SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 07-309
District Docket No. XIV-04-405E

IN THE MATTER OF	
VINCENZA LEONELLI-SPINA	
AN ATTORNEY AT LAW	

Decision

Argued: March 20, 2008

Decided: May 20, 2008

Walton W. Kingsbery, III appeared on behalf of the Office of Attorney Ethics.

Gerard E. Hanlon 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 disbarment filed by Special Master Murry D. Brochin, J.A.D. (Ret.), based on respondent's knowing misappropriation of client

and escrow funds. For the reasons expressed below, we agree with the special master's recommendation.

Respondent was admitted to the New Jersey bar in 1990. At the relevant times, she maintained an office for the practice of law in Totowa. In 2003, respondent was admonished for gross neglect, lack of diligence, and failure to communicate with the client. Respondent failed to file an appellate brief on two separate occasions and to reply to her clients' telephone calls and correspondence.

From September 30 to October 7, 2002, and from September 15 to September 17, 2003, respondent was on the Supreme Court's list of ineligible attorneys, due to non-payment of the annual attorney assessment to the New Jersey Lawyers' Fund for Client Protection.

This disciplinary matter arose out of two grievances filed against respondent, in January and May 2003, alleging that she had improperly handled trust funds. The grievances sparked an investigation by the Office of Attorney Ethics (OAE), ultimately leading to charges that, from July through December 2002, respondent had misappropriated funds from three clients, Arthur and Amelia Mazzarella, Stephen Melis, and Kenneth Fekete. The September 23, 2005 complaint charged respondent with having

violated RPC 1.15(a) and (c) (failure to safeguard trust funds), RPC 8.4(c) (conduct involving dishonesty, fraud, deceit and misrepresentation), and the principles of In re Wilson, 81 N.J. 451 (1979), and In re Hollendonner, 102 N.J. 21 (1985). Although respondent admitted recordkeeping improprieties in the handling of her trust account, she denied that she had knowingly misappropriated trust funds.

The special master presided over a nine-day hearing that took place in November and December 2006. The witnesses included an OAE investigator, respondent, respondent's part-time bookkeeper, the clients whose funds were allegedly misappropriated, and some character witnesses.

THE MAZZARELLA MATTER

On July 1, 2002, Royale Realty, LLC (Royale Realty), contracted to buy two properties owned by Arthur and Amelia Mazzarella, respondent's clients. The contracts provided for respondent to hold in escrow a combined $70,000 deposit, until closing of title.

On that same date, Maureen Emich, one of the owners of Royale Realty, wrote a personal check for $70,000, payable to

respondent. The check contained the notation "dep 277 + 281 Main St."

For reasons that are not entirely clear, that check was not deposited into respondent's trust account, although, on July 8, 2002, it was recorded as a trust account deposit, in the register listing, as "Mazzarella, Arthur – Giegold Proceeds. As seen below, David Giegold was a client of respondent and the husband of respondent's part-time bookkeeper, Lorraine Giegold. Neither of the Giegolds had anything to do with the Mazzarella transaction.

Ten days after Emich gave respondent the $70,000 check, Royale Realty issued a second $70,000 check (No. 1001), payable to the "ESCROW ACCOUNT OF VINCENZA LEONELLI-SPINA, ESQ." The memo line bore the notation "Deposit Mazzarella to Royale Realty." Apparently, a change in the identity of the buyer necessitated the re-issuance of the deposit check. Respondent explained that, initially, Emich was to purchase the properties individually. Later, however, she and Beverly Baker, the attorney who had been representing her in the transactions,

decided to purchase them jointly.[1] The second check represented Emich's and Baker's joint funds.

The replacement check was deposited in respondent's trust account on July 15, 2002, raising its balance to $76,217.52. It is at this juncture that, allegedly, the first instance of knowing misappropriation occurred.

Specifically, on the same day that the replacement check was deposited, respondent issued trust account check No. 3065 to David Geigold [sic], in the amount of $10,000.[2] Respondent's register listing identified the disbursement as "David Geigold [sic] – Geigold [sic] – Payment to Client."[3] After that check was negotiated, the balance in respondent's trust account was reduced to $66,217.52.

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[1] Apparently, Baker later on became Emich's business partner, at which point she ceased representing Emich.

[2] Respondent used a Quicken recordkeeping program. The check to Giegold was generated by Quicken.

[3] At oral argument, counsel for respondent stated that respondent denied writing or signing any checks to David Giegold. Post-argument, counsel wrote a letter to Office of Board Counsel, correcting this statement. He wrote: "The checks written to David Giegold were drafted by Lorraine Giegold and then signed by M. Spina or Lorraine Giegold."

The complaint charged and OAE investigator Barbara Galati testified that, because respondent was not holding any funds on behalf of Giegold, the check had invaded the Mazzarella $70,000 deposit. As detailed below, respondent explained that she believed that this $10,000 check to Giegold, as well as subsequent disbursements that ended up depleting the $70,000 deposit, had been backed by personal funds left in her trust account. Also detailed below is respondent's explanation for this and other disbursements to Giegold.

The next invasion of the Mazzarella deposit occurred on July 29, 2002, when respondent transferred $10,000 from her trust account to her business account. At that time, the business account had a negative balance of $7,553.76. This transfer further decreased the trust account balance to $56,217.52, causing another invasion of the $70,000 deposit. The day after this infusion of funds in respondent's business account, its balance reverted to a negative status of $1,657.35.

