and Donald Jacobs taught at various schools. Winters and Jacobs sought and received permission to keep their teaching fees. Frazza asserted that Novak had also obtained permission to keep his teaching stipend. The following exchange then took place between Frazza and respondent's counsel:

> Q. So if Mr. Novack indicates that he never sought such permission and did keep the fees, that would be contrary to, at least, your general understanding, true?
>
> A. Contrary to what he told me.
>
> Q. Contrary to your general understanding though?
>
> A. What he told me. Not my general understanding. . . .
>
> Q. Are you saying to us that if Mr. Novack kept his teaching fees, that would be contrary to what he told you, is that fair?

> A. Mr. Novack . . . specifically told me, I don't remember the time, that he had sought out the approval to teach, and that he had been given approval to keep the money, and I remember that was following Mr. Jacobs doing the same thing and telling me the same thing.
>
> Q. Now, if Mr. Novack would indicate that he's not aware of any firm policy requiring that gifts or things of value received by shareholders be reported to the board for permission to retain them, that would be contrary to your experience, correct?
>
> A. Absolutely.
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> [2T118-10 to 18;2T119-14 to 2T120-8.][6]

Upon questioning by the presenter, Frazza testified that Novack had left Budd Larner under very bad circumstances. Novack joined another law firm, located in the same building as Budd Larner, solicited other Budd Larner employees to join him and, along with Apfel, became involved in litigation with Budd Larner.

Susan Reach Winters testified that she would be "shocked" to learn that Novack was denying any knowledge of the firm's gift policy. Winters explained that Novack "was well aware of that policy because he told me." Similarly, she expressed surprise that Apfel had denied knowledge of the gift policy because, when she had assisted him in writing an update to a

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[6] 2T denotes the transcript of the June 3, 2008 ethics hearing.

book that he had authored, he had told her that the fees earned from the book update belonged to the firm.

Winters described the policy as the following: "everything you receive belongs to the firm, unless otherwise agreed upon." Her understanding of the policy was based on discussions held over the years, incidents in which gifts had been brought to the attention of the board or the managing partner, and a provision in the employment agreement. Although Winters could not locate a signed employment agreement, she asserted that "you don't need a writing when everyone knew that was the policy . . . [and] that we all operated under those rules."

Winters received board approval to keep a diamond necklace worth a couple of hundred dollars and a $100 gift certificate to Bloomingdale's. She taught for several years at Seton Hall Law School and asked more senior people, specifically Novack and Frazza, about what she should do with the teaching stipend. Although Winters followed their advice, at the time of the hearing, she could not recall what the advice was.

Schiavone, too, asserted that Budd Larner had a policy requiring disclosure of gifts that had more than a de minimis value. According to Schiavone, the firm acquiesced in the receipt of gifts without formal board approval, so long as the gift was disclosed. Drafts of employment agreements were circulated and the language in those agreements was discussed at board meetings. Although Schiavone signed an employment agreement, he was not able to find an executed copy.

For his part, respondent testified that, although draft employment agreements had been circulated after Budd Larner incorporated, he had not signed one. He confirmed that Novack and Apfel were involved in contentious litigation with Budd Larner.[7]

Respondent recalled that, in 2000, Geoffrey Gaulkin, a retired Appellate Division judge who had an "of counsel" position with Budd Larner, had told him that a client had offered him a Mercedes Benz automobile. Gaulkin asked respondent whether he needed permission to accept the gift. Respondent replied that no approval was required. Gaulkin confirmed respondent's testimony. According to Gaulkin, he had asked respondent whether he "owed anything to the firm, either by way of getting permission to receive it or remitting to the firm

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[7] Respondent asked the special master to take judicial notice of Apfel v. Budd Larner Gross, 324 N.J. Super. 133 (App.Div. 1999). In that case, the Appellate Division ruled that Budd Larner's shareholder agreement was anti-competitive and violative of RPC 5.6(a) (a lawyer shall not offer or make an employment agreement that restricts the rights of a lawyer to practice after termination of the relationship) and ordered Budd Larner to compensate Novack. Id. at 141. Apfel and Budd Larner had settled their dispute. Id. at 135.

some portion of the value of the gift." Gaulkin testified that the car was worth about $65,000.

Under Gaulkin's financial arrangement with the firm, he received no salary or benefits and remitted fifteen percent of his receipts to Budd Larner. Because Gaulkin was obligated to remit fifteen percent to the firm, he questioned whether he had an obligation to remit a percentage of the value of the car to Budd Larner. Respondent conceded that, because Gaulkin was not a shareholder, he had never signed a shareholder agreement.

Respondent testified that, when the Keene managing trustee, Richard Lippe, a New York attorney with Meltzer, Lippe & Goldstein, notified him that the trustees wanted to present him with a $100,000 gift, Lippe made it clear that the gift was intended for respondent, individually, not Budd Larner. The trustees believed that respondent had done an exceptional job in obtaining the settlement in a relatively short time.