On August 2, 2002, the sum of $4000 was transferred from respondent's trust account to her business account to cover a $3,215.52 shortage. That transfer lowered the trust account balance to $52,217.52, thereby once again invading the $70,000

deposit. Within three days, the business account balance had dwindled to - $1,190.37.

Further invasions of the Mazzarella deposit, pre-closing, occurred on August 19, 2002 ($5000 check to David Giegold); September 3, 2002 ($2000 transfer to respondent's business account); September 16, 2002 ($5000 check to David Geigold and $2000 check to a Concetta Oliveri); September 26, 2002 ($10,000 transfer to respondent's business account to cover a $8,468.58 balance deficiency); and October 7, 2002 ($5,000 transfer to the business account to cure a $2,858.46 shortage).

During this time, no other funds had been deposited in respondent's trust account. Therefore, all of the above disbursements invaded the $70,000 deposit.

The misappropriation of the $70,000 continued after the closing, which took place on October 8, 2002. By then, the $70,000 belonged to the sellers, the Mazzarellas, who were respondent's clients.

Respondent did not turn over the $70,000 to the Mazzarellas on the closing day. At the time, her trust account balance was

a mere $23,217.52. At the hearing below, Arthur Mazzarella was asked why he had not requested the $70,000 at the closing.[4] He replied that he was experiencing "terrible pain in his hip that day;" that "anything [respondent] did was okay by me;" that respondent's failure to give him the $70,000 at the closing "was never an issue;" that he "never thought about it;" and that, if respondent had asked him for the use of the deposit, he would have said "yes."

Respondent, in turn, testified that she had gone over the settlement statement with Mazzarella, but had not specifically told him how much money he was going to receive because "he is a very good businessman. He knows his figures better than I do." The settlement statement reflects that, at closing, the Mazzarellas should have received a credit for the combined $70,000 deposit.

As indicated above, the invasion of the $70,000 continued post-closing. On October 22, 2002, two weeks after the closing, a check for $5000 to David Giegold was negotiated. On November

[4] There is no allegation that the Mazzarellas did not receive funds due from the buyer, but only the deposit that respondent was holding in escrow.

15, 2002, the bank paid another $5000 to David Giegold. With those two checks, the $23,217.52 balance in the trust account sank to $13,217.52.

Between November 25 and December 3, 2002, and for the first time since the deposit of the $70,000, new funds were deposited into respondent's trust account. On November 25, 2002, Stephen Melis, another client of respondent, gave her a $12,000 check containing the notation "Hamsphire [sic] House," a transaction detailed below. That deposit increased the trust account balance to $25,217.52. On December 2, 2002, a deposit of a $14,000 check issued by the Borough of Paramus, and payable to respondent's trust account, increased the balance to $39,217.52. On December 3, 2003, the trust account balance rose to $139,217.52, after the deposit of a $100,000 cashier's check payable to John Melis, Stephen's father, and endorsed in blank.[5] That check's memo line contained the words "Hampshire House."

As seen below, the OAE and Stephen Melis contended that the $12,000 and the $100,000 sums represented payments in a real

[5] Melis had given his father a limited power of attorney to complete a real estate transaction on his behalf.

estate transaction in which Melis was the buyer. The $14,000 consisted of a portion of a settlement that respondent had negotiated for a client, Kenneth Fekete.

As of December 3, 2002, the breakdown of the funds held in trust by respondent was as follows: $13,217.52 belonging to the Mazzarellas (the remaining balance of the $70,000), $14,000 belonging to Fekete, and $112,000 held on behalf of Melis,[6] for a total of $139,217.52.

On December 3, 2002, almost two months after the Mazzarella closing and the same day that the $100,000 Melis check was deposited in respondent's trust account, she issued a $71,500 trust account check (No. 3072) to the Mazzarellas, but only after Arthur had called her and inquired about the money.[7] According to the complaint, because only $13,217.52 stood to the credit of the Mazzarellas at the time, funds belonging to Melis and to Fekete were invaded.

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[6] Although the $112,000 represented funds of Stephen Melis and his father John, we will refer to both as Melis, in the singular.

[7] Arthur was unable to explain why he received $71,500, instead of $70,000.

On December 10, 2002, respondent transferred $20,000 from her trust account to her business account. That $20,000 transfer resulted in a reduction of even amount in respondent's trust account, causing its balance to sink to $47,717.52. The complaint charged that this transfer invaded funds belonging to Melis and to Fekete, for whom respondent should have been holding $112,000 and $14,000, respectively. Before that transfer, the business account was overdrawn by $8,315.39. Ten days later, the business account reflected a negative balance of $1,937.

Two days later, on December 12, 2002, respondent deposited in her trust account a $25,000 check issued by National Union Fire Insurance Co. of Pittsburgh. At the top of the check was the notation "FINAL SETTLEMENT." The deposit slip identified the funds as belonging to Fekete. With that deposit, the balance in the trust account increased to $72,717.52. In fact, the balance should have been $151,000 ($112,000 for Melis and $39,000 for Fekete).

On December 24, 2002, respondent transferred $10,000 from her trust account to her business account, this time to remedy a $2,866 deficiency. All funds in her trust account at the time belonged to Melis and to Fekete.

THE MELIS MATTER

Stephen Melis became respondent's client in February 2002. Sometime before he met respondent, he was awarded approximately ten million dollars, in a New York personal injury action.

As mentioned above, the knowing misappropriation charge arising out of respondent's representation of Melis involved the $12,000 that Melis gave her in November 2002, and the $100,000 that his father gave her on December 2, 2002. According to Melis, these funds represented deposit monies for his purchase of a Fort Lee co-op unit. Respondent, in turn, contended that the monies represented payment of legal fees that Melis owed to her.

Melis, who owned two buildings located at 1108 and 728 Washington Street, Hoboken, had sought respondent's counsel with respect to the following matters: (1) the purchase of a residential unit in a Fort Lee co-op building called Hampshire House; (2) the purchase of a unit at 315 Washington Street, which was owned by his grandmother and controlled by an irrevocable trust; (3) a lease with Dunkin' Donuts at one of his Washington Street buildings; (4) the formation of an umbrella corporation, called Hampshire House, to manage his properties; (5) communication with the Hoboken "bureaucracy," such as the

construction official and the health inspector; and (6) tenant issues at both Washington Street properties, including the preparation of a lease for at least one tenant at 728 Washington Street and the eviction of a tenant at 1108 Washington Street. Respondent's representation of Melis in those matters did not produce many results. As seen below, the purchase of the Hampshire House co-op unit did not materialize until sometime in 2003, after Melis had severed his professional relationship with respondent.

The scope of respondent's representation was spelled out in the retainer agreement between her and Melis as "violations as to properties, tenancy problems and other related issues with Nect[ar] Leasing and Infinity Enterprises." The agreement required an initial retainer of $15,000. Melis paid $3000 toward that amount on May 7, 2002.

The next check that Melis wrote in connection with respondent's representation was dated September 19, 2002, in the amount of $12,000, payable to Arthur Balsamo, the attorney for the seller of the Hampshire House co-op. This check represented the down payment toward the $120,000 purchase price.

Balsamo, however, never received the check. The check's memo line read "Hampshire House 1490 Anderson." Respondent

explained that she had sent it to the wrong address and that it had been returned to her in early November, uncashed. The record is not clear as to what happened to that check.

On November 11, 2002, Melis wrote another $12,000 check, this time payable to respondent's trust account. He claimed that respondent had asked him to write this second $12,000 check to her trust account because Balsamo had not received the first check. Contrarily, respondent claimed that the check represented the balance of the $15,000 required by their retainer agreement, a contention that Melis vigorously denied. Respondent maintained that, by the time that Melis gave her the $12,000 check, he had decided not to buy the co-op.

In evidence is Exhibit MR-64, a time-of-the-essence letter from respondent to Balsamo, dated November 15, 2002, scheduling the closing for December 2, 2002. Respondent testified that she had not sent that letter because, by that time, Melis had decided not to buy the property. In turn, Melis produced to the OAE a "status memo" purportedly sent to him by respondent on December 2, 2002, reporting, among other things, that respondent had sent the time-of-the-essence letter to Balsamo. Respondent denied having sent that memo, pointing out that it would have

been incongruous to send, on the closing date, a status memo about the closing date.

As mentioned earlier, in addition to the $12,000 check, respondent deposited a $100,000 check in her trust account, also bearing the notation "Hampshire House." The check was deposited on December 3, 2002. The purpose of this check, too, was the subject of contention between respondent and Melis. Melis claimed that the funds were to be applied toward the purchase of the Hampshire House co-op. Respondent, by contrast, was adamant that it represented payment for overdue legal fees. She maintained that the "Hampshire House" note on the check related to a corporation of the same name, which she had formed for Melis.

The parties' divergent positions on the purpose of the two checks are more fully set out below.

THE FEKETE MATTER

In 1999, Kenneth Fekete, who had retired from the Paramus Police Department, sought respondent's representation with respect to a promotional problem that occurred while he was employed. When respondent told him that she required a $10,000 retainer and that her fee would be $215 per hour, he went to

another attorney, Richard J. Donohue, now a Superior Court judge. Donohue filed a discrimination suit on behalf of Fekete.

Donohue was sworn in as a Superior Court judge in January 2002. At the time, the Fekete case was ready for trial, which was scheduled for June 2002. Donohue recommended respondent to Fekete.

In January 2002, Fekete met with respondent, at which time they discussed their fee arrangement. According to Fekete, respondent agreed to keep the same fee arrangement that he had with Donohue, that is, a contingent fee agreement. Fekete added that Donohue also recorded his billable time separately because, in the event that Fekete prevailed, Donohue would be entitled to legal fees.

Respondent, however, testified that her fee agreement with Fekete was for the payment of a $200 hourly rate and a $5,000 retainer. She claimed that she had sent a retainer agreement to Fekete with those terms, but that he had never signed it.

In the course of the June 2002 trial, the case was settled. The settlement provided for, among other things, a retroactive promotion, an increase of $1000 in Fekete's monthly pension benefits, a $35,000 lump sum payment from the pension plan, a $14,000 payment by the Borough of Paramus, and a $25,000 payment

by the National Union insurance company. According to respondent, the total value of the settlement was $270,000.

By December 2002, respondent had received the $14,000 and $25,000 payments. On December 2, 2002, she deposited the $14,000 check into her trust account. On December 12, 2002, she deposited the insurance company's $25,000 check. Respondent considered the $39,000 to be her legal fees. Of this amount she gave Donohue a $5000 referral fee.