According to respondent, Jack Feinblatt, Keene's accountant, had suggested that respondent send him a bill or a letter, requesting that the checks be issued from the trust. Respondent then sent the April 10, 1998 letter to Feinblatt, quoted at length above.

Although respondent's April 10, 1998 letter to Feinblatt characterized the enclosure as a "bill," under cross-examination, respondent admitted that it was not:

> Q. Now, [is] it, in fact, a bill?
>
> A. I don't think it's a bill. Because a bill, in my recollection, is normally contains [sic] hourly time records and things such as that. This was what Mr. Feinblatt asked me to send to him, and the term bill is in there, but I don't look at it as a normal bill that one sends out, that I sent out, as far as time goes.
>
> Q. Did Mr. Feinblatt ask you to use the word "bill" in your letter?
>
> A. I don't know, I don't remember.
>
> Q. Did he ask you to send him a bill?
>
> A. I think he may have. I think he may have, but I'm not sure.
>
> [4T133-21 to 4T134-10.][8]

Respondent admitted that, at times, he believed that he was not being fairly compensated at Budd Larner. He denied, however, that, during his conversation with Schiavone, he had connected his receipt of the Keene gift with his belief that he was underpaid. He also denied that he had asked anyone, including the trustees or Feinblatt, to keep the Keene gift secret. Respondent asserted that, if he had wanted to conceal the Keene gift, he could have asked his wife, who was computer-literate,

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[8] 4T denotes the transcript of the June 13, 2008 ethics hearing.

to prepare the letter to Feinblatt. He also could have asked that the check be sent to his house, instead of to the office. When respondent received the $50,000 check from Keene, he did not try to hide it from McCarthy, his secretary.

Respondent admitted that Keene had retained Budd Larner, not him individually, for the fraudulent conveyance and insurance matters; that, when he worked on those matters, he was an employee of Budd Larner; and that he was paid by Budd Larner, while he worked on the Keene matters.

According to respondent, the Keene gift was specifically for him; no policy of the firm precluded him from keeping it. Respondent pointed out that, when he accepted the Keene gift, Budd Larner's bills to Keene had been paid in full. Mark Larner, however, testified that, although the firm had received fees in excess of five million dollars from Keene at that time, another one million dollars was still due, when respondent left the firm in 2002.

When asked whether the $100,000 had been taken from funds intended for claimants against the Keene corporation, respondent's reply was, "I don't know." However, both respondent and George Davidson, Keene's attorney, explained that the trust had been established by the bankruptcy court to compensate asbestos personal injury and property damage claimants against the Keene corporation. In this regard, Schiavone testified that, after respondent left the firm, Schiavone had two conversations about the Keene gift with Lippe, the Keene managing trustee. In the first discussion, on October 8, 2002, Lippe asserted that he had been the architect of the $50,000 "gift" to respondent. Schiavone replied, "I don't think you want to say that, because you are a trustee, and trustees don't make gifts." In the second conversation, Lippe indicated to Schiavone that, although the check was a gift to respondent, he could not call it a "gift" because it had come from a trust.

The Hamilton Defense Fund Matter

In 1995, Budd Larner defended about twenty-seven gun distributors, in a federal lawsuit ("the Hamilton matter") in the Eastern District of New York. Between five and seven Budd Larner attorneys worked on the Hamilton matter. Respondent was the lead Budd Larner attorney in the case.

Upon the filing of subsequent related cases against respondent's clients, as well as other gun manufacturers and distributors, the co-defendants formed a joint defense fund ("the defense fund"), into which each defendant made contributions for defense-related costs. On April 28, 1998, Budd Larner became manager of the defense fund and established a separate attorney trust account for it.

As manager of the defense fund, Budd Larner was responsible for collecting funds from all of the defendants and paying the authorized expenses. Although respondent was originally the only authorized signatory on the defense fund account, James Fitzsimmons, a Budd Larner attorney who worked with respondent on the Hamilton cases, later handled the defense fund account.

On January 4, 2002, a Chicago law firm, Wildman, Harrold, Allen & Dixon ("Wildman"), sent to Fitzsimmons a $2,437.02 check, payable to Budd Larner Gross Rosenbaum Joint Defense Group Fund. Wildman had represented gun manufacturer Smith & Wesson in the Hamilton litigation and had used a litigation support services firm named Lexecon for the preparation of exhibits and photocopying of documents. The $2,437.02 check represented reimbursement for an overpayment to Lexecon. The letter accompanying the check contained instructions to distribute the funds "to Hamilton vendors as you see fit."

Because Fitzsimmons was no longer working on the Hamilton case when the check arrived, he gave it to respondent. Fitzsimmons made two suggestions about the disposition of the check: the firm could either divide the funds among the fifty defendants or it could pay two vendors of the Hamilton defense fund. Those vendors had not been fully paid because of insufficient funds. Respondent replied that he would take care of the check.