In September 2002, Fekete began to question respondent about the status of the payments. According to Fekete, in January 2003, respondent told him that she "had never received any of the money from the Borough or the insurance company". That was untrue.[8] She had received them in December 2002.

At the ethics hearing, Donohue testified that Fekete had expressed some dissatisfaction with the settlement, although not with the way respondent had handled the case during the course of the litigation. Rather, Fekete's complaint was that "he didn't get all his money from [respondent]." Donohue talked to

[8] The complaint did not specifically charge respondent with having made a misrepresentation to Fekete.

respondent about Fekete's complaint. She replied that she would discuss it with Fekete.

Donohue also had a conversation with respondent about the fee arrangement between her and Fekete. Respondent stated that, although she did not have a written fee agreement with Fekete, she was entitled to "a quantum meruit for a portion of his pension."

After respondent's conversation with Donohue, she sent $9000 to Fekete (which she termed a "refund"), by way of a trust account check issued on January 16, 2003. According to Fekete, he did not receive a settlement statement from respondent.

On January 29, 2003, respondent wrote a $25,000 check to a Charles Kosbab, thereby zeroing out the Fekete trust ledger. Fekete did not authorize respondent to make this disbursement and did not know a Charles Kosbab.

Fekete persisted in his request for the balance of the settlement, by making telephone calls and writing letters to respondent. According to Fekete, respondent told him that she had not yet received the remaining funds.

Fekete testified that, in January 2004, respondent had finally told him that the case had concluded and that she was going to mail him a check for $18,000. On January 12, 2004,

respondent sent a letter to Fekete, accounting for the settlement funds. The accounting provided that, out of the $39,000, she had sent $5000 to Donohue, $9000 to Fekete in 2003, $18,000 to Fekete in January 2004, and $1400 to the Division of Pensions. There remained a $5,000 balance for "lawyer's fee."

It was not until a month later that Fekete received the $18,000 check, and then only after he had sent some correspondence to respondent and had announced his intention to pick up the check at her office.

Notwithstanding respondent's initial claim that she was entitled to the $39,000 by way of fees, and that she later disbursed $27,000 out of those funds to Fekete in 2003 and 2004, she continued to assert that she was still owed $34,000 in fees. She explained that she had "refunded" Fekete $9000 and $18,000 because they had reached an agreement. According to respondent, "the agreement was that he would stop 'badmouthing me' and he would be done, take whatever refund he wants, and we would go our separate ways."

In 2006, however, respondent pressed Fekete for $34,000 in fees. She wrote him a letter on May 10, 2006, informing him that he owed $34,956.35 in unpaid legal fees and disbursements. The letter also informed Fekete of his right to request fee

arbitration. Respondent testified that, contrary to their agreement, Fekete had not stopped "badmouthing" her. After she learned from a client that he was calling her a thief, she sent him a fee arbitration notice because "if he thinks I stole money from him, I want my money back."

Fekete testified that, before respondent's May 10, 2006 letter, he had never received a bill from respondent.

RESPONDENT'S DEFENSES

As stated previously, respondent did not dispute the results of the OAE's analysis of her trust account and business account activities. She acknowledged that she had invaded trust funds, but denied that she had done so knowingly. In a sometimes confusing and inconsistent fashion, she offered a host of defenses for her actions. Her central explanation in the Mazzarella matter was that, based on representations made by Lorraine Giegold (Lorraine), her part-time bookkeeper, she believed that she had sufficient personal funds in her trust account to cover the disbursements and transfers during the time in question. As to the Melis and Fekete funds, she claimed that they represented legal fees, not clients' funds.

As mentioned above, Lorraine is the wife of David Giegold, one of respondent's clients. Lorraine started working for respondent in April or May 2002, on a part-time basis. Respondent agreed to pay Lorraine $21 per hour, in return for help with updating her billings. According to respondent, she also agreed to give Lorraine ten percent on "any of the aged billings that she brought in over ninety days."

As to her specific duties, Lorraine testified that respondent had given her data to enter into a computer program called "Timeslips." The Timeslips program generated a billing worksheet based on the information entered by Lorraine. The actual invoice was generated by respondent. According to respondent, the Timeslips system generated a detailed worksheet, which she considered to be a "pre-bill," which then became a bill after she had compared the worksheet to the file to determine whether any time had gone unrecorded.

Lorraine denied that she had anything to do with respondent's trust account, stating that respondent was solely responsible for its maintenance. Contrary to Lorraine's testimony, respondent asserted that one of Lorraine's duties was to review the trust account and business account bank statements. According to respondent, in the course of

Lorraine's employment, she, respondent, did not review the Quicken register listing and her monthly trust account statements, never telephoned the bank to ask for the balance in her trust account, and, on any given day, did not know the balance in the account. She acknowledged, however, that she could have looked at the Quicken program at any time to determine the balance in her trust account.

Respondent also testified that she had given Lorraine authorization to sign respondent's name on trust account checks. She stated that, although Lorraine did not have official check-signing power, "[m]y signature is a scribble, and at times if I wasn't available, if I wasn't there, I would simply indicate to her just sign it."

Lorraine's last day of work was sometime in November 2002. Lorraine testified that, at the time, respondent's billing was "all caught up."

We now address respondent's specific defenses to her use of each of the funds in question.