Respondent wrote on the transmittal letter from Wildman: "Deposit in our Trust. Fees chargeable to guns in general." Respondent's secretary, McCarthy, sent the unendorsed check and a completed deposit form to the firm's accounting department so that the check could be deposited in the defense fund account. The accounting department returned those documents to McCarthy for a specific, not a general, client number. By that time, the Hamilton file had been closed.

McCarthy gave the check to respondent, along with the deposit form. The check remained on respondent's desk for some time. McCarthy never saw the deposit form, after she gave it to respondent. From time to time, McCarthy reminded respondent that he should do something with the Lexecon check. According to McCarthy, eventually, respondent signed the check and instructed her to cash it. Respondent denied that he had instructed McCarthy to do so.

Respondent endorsed the Lexecon check by signing "Budd Larner Gross" and his own name. He acknowledged that, when he signed the check, he must have been aware that it had been issued to Budd Larner. Also, he admitted that he ordinarily did not endorse checks payable to the firm. He explained that he was in a hurry because, on that day, he and Schiavone were flying to Atlanta.

The stipulation of facts recited that, on March 8, 2002, respondent endorsed the check, which was cashed, along with some of respondent's personal checks, when an office messenger took them to the bank that same day. The messenger returned the cash to McCarthy, who, in turn, gave it to respondent. Routinely, about once a week, respondent gave McCarthy checks to be cashed by the messenger at the bank. Although McCarthy did not photocopy those checks, she made a copy of the Lexecon check, because she thought it belonged to the firm.

As previously mentioned, when Schiavone approached respondent about the Keene gift, he also asked respondent to reimburse the firm for the Lexecon check. Respondent immediately issued a check to the firm for the Lexecon funds. On May 28, 2002, Fitzsimmons sent checks to two vendors, in partial payment of their respective invoices to the Hamilton defendants.

Respondent asserted that he had signed the Lexecon check in error. He explained that, at that time, he was involved with the Keene and Hamilton cases and was acting as an advisor to United States District Court Judge Alfred Wolin in five asbestos bankruptcies, all of which required substantial travel and time commitments. In addition, he lectured nationally and internationally about asbestos litigation, served on committees of the Supreme Court of New Jersey, spoke annually at the state judicial college, and served as president of the Association of the Federal Bar of the State of New Jersey. He admitted that, had he been more attentive, he would not have cashed the check. In short, he attributed his inadvertence to inattention caused by a busy schedule.

__Mitigation__

Respondent presented the testimony of a number of witnesses, including three former judges, who praised his reputation. Specifically, retired United States District Court Judges Nicholas Politan and Alfred Wolin (respondent's colleague at Saiber), and attorneys William McGuire, William Maderer (respondent's law partner at Saiber), Thomas Campion, Laurence Orloff, Frederick Becker, and Richard Badolato testified that respondent enjoyed an outstanding reputation for honesty, professionalism, integrity, and ability. In addition, although Geoffrey Gaulkin (respondent's former colleague at Budd Larner and current colleague at Saiber) was precluded, as a retired Appellate Division judge, from testifying about respondent's reputation among the members of the legal community, he opined that, in his experience, respondent was a person of integrity and honesty.

Also, former Governor Brendan Byrne and attorney Stephen Weinstein submitted letters to the special master, attesting to respondent's reputation for honesty, integrity, and professionalism, as well as his service to the bar and the public.

At the conclusion of the ethics hearing, the special master determined that the payment from Keene to respondent was not a gift.

With respect to the issue of whether Budd Larner had a relevant policy in effect when respondent received the Keene funds, the special master noted initially that the proposed employment agreements that were circulated had never been executed and that former members of the firm would testify that they were unaware of any policy requiring approval of the receipt and retention of gifts. Nevertheless, the special master concluded that respondent "acted wrongly against" Budd Larner by accepting a fee from Keene for settling the insurance matter, when "he had to know" that the fee was to be shared with his partners. The special master reasoned that, because respondent had signed the partnership agreement and knew that there had been no changes to the part of the agreement addressing "the fruits of the labor" of attorneys, respondent knew that the monies belonged to the firm. Implicit in his conclusion was the special master's determination that the firm had such a gift policy and that respondent was aware of it.

In addition, the special master noted that respondent had signed the amendment to the certificate of incorporation that referred to liability for the receipt of an improper personal benefit.

The special master also concluded that respondent should have turned over the $100,000 to the firm and that he had no authority to share it with Levy. Additionally, the special master found that respondent had instructed his secretary to delete from her computer the letter to the Keene trust that provided information for the issuance of the checks to Levy and respondent.

As to the Lexecon check, the special master determined that respondent had inadvertently cashed it. He, thus, found no unethical conduct in connection with the Hamilton matter.

The special master recommended respondent's disbarment, based on his findings that "there was intent to do harm to the Firm, and there was a disregard of standards of ethics."

Following a de novo review, we are satisfied that the special master's findings that respondent's conduct was unethical are supported by clear and convincing evidence.