THE MAZZARELLA DEFENSE

As mentioned previously, the misappropriations of the $70,000 deposit were caused by respondent's transfer of funds

from her trust account to her business account ($31,000) and payments to Giegold ($30,000). At the hearing below, respondent testified about the genesis of her professional relationship with David Giegold and the reason for her disbursements to him.

According to respondent, in May 1997, Giegold had retained her to evaluate the merits of two employment-related cases, which had been dismissed with prejudice in late 1995 and early 1996, as well as the merits of a malpractice case against prior counsel. Respondent charged him $5000.

On June 12, 1997, respondent wrote a letter to Giegold, informing him that there was no merit to or basis for any of the cases. She never filed a lawsuit on behalf of Giegold.

In March 2002, respondent had a meeting with Giegold and Lorraine. Respondent, who had known Lorraine since 1997 and considered her a friend, allegedly felt sorry for the Giegolds' financial difficulties at the time and offered to assist them by hiring Lorraine to help her at the office. Respondent believed that Lorraine was "a collections expert" because she "did strictly collections and billing for a company out of her home."

Respondent insisted that the payments to Giegold constituted advances to Lorraine against the ten percent that Lorraine would receive for her collection work. Lorraine,

however, had a different recollection of the nature of respondent's disbursements to Giegold. According to Lorraine, respondent had told them that Giegold's employment case had resulted in a settlement and that they would be receiving $5000 monthly payments for the next two years.

We now address respondent's explanation for her invasion of the $20,000 Mazzarella deposit.

Respondent conceded that the deposit was invaded and that the invasion was unauthorized. She explained, however:

> I did not know about that $70,000 until I sat in the Office of Attorney Ethics in Trenton. They pointed it out to me, and the room was – just closed in on me. I did not know I had used it. If I had known, I would have at the very least contacted Mr. Mazzarella and apologized or indicated that I had done something wrong. I did not know until my books were scrutinized.
>
> [Transcript dated December 4, 2006, p. 95, 11.6-14.]

Instead, respondent claimed, she believed that she had at least $70,000 of her own funds in the trust account. She testified that the first $70,000 check from Royale Realty (the check drawn on Emich's personal account that was never deposited in respondent's trust account) had been recorded as "proceeds" in the register listing and that the word "proceeds" meant to

her that Lorraine had collected overdue legal fees. As a result, she stated, "we were drawing off that money as if it were legal fees as opposed to a closing deposit." She acknowledged, however, that nothing on the actual check suggested that it was a fee.

Presumably, the fact that respondent was drawing against funds kept in her trust account did not signal to her that they were not legal fees. She testified that she always kept her legal fees in her trust account, drawing them as needed. She added that she discontinued this practice when she learned from the OAE that is was improper.

Moreover, respondent contended, Lorraine had told her that she had been successful in collecting $78,000 in fees, during the month of July 2002. Respondent did not verify the truthfulness of Lorraine's representation.

Other defenses raised by respondent were that, at the time that the $70,000 check was received, Mazzarella owed her legal fees[9] and that she thought that she had "other legal fees in

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[9] It should be recalled, however, that the $70,000 deposit did not belong to the Mazzarellas. It consisted of escrow
(footnote cont'd on next page)

[her] trust account." Indeed, respondent prepared a chart for the OAE, showing that, in 2002, Lorraine had collected $220,397.37 in fees.

Respondent offered no explanation for her failure to turn over the $70,000 to the Mazzarellas at the closing.

THE MELIS DEFENSE

As stated previously, respondent denied any misappropriation of Melis's funds, asserting that the $112,000 consisted of legal fees. Melis, by contrast, testified that the $12,000 was a down payment for the Hampshire House co-op and that the $100,000 was to be applied toward the purchase price of the co-op. Melis pointed to the designation "Hampshire House" on both checks to corroborate his assertion that the monies were related to that transaction. Respondent, in turn, contended that "Hampshire House" referred to a corporation that she had

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(footnote cont'd)

funds, not client funds, to be held in trust for the benefit of both parties to the transaction until the closing of title.

formed as an umbrella organization for all of Melis's properties and under which name all of his business were to be transacted.

In support of her position that the monies were fee payments, respondent testified that, on October 11, 2002, she had mailed a letter to Melis, enclosing an outstanding bill and a revised retainer agreement (identifying Hampshire House, the corporation, as the client), and reminding him that "legal fees are substantial and overdue." According to the letter, a copy of the outstanding bill was enclosed. Respondent testified that the outstanding bill was dated September 27, 2002, and that it identified a fee balance of $107,353. Respondent termed the $100,000 check a payment toward an "aged receivable."

Melis denied having received this bill or any other bills during respondent's representation.

Melis relied upon numerous email exchanges between him and respondent, in support of his claim that the $112,000 was intended for the purchase of the Hampshire House co-op unit, as opposed to legal fees. One of the emails, allegedly originated by respondent on December 2, 2002 (the day before respondent's receipt of the $100,000 check), asked Melis for at least $75,000 for the closing:

> With regard to the closing, I need to place at least $75,000 in trust account.
> Total is as follows:
> 120,000 minus 12,000 minus 1,000 = 107,000 plus approximately $3,000 in closing costs = grand total of $110,000.
> We need to deposit this into the account immediately.
>
> Vinnie Spina
>
> [Exhibit C-62.]

Melis testified that the $100,000 check given to respondent was in response to this email. Also on December 2, 2002, Melis claimed, respondent prepared a status memo to him that stated, among other things:

> Hampshire House:
> Time of the essence letter sent establishing December 2, 2002 as date of closing. See attached.
>
> [Exhibit C-63.]

For reasons that respondent and Melis dispute, as of January 22, 2003, the transaction had not closed. Respondent claimed that Melis was no longer interested in the property. Melis, however, blamed respondent for the delay.

Eventually, Melis hired another attorney, Stacey Sava. According to Melis, he did so "because Vinnie didn't close on the condo." Melis ended up purchasing the property in June 2003.

At some point during the month of February 2003, Melis started asking respondent to return his money. Yet, according to him, she did nothing, which frustrated him. She did not answer his calls or emails. When he began to appear at her office to get the money, she kicked him out "a few times."

On February 24, 2003, respondent sent an email to Melis, which read:

> I just got into the office, it is 10 pm — I am trying a case. I need to talk to you as soon as I can. We definitely need to talk!!
>
> I will follow your request, however the money is $112,000 -- $12,000 already went to Sellers for deposit. I will do this as soon as I can. I understand your frustration, but I have not had a chance to breath [sic] as of late. I am the only one who covers my books and I cannot act as quickly as you want.
>
> I will call you on my way to court tomorrow morning.
>
> Vinnie Spina
>
> [Exhibit C-66.]

Two other emails from Melis pressed respondent for the return of the monies. On March 10, 2003, respondent replied that she "had not had an opportunity to do anything on Hampshire" because she "was in the middle of a matter that she

[could] not leave for the moment." She assured Melis that she would "get back to [him] this week with all the information, check, etc. that [he had] requested."

On March 27, 2003, Melis and his father wrote a letter to respondent, authorizing her to release the $112,000 to the new attorney, Sava. The next day, respondent emailed Melis with the information that she had "forwarded the check back to you by certified mail." Melis did not receive that check.

On April 6, 2003, Melis informed respondent that he had not received the check and again directed her to send it to Sava. By email dated April 10, respondent asked Melis to "[g]ive it a few days, then I will put a track on it – it was sent certified mail so it cannot get lost."

Sometime in June 2003, Melis retained attorney Eugene Paolino to assist him in recouping the funds. On June 13, 2003, Paolino wrote a letter to respondent, directing her to release the funds to him. Three days later, respondent wrote two letters to Paolino. The first letter complained about "baseless and frivolous allegations" contained in his letter. The second letter advised him that Melis had given her "written confirmation" that the $112,000 was "to be utilized towards his

outstanding legal bills which bills were to be paid in accordance with the executed retainer agreement."

Melis denied that he had ever provided respondent with such written confirmation. He testified that he had no written retainer agreement with her and had never received any bills from her. Melis was shown a series of bills purportedly issued to him by respondent. The bills ran from April 1, 2002 to March 28, 2003. Melis claimed that the first time he saw these bills was during his first meeting with OAE investigator Barbara Galati, after the grievance had been filed in 2003. He insisted that he had never received a bill from respondent during the time of her representation.

At the hearing before the special master, respondent was forced to concede that the only "written confirmation" of Melis's agreement to apply the $112,000 to his outstanding bills was the retainer agreement itself.

Respondent denied having received any emails from Melis and maintained that her emails to him had been fabricated. She stated that she had communicated with Melis by telephone and correspondence sent to a lock box at his home.

Respondent pointed to several irregularities suggesting that the emails were not authentic. For instance, the subject

line on some of them referred to "778," even though there was no such property; some of the emails that she purportedly sent had omitted certain information, such as the "to" and "from" lines; one other email contained verbatim statements from a letter that she had mailed to Melis previously.

During the OAE investigation, respondent was asked to produce bills substantiating the services provided to Melis. She did so. She maintained that the bills had been mailed to Melis at his 1108 Washington address, the same address that she used to send him correspondence and other items, including the retainer agreement.

The bills reflected an inordinate number of hours for certain services. For example, on March 14, 2002, respondent charged five hours for a "[c]onference with client regarding rental." Melis testified, however, that he did not have a five-hour meeting with respondent. In fact, he claimed, it would have been physically impossible for him to do so at any time.

Another example was a seven-hour charge, on May 29, 2002, for a conference with the client regarding Hoboken, "assign Yanni judgment to Steve," and "[d]ictate to Investigator concerning Yanni." According to Melis, he did not know what "Yanni judgment to Steve" meant and had not asked respondent to

perform that service. He denied having met with respondent for seven hours on that day.

Other examples were six-and-a-half hours for a telephone conference with client, follow up dictation, and "file" on April 10, 2002, and eight-and-a-half hours to the file for "[d]ictate to client regarding deeds, cert and tenant" on May 4, 2002. This pattern continued with all the bills that respondent produced to the OAE.

Respondent maintained that, but for one entry on November 9, 2002, her bills to Melis were accurate. She admitted that she did not "put every single detailed item or event" on a bill. For example, she stated that "five hours for a phone call certainly wasn't five hours for a phone call, but if you look at that particular day, you will see the files to substantiate the time that was placed".