Based on the parties' stipulation, the following facts in the Keene matter are not disputed: (1) after respondent achieved a favorable result for the Keene trust, the trustees decided to reward him with $100,000, in addition to the legal fees that were due; (2) respondent, in turn, chose to share the $100,000, not with his partners, but with Stanley Levy, his co-counsel in the Keene matters; (3) respondent did not disclose to his partners his receipt of the Keene funds; (4) the firm was paid in full for its services in the Keene matters, although respondent and the firm disagree about whether payment in full had been made at the time that respondent received the $50,000; and (5) at the time that respondent represented Keene, he was a member of Budd Larner and was compensated by the firm for his work.

A significant amount of the legal argument in this case addressed the characterization of the funds that Keene gave respondent. The monies were identified at various times as a "gift," "special consideration," and "compensation." In our view, the label affixed to that payment is not significant. Of consequence is that respondent, at that time a skillful and prominent attorney with thirty-eight years of experience, thought nothing of accepting funds from a client and of failing to either report or remit that payment to his partners.

The key issues in this matter, thus, are whether respondent was required to disclose to and share with his partners his receipt of funds from a grateful client and, if so, whether his belief that he was not so obligated was reasonable. We find that the evidence clearly and convincingly supports a finding that Budd Larner had a policy, albeit unwritten, requiring attorneys to disclose to the firm their receipt of gifts or other items of value from clients.

On August 1, 1980, in anticipation of forming a professional corporation, Budd Larner partners, including respondent, signed a partnership agreement that was to serve as the framework for its corporate documents. The partnership agreement provided that all gains from the work of the partnership were assets of the partnership and defined "work of the partnership" as "all services directly or indirectly related to the practice of law."

Between 1980 and 1995, approximately fifteen drafts of an employment agreement were circulated among Budd Larner shareholders, including respondent. Each draft contained a section, under the heading "Duties," providing that all gains from an employee's work shall be the property of the employer. In addition to the distribution of the draft employment agreement, on various dates between 1982 and 1995, Mark Larner sent ten memoranda to several shareholders, including respondent, discussing the employment agreement and enclosing drafts of it. Thus, for a fifteen-year period, ending about three years before respondent's receipt of the Keene funds, respondent received at least twenty-five copies of a proposed employment agreement that required all gains from an employee's work to be shared with the firm.

In addition to having been distributed, the shareholder agreement and employment agreement were discussed at shareholder meetings. Shareholder Finazzo testified that there was never any question that anything received from the practice of law belonged to the firm. According to him, the discussions concerned the extent and operation of the "gifts" clause, not its existence.

Budd Larner shareholders Greenberg, Finazzo, Frazza, Winters, and Schiavone all testified that, in 1998, when respondent received the Keene funds, Budd Larner had a policy requiring the disclosure of an attorney's receipt of gifts or things of value. Upon disclosure, the board of directors would determine the disposition of the gift.

It is apparent that the policy was enforced in a flexible manner. For example, although the partnership agreement required the written approval of the board of directors for a gift to be retained, in practice, verbal authority sufficed. Moreover, according to Finazzo, the policy was enforced via a chain of command: associates disclosed gifts to partners, who then reported the matter to the board of directors. In addition, although all shareholders who testified agreed that de minimis gifts need not be reported, there were no criteria for determining whether a gift was of only de minimis value. Not every gift was reported to every member of the firm. Some partners were aware of Frazza's trip to Hawaii and Winters' receipt of a necklace and knew which attorneys taught or published books and whether they kept their fees or remitted them to the firm. Other partners did not have this information. In other words, the communication among the partners was not perfect or complete. Nonetheless, these five shareholders all agreed to the existence of and compliance with the policy.

Pitted against this testimony is the statement in the stipulation that, if four former Budd Larner shareholders (Robert Novack, Kenneth Apfel, Ed Matthews, and Cynthia Matheke) testified at the ethics hearing, they would deny any knowledge of the gift policy. Because respondent chose to present the positions of these former firm members via stipulation, rather than testimony, they were not subject to cross-examination. However, the credibility of their position may be assessed indirectly.

Frazza testified that Novack had to know about the firm's gift policy because Novack had told Frazza that he had obtained approval to keep his teaching fees. Furthermore, Greenberg asserted that, when he had arranged for Novack to teach at Rutgers Law School, he had told Novack that Novack was required to remit his fees to the firm.

In addition, according to Winters, Novack had told her about the gift policy. Also, when she had assisted Apfel in writing an update to a book that he had authored, he had told her that the fees earned from the update belonged to the firm. Furthermore, Mark Larner testified that Novack, Matheke, and Matthews had attended the majority of meetings during the ten or fifteen years when these shareholder and employment agreements were discussed.

We are convinced, thus, that the evidence clearly and convincingly establishes that Budd Larner had a policy that required attorneys to disclose the receipt of all gifts or things of value. We noted that, although the shareholders did not formally execute a written agreement, the "duties" provision stating that all gains from an employee's work shall be the property of the employer remained in the draft employment agreement for many years.