Lorraine testified about respondent's billing in the Melis matter. She identified a Timeslips "client billing worksheet," dated September 7, 2002, and a bill dated September 27, 2002. She noted that the two documents "did not match." In particular, the Timeslips detail was "a smaller bill timewise and dollar amounts." The first entry on the time detail (February 27, 2002) was a one-hour conference with the client at

$200 per hour. The last entry was a $3 fax (July 27, 2002). The corresponding bills, which Lorraine did not prepare, ran from August 23, 2002 through September 27, 2002. The attached client billing statement reflected a previous balance of $89,953.67. However, the billing detail prepared by Lorraine for February 27 through July 27, 2002 did not reflect a previous balance. Rather, the time detail from February 27 through July 27, 2002 totaled only $7,570.58.

At the hearing below, respondent was confronted with a September 12, 2002 entry on the bill, charging 2.5 hours to "review correspondence from Balsamo regarding coop; telephone conference with client; dictate fax to client concerning status and Hoboken address." As the presenter pointed out, however, at one point during respondent's testimony about one of the Giegold checks, she had stated that she had not been in the office on that day because she was attending a special event. When confronted with this apparent inconsistency, respondent explained that she had probably gone into the office early that day to take care of the Melis matters.

OAE investigator Galati testified that she saw nothing in respondent's documents indicating that either the $12,000 or the $100,000 Melis's checks were for the payment of a fee.

THE FEKETE DEFENSE

Respondent's defense to the use of the Fekete funds was that she considered the $39,000 to be her legal fees. She conceded that she did not have a retainer agreement with Fekete, but added that she had told Donohue that she was entitled to "a quantum meruit for a portion of his pension" because she had obtained a $270,000 settlement for Fekete.

According to respondent's calculations, at the end of the trial, the amount owed by Fekete totaled $34,236.35 (presumably on an hourly rate). That amount was exclusive of the motions that she had to file after the settlement.

As to the disbursement to Kosbab, respondent explained that it had been drawn against the $39,000, which, in her view, represented the fair amount of fees to which she was entitled.

The special master found that respondent had knowingly misappropriated client funds from the Mazzarellas and from Melis. Although he also found that she had misappropriated Fekete's funds, he concluded that the "the transgression . . . [wa]s not as aggravated as those relating to Mazzarella and Melis."

With respect to the Mazzarellas' funds, the special master rejected both respondent's and Lorraine's explanations for the $40,000 in trust account payments to Giegold. He noted that the evidence had failed to establish that respondent had represented Giegold in any matter. In addition, he considered implausible respondent's claim that the funds were advanced against Lorraine's ten percent commission on her collection of outstanding receivables, as that meant that respondent would have unpaid bills totaling $400,000. Yet, the special master noted, respondent offered no evidence that she was owed that much money or that anyone had collected that amount of money on her behalf, after Lorraine was no longer employed by her.

In any event, the special master stated, the reason for the payments was irrelevant to the determination of whether respondent had knowingly misappropriated the Mazzarella funds. First, the special master found that respondent was "actively involved in maintaining" the trust account during the relevant time, as she had stated, in a February 2003 email to Melis, that she was "the only one who covers my books." Also, respondent told the OAE that she was the person who handled her trust account.

Second, the special master rejected respondent's claimed belief that Lorraine had collected $70,000 in legal fees, which had been deposited into respondent's trust account. The special master opined that the support offered by respondent for her "alleged misapprehension is flimsy—a vague statement she attributes to Ms. Giegold and the receipt of an escrow check from a non-client followed by another escrow check for the same transaction described in the cover letter as a replacement for the first check."

In this regard, the special master pointed out that the second $70,000 check had been sent to respondent under a cover letter that expressly referred to it as a replacement check and that further referred to an earlier conversation between respondent and the writer of the letter about the issuance of that second check. The special master rejected respondent's belief that the first check had been cashed, finding no basis for such belief.

Finally, the special master found that the consistent misspelling of Giegold's last name on the checks and on a letter to a mortgage broker meant that they were "probably prepared by someone other than either of the Giegolds and, if not by them, then probably by Respondent."

Accordingly, the special master concluded that the evidence, "considered as a whole," clearly and convincingly established that, between July 15 and November 24, 2002, respondent had knowingly withdrawn $63,000 against the Mazzarellas' funds, without their knowledge or authorization.

In the Melis matter, the special master rejected respondent's claim that the $12,000 and the $100,000 deposits represented payments for legal fees. Although Melis had "very little independent recollection of the details of transactions between himself and Respondent," the special master concluded that Melis's testimony reflected "a consistent, independent conviction that the $112,000 that was paid to Respondent by checks referring to Hampshire House had been transmitted and received by her to be used as part of the funds for his purchase of a condominium apartment in a building known as Hampshire House."

The special master found that respondent had fabricated the bills supporting her claim for nearly $135,000 in legal fees. The special master remarked that the descriptions of the work performed were vague, mostly referred to "conferences" and "dictation," and most of the work billed related to the two Washington Street buildings. Inasmuch as the work described

mainly involved "tenants' apartment leases, minor landlord-tenant controversies, and dealings with municipal officials and the formation of a corporation," the special master believed that the charges seemed "grossly excessive."

The special master accepted Melis's testimony that he had never seen the bills before they were shown to him by the OAE investigator, reasoning that, "[i]f they had been presented to Mr. Melis when they purport to have been prepared, I would expect to find evidence of vigorous objections. The proofs do not include letters, emails or testimony to that effect."