We next assess the reasonableness of respondent's stated belief that there was no firm policy about the receipt of gifts. Respondent spent forty-two years with Budd Larner, thirty-seven of them as a partner or shareholder, and thirty as the managing partner or shareholder. In addition, he was president of the firm and served on the board of directors, the executive committee, and the compensation committee. Other attorneys considered respondent, along with Mark Larner and Michael Rosenbaum, to be the head of the firm. Respondent offered no factual basis for his belief that no such policy existed. He did not, therefore, sustain the contention that his belief that there was no gift policy was reasonable.[9] We, thus, are satisfied that respondent had knowledge of the firm's gift policy.

Furthermore, respondent's efforts to conceal his receipt of the Keene funds indicate his awareness of wrongdoing. The deception began even before he received the funds. Respondent had no authority to share the Keene funds with Levy. It was not his money; the funds belonged to the firm.

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[9] See In re Mininsohn, 162 N.J. 62, 74 (1999), in which the Court stated: "Respondent's erroneous belief that he had an equity cushion was unfounded, and respondent failed to offer evidence to sustain the contention that his belief in the existence of an adequate cushion was reasonable or justifiable."

In addition, respondent admitted that, although his letter to Keene indicated that he had enclosed a bill, the enclosure was not a bill. He conceded that the "bill" did not contain time records or look like a "normal bill." His testimony about the bill and about the cover letter to Keene was vague. He could not remember whether Feinblatt had asked him to send a bill or had suggested that he use the word "bill" in his letter to Keene.

Furthermore, respondent instructed McCarthy not to submit the "bill" to the accounting department, contrary to standard procedure. He also instructed McCarthy to delete the letter to Keene from her computer and to keep no copy of it. Obviously, his purpose was to hide his receipt of the Keene funds from the firm. Although respondent asserted that he had not asked anyone to keep his receipt of the check a secret, he did not deny McCarthy's testimony that he had instructed her to delete the letter from her computer and to retain no copy of it.

Respondent attempted to discredit McCarthy's testimony by, among other things, asserting that she had reported his perceived misconduct to the firm based on a desire to embarrass and humiliate him. A grievant's motive, however, is irrelevant to the determination of whether an attorney's conduct is unethical. Respondent's conduct is subject to scrutiny, regardless of the reason that it was brought to the attention of the ethics authorities.

Parenthetically, we note that the record supports the conclusion that the Keene trust did not have the authority to give respondent a gift. The trust was *established* by the bankruptcy court as a source of funds for personal injury and property damage claimants against the Keene Corporation, an asbestos manufacturer. The trustees wanted the gift disguised as legal fees. Respondent cooperated by submitting a fictitious invoice, referring to "special consideration." Schiavone's conversation with Lippe, the managing trustee, confirms the impropriety of the trust's gift to respondent. When Schiavone told Lippe that trustees cannot make gifts, Lippe replied that it was a gift, but that he could not refer to it as such.

Respondent's deception continued after he received the Keene funds. Pursuant to his instructions, the trust sent the check in an envelope marked "personal and confidential," thus ensuring that it would not be opened in the mail room and the check would not be sent to the accounting department. Respondent, thus, by-passed the controls that the firm had established for the receipt of checks and mail. After he received the check, he failed to disclose it to the firm and retained the proceeds for his own use. Although respondent had told Schiavone about the settlement that he had obtained for Keene, he did not reveal that he had received $50,000 from the trust. Respondent's reaction, when Schiavone told him that the firm wanted him to reimburse the $50,000, is an indication of how respondent treated his partners of forty-two years.

In short, we find that respondent's purported belief that he was entitled to keep the Keene funds is not reasonable. In another context, the Court has rejected as unreasonable attorneys' claims that they reasonably believed that they were entitled to obtain or retain certain funds. In In re DiLieto, 142 N.J. 492 (1995), the attorney represented a long-time friend in a real estate sale. Id. at 501. Although DiLieto obtained the seller's consent to withdraw for his own use the $15,000 real estate deposit, DiLieto did not obtain the buyer's permission. Id. at 502. The seller owed DiLieto legal fees from other matters. Ibid.

DiLieto claimed a good faith belief that he could use the funds, based on the seller's representation that the buyer had acknowledged that the deposit was nonrefundable. Id. at 503. The Court, however, observed that DiLieto had drafted the escrow agreement, which did not provide for forfeiture of the deposit, and that the buyer had demanded the return of his deposit. Ibid. The Court found that DiLieto did not "demonstrate a basis for good faith reliance" on the seller's representation, reasoning that DiLieto "had to be aware" of the need to obtain the buyer's consent because, in an unrelated transaction only four months earlier, he had followed that procedure. Id. at 506. DiLieto was disbarred for knowing misappropriation. Id. at 508.

In In re Weiss, 147 N.J. 336 (1997), while employed at two law firms, the attorney retained legal fees, instead of submitting them to the respective law firms. In this way, he received more than $76,000 during a two and one-half year period. In the Matter of Douglas H. Weiss, DRB 96-038 (October 1, 1996) (slip op. at 9). Weiss did not deny his actions. He claimed that, at the law firm (Pincus) where he had begun his career, the attorneys routinely kept fees, if the services were provided after normal working hours. Id. at 2. He further alleged that the partners at the Pincus firm freely discussed the practice of retaining fees. Ibid.

According to Weiss, he had no discussions with his next firm (Flaster) about the disposition of fees from cases that he originated. Id. at 4. He testified that, if fees were paid by his own clients and if he had performed the services in the evenings or on weekends, he believed that he was entitled to retain those payments. Id. at 5-6. He retained these fees only if he needed them to pay his living expenses. On other occasions, he remitted the fees to the firm. Id. at 6-7.

At a third firm (Krusen), Weiss continued to keep fees. Id. at 9. He had not discussed with any member of the firm the issue of retaining fees. Id. at 9-10.

The Flaster and Krusen firms were not aware that Weiss had retained legal fees. Id. at 10-12. Members of both firms were shocked to learn of his conduct, asserting that no other firm attorneys retained fees and that the practice was not tolerated. Id. at 12-13.

We rejected Weiss's contention that he reasonably believed that he was entitled to keep fees from his own clients. Id. at 15. The clients had signed retainer agreements with the firms, not with him individually. Ibid. Moreover, Weiss used the respective firms' resources, when he provided services to those clients. Id. at 16. Although Weiss claimed a belief, based on his experience at the Pincus firm, that the practice of retaining fees was common, he could name only one attorney at the Pincus firm who engaged in similar conduct. Ibid. Moreover, nothing in his professional arrangement with the subsequent firms gave him reason to believe that retaining fees was an acceptable practice. Ibid.

Weiss was disbarred for knowingly misappropriating funds from law firms. Weiss, supra, 147 N.J. at 336.

Similarly, the attorney in In re Gifis, 156 N.J. 323 (1998), claimed an honest belief that he could use a real estate deposit. In that case, Gifis represented John and Laura Boyd in the sale of their house. Id. at 326. He was required to hold the buyers' $51,000 deposit in escrow until the completion of the transaction. Id. at 326. However, within ten days of his receipt of the deposit, he had depleted the entire amount. Id. at 328. Although he claimed that he had the consent of John Boyd, he did not allege that he had Laura Boyd's consent to use the funds. Id. at 329. Moreover, he admitted that he had not asked for the buyers' consent to use the deposit. Ibid. He asserted that he considered the real estate deposit to be nonrefundable, because the buyers had waived the mortgage contingency clause. Ibid. He acknowledged, however, that the buyers could have canceled the contract for other reasons and could have demanded the return of the deposit. Ibid.

Gifis contended that his use of the deposit did not amount to knowing misappropriation because he was unaware of In re Hollendonner, 102 N.J. 21 (1985), and because he honestly, but mistakenly, believed that the funds belonged solely to John Boyd. Id. at 330. We rejected this argument, noting that the real estate contract contained other contingencies that could have permitted the buyers to cancel the contract and obtain a refund of their deposit. Id. at 352. Moreover, Gifis, a law professor who taught contracts law, had to know that the deposit was not nonrefundable. Ibid. Gifis was disbarred. Id. at 324.[10]

In two cases, attorneys claimed that they reasonably believed that they retained sufficient personal monies in their trust accounts to warrant their removal of funds. In In re Mininsohn, supra, 162 N.J. 62 (1999), the attorney knowingly misappropriated funds in three ways: (1) by withdrawing legal fees from escrow funds before a real estate closing took place; (2) by advancing legal fees from other clients' funds; and (3) by disbursing funds to himself from his trust account without sufficient funds on deposit. Id. at 66.

According to Mininsohn, he thought that he had maintained a "cushion" by failing to withdraw earned fees from his trust account. Id. at 71. He argued that, based on this belief, he did not know that he was invading clients' funds, when he removed his fees. Ibid. He did not offer any specific facts to support his belief that he had maintained extra funds in that account. Id. at 74. As noted previously, the Court rejected Mininsohn's claim, finding that he had not offered evidence to sustain the

[10] In its order, the Court adopted our report and recommendation. In re Gifis, supra, 156 N.J. at 324.

contention that his belief that he had sufficient funds was reasonable. Ibid. Mininsohn, too, was disbarred. Ibid.

Likewise, another attorney's claimed belief that he had sufficient earned fees in his trust account to cover withdrawals was rejected. The attorney was disbarred. In re Goldstein, 167 N.J. 279 (2001). There, the attorney used various methods to knowingly misappropriate funds. In three personal injury cases, he advanced fees to himself before he received settlement proceeds, thereby invading other clients' funds. In the Matter of Jerrold D. Goldstein, DRB 00-200 (2000) (slip op. at 28). In three real estate transactions, he used real estate deposits, without the consent of the parties. Ibid. In two matters, he took excessive fees, again invading other clients' funds. Ibid. In a real estate matter, his trust account check was returned for insufficient funds. Ibid. He failed to replace the funds for more than one month. Ibid. Finally, although he had deposited only $150 in his trust account for a litigation matter, he issued a $15,000 trust account check for expert fees for that case. Id. at 15.

Goldstein claimed that, because of poor recordkeeping, he believed he had sufficient earned fees in his trust account to cover the above withdrawals. Id. at 29. He did not present a factual basis for that belief, however. Ibid. Moreover, he had received overdraft notices from the bank in which he maintained his trust account. Ibid. In addition, we noted that because he had received a reprimand for negligent misappropriation, he should have had an increased awareness of recordkeeping requirements. Ibid. We, thus, found that he could not have reasonably believed that he had fees in his trust account that he had not disbursed. Ibid.

Here, for the reasons expressed above, we reject as unreasonable respondent's claim of a belief that he was entitled to keep the Keene funds and find that he knowingly misappropriated funds from his law firm.

Indeed, regardless of Keene's donative intent, respondent was obligated to follow the requirements of his profession. Although Keene wished to compensate respondent individually (in addition to the legal fees owed to his firm), respondent was duty-bound to comply with the Rules of Professional Conduct, opinions of the Advisory Committee on Professional Ethics, applicable caselaw, and other professional mandates. In the seminal New Jersey case on knowing misappropriation of law firm funds, In re Siegel, supra, 133 N.J. 162, the Court extended the rule announced in In re Wilson, supra, 81 N.J. 451 (disbarment for knowing misappropriation of client funds) and In re

Hollendonner, supra, 102 N.J. 21 (disbarment for knowing misappropriation of escrow funds) to law firm funds, declaring:

> We see no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners. In the absence of compelling mitigating factors justifying a lesser sanction, which will occur quite rarely, misappropriation of firm funds will warrant disbarment. (Citations omitted).
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> [In re Siegel, supra, at 167-68.]

When we considered Siegel, six Board members determined that he should be spared from disbarment:

> [T]he Board is not persuaded that disbarment is the only appropriate sanction. This conviction is based on two basic considerations. One is grounded on essential fairness: the bar has not been put on notice that stealing other law partners' monies might result in disbarment; the other is rooted in human sympathy: an attorney, like this respondent, who has commanded the overwhelming respect and trust of his peers and clients alike, who has served as a role model for countless young attorneys and who has, before this tragic occurrence, epitomized what the public and the judicial system expect of a member of the legal profession, should be given a second chance.
>
> [In the Matter of Steven G. Siegel, DRB 92-247 (January 28, 1993) (slip op. at 20).]

Contrarily, three dissenting (public) members voted to recommend Siegel's disbarment:

> The majority has come to a determination that Siegel should be excepted from

> disbarment because (a) his professional accomplishments should count for something, and (b) lawyers have not been forewarned that their license to practice law might be pulled if they pick their partners' pockets. With due respect to the majority, these three public members disagree.
>
> [In the Matter of Steven G. Siegel, DRB92-247 (January 28, 2993) (dissenting slip op. at 1).]

In this case, respondent had a fundamental obligation not to "pick his partners' pockets." He did so by refusing to inform his partners that he had received $100,000 from Keene and either obtaining their authorization to keep the funds or to turn them over to their rightful owner, the firm.

As the Court announced in Siegel, attorneys who are guilty of knowing misappropriation of law firm funds are met with disbarment. See also In re Greenberg, 155 N.J. 138 (1998) (attorney obtained $27,025 in law firm funds for his personal use by submitting false disbursement requests; he also used deception to arrange for his clients to send a $7,500 fee directly to him, instead of his law firm); In re LeBon, 177 N.J. 515 (2003) (attorney diverted $5,895.23 from his law firm by instructing a client to make a check for legal fees payable to him, depositing the fee check in his personal bank account, and using the funds to pay his mortgage payment and to make political contributions); In re Epstein, 181 N.J. 305 (2004) (attorney, an associate with a law firm, failed to disclose that he had cashed seven checks for legal fees and retained the funds; at least four of the clients had made their checks payable to Epstein, instead of the firm; the firm's attorneys testified that, although there was no written policy about the disposition of fees obtained from clients, it was unacceptable for associates or partners to negotiate the firm's checks for legal services and that all attorneys were expected to turn over fees to the office manager immediately); and *In re Staropoli*, 185 *N.J.* 401 (2005) (attorney, an associate at a law firm in which the fees received in cases originated by the associates were divided equally between the firm and the associates, did not inform the firm that he had settled a case that he had originated; at the time he took the money, the firm was in the midst of a "bitterly contested dissolution" and the attorney had been advised that he would soon lose his job; he asserted that he had kept the money because he had been fired and because he could have referred the case to another firm).

A final point in connection with the Keene matter warrants mention. The OAE argued that, as a director and officer of Budd Larner, a professional corporation, respondent breached a fiduciary duty under principles of corporate law. *R.* 1:20-4(b) requires the complaint to "set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct." Because the complaint did not allege that respondent breached a fiduciary duty owed to Budd Larner under principles of corporate law, we made no finding in this regard.

As to the Lexecon matter, we are not persuaded that the evidence of knowing misappropriation is clear and convincing. When respondent first received the Lexecon check, his instructions to McCarthy to submit it to the accounting department were appropriate. Upon the accounting department's return of the check for more information, respondent failed to take prompt action, permitting the check to remain on his desk for several months. Although respondent signed the check and instructed McCarthy to have it cashed, the evidence supports the view that this action may have been inadvertent. Respondent gathered the Lexecon check with other personal checks and signed them in a hurry, before he left the office for a flight to Atlanta. Under these circumstances, there is insufficient evidence to support a finding of knowing misappropriation.

Respondent, however, neglected to deposit the Lexecon check and failed to ensure that the funds were promptly delivered to the unpaid Hamilton vendors. We, thus, find that he failed to safeguard funds and failed to promptly deliver funds to a third person, violations of RPC 1.15(a) and (b).

For the above conduct, the discipline imposed is usually either an admonition or a reprimand, even if accompanied by other, non-serious violations. See, e.g., In the Matter of David J. Percely, DRB 08-008 (June 9, 2008) (admonition: for three years attorney did not remit to client the balance of settlement funds to which the client was entitled, a violation of RPC 1.15(b); the attorney also lacked diligence in the client's representation, failed to cooperate with the investigation of the grievance, and wrote a trust account check to "cash," violations of RPC 1.3, RPC 8.1(b), and R. 1:21-6(c)(1)(A); significant mitigation presented, including the attorney's unblemished twenty years at the bar); In the Matter of Anthony Giampapa, DRB 07-178 (November 15, 2007) (admonition: attorney did not promptly disburse to a client the balance of a loan that was refinanced; in addition, the attorney did not adequately communicate with the client and did not promptly return the client's file; violations of RPC 1.15(b), RPC 1.4(b), and RPC 1.16(d)); In the Matter of Patrick DiMartini, DRB 04-440 (February 22, 2005) (admonition: attorney failed to promptly deposit in his trust account a settlement check for clients, resulting in its theft; attorney had a prior three-month suspension for unrelated misconduct; mitigating factors included the attorney's assistance to the clients to obtain reimbursement and his prior forty-six year bar membership, marred only by the three-month suspension, which had been imposed after a thirty-year unblemished career); In re Conner, 193 N.J. 25 (2007) (reprimand: attorney failed to promptly disburse funds to which two clients were entitled; also, in connection with the representation of those two clients, the attorney inadvertently deposited client funds into his business account, instead of his trust account, an error that led to his negligent misappropriation of other clients' funds); and In re Dorian, 176 N.J. 124 (2003) (reprimand: for months attorney failed to satisfy a medical lien out of funds escrowed for that purpose; the attorney also failed to cooperate with the investigation of the grievance; prior admonition and reprimand).

Based on respondent's previously unblemished career of forty-two years, we determine that the appropriate level of discipline in the Lexecon matter would have been an admonition. However, respondent's receipt of the Keene funds, which he knew belonged to his firm, and his acts of deception require that he be disbarred. We, thus, recommend his disbarment.

We are mindful that respondent has had a long and distinguished career. His accomplishments have been many and his success exceptional. Many eminent members of the legal community attested to his outstanding character and integrity. However, in knowing misappropriation cases, these factors do not serve to mitigate the mandatory discipline of disbarment. In <u>In re Lennan</u>, 102 <u>N.J.</u> 518, 524 (1986), the Court observed that, in <u>Wilson</u>, it had explicitly noted that evidence of prior good character was unpersuasive to avoid the automatic disbarment rule.

Member Yamner voted to impose a censure, finding that respondent reasonably believed that he was entitled to and permitted to keep the Keene funds and that the evidence that he told his secretary to destroy all copies of his letter and other correspondence to Keene in regard to the Keene funds was not clear and convincing. He concluded, however, that respondent should have disclosed to his partners his receipt of the Keene funds.

Member Baugh also found that respondent had a good faith, but erroneous, belief that he was entitled to the Keene funds. She concluded that his acts of deception require a one-year suspension.

Vice-Chair Frost recused herself. Member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in <u>R.</u> 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of David R. Gross
Docket No. DRB 09-186

Argued: November 19, 2009

Decided: December 18, 2009

Disposition: Disbar

Members	Disbar	One-year suspension	Censure	Dismiss	Disqualified	Did not participate
Pashman	X					
Frost					X	
Baugh		X				
Clark						X
Doremus	X					
Stanton	X					
Wissinger	X					
Yamner			X			
Zmirich	X					
Total:	5	1	1		1	1

Julianne K. DeCore

Julianne K. DeCore
Chief Counsel