The special master rejected respondent's claim that the "Hampshire House" notation on each of the two checks totaling $112,000 referred to the Hampshire House umbrella corporation that respondent was setting up for Melis, for the purpose of managing his properties more efficiently. The special master offered several reasons in support of this finding.

First, the bills were directed to Melis personally, rather than to a corporation. Second, the special master accepted Melis's testimony that the "Hampshire House" notation referred to the co-op building called Hampshire House, and that the purpose of the $112,000 was to fund his purchase of a unit in that building. The special master noted that the $12,000 check

from Melis was payable to respondent's trust account. The $100,000 check was made payable to John Melis, to whom Melis had given a limited power of attorney to carry out the purchase of the co-op on Melis's behalf. John Melis had endorsed the $100,000 check in blank.

Third, the special master relied on respondent's November 15, 2002 letter to the seller's attorney, stating that time was of the essence for a December 2, 2003 closing. Fourth, the special master relied heavily on the purported emails between Melis and respondent, between December 2, 2002 and March 28, 2003, which involved the co-op unit purchase and demonstrated respondent's understanding that the $112,000 represented funds for the purchase of the unit, not legal fees. Finally, the special master pointed out that, with the exception of her testimony, respondent submitted no corroborating evidence that Melis had agreed to apply the $112,000 toward legal fees.

The special master rejected respondent's claim that the emails were forged and that she communicated with Melis only through written correspondence because his father intercepted the emails. The special master found:

> Her creditability [sic] has been critically impaired by her conduct with respect to the Mazzarella funds and by the unbelievable testimony she offered to excuse that conduct and to explain her dealings with the Giegolds. She has a strong motive to claim forgery to explain the otherwise damning email correspondence with Mr. Melis, and I have found as a fact that she created false legal bills for services to Mr. Melis.
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> [Special Master's Report, p. 16.]

According to the special master, Melis's testimony and demeanor as a witness "convince[d him] that Melis was "not likely to have fraudulently concocted the emails."

As in the Mazzarella and Melis matters, the special master concluded that respondent had misappropriated Fekete's funds. The special master ruled that respondent "was not entitled to withhold all or part of the proceeds of the litigation settlement from her client in order to apply those funds to payment of her attorney's fees without first obtaining either her client's explicit agreement or court approval after appropriate notice." In the absence of either, the special master concluded, withholding the funds constituted misappropriation.

The special master summarized his total findings and conclusions as follows:

> Because I have concluded that the proofs presented to me show clearly and convincingly that Respondent committed the several invasions and misappropriations detailed in this report and that, at least as to the Mazzarella and Melis funds, she did so knowingly and willfully, I recommend that she be permanently disbarred. In re Wilson, 81 N.J. 451 (1979).
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> [Special Master's Report, p. 18.]

Following a de novo review of the record, we are satisfied that the special master's finding that respondent knowingly misappropriated trust funds was fully supported by clear and convincing evidence.

In the Mazzarella matter, the clear and convincing evidence established that, prior to and after the October 8, 2002 closing date, respondent invaded the $70,000 deposit in the Mazzarella/Royale Realty transaction. In doing so, she violated both the Wilson and *Hollendonner* rules. In re Wilson, 81 N.J. 451 (1979) (unauthorized use of client funds constitutes knowing misappropriation); In re Hollendonner, 102 N.J. 21 (1985) (unauthorized use of escrow funds amounts to knowing misappropriation).

As mentioned above, on July 15, 2002, the Mazzarella $70,000 down payment was deposited into respondent's trust account, bringing its balance to $76,217.52. Between July 15

and October 8, 2002 (the date of the closing), no other funds were deposited into respondent's trust account. Nevertheless, during this time, respondent wrote $22,000 in trust account checks ($20,000 to Giegold and $2000 to a Concetta Oliveri) and transferred $31,000 from the trust account to the business account. Prior to expending these funds, respondent did not seek the authorization of either the Mazzarellas or Royale Realty, both of whom had an interest in the funds. As of October 7, 2002, the day before the Mazzarella/Royale Realty closing, the trust account balance was only $23,217.52.

The closing took place on October 8, 2002. Respondent did not turn over the $70,000 deposit to Mazzarella on that day. The trust account balance remained unchanged from the day before.

Between October 7 and November 25, 2002, no additional funds were deposited into respondent's trust account. On October 22 and November 15, 2002, respondent wrote two $5000

checks to Giegold.[10] Prior to using these funds, respondent did not seek the authorization of the Mazzarellas, to whom these funds now belonged. As of November 15, 2002, these checks reduced the trust account balance to $13,217.52.

A $12,000 trust account deposit on November 25, 2002, (Melis's funds) and a $14,000 deposit on December 2, 2002 (Fekete's funds) increased the balance in respondent's trust account to $39,217.52. On December 3, 2002, a $100,000 trust account deposit from Melis's father raised the balance to $139,217.52. On that date, respondent wrote a $71,500 check to Mazzarella, representing the closing deposit, but only after Arthur Mazzarella had called her and asked her when he would be receiving it.

For two principal reasons, we reject respondent's claimed belief that there were $78,000 in legal fees sitting in her trust account, against which she thought she was drawing, when she disbursed funds to Giegold and to Oliveri, and transferred funds to her business account.

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[10] A total of $40,000 in checks was written to Giegold – the $30,000 against the Mazzarella deposit and $5000 given to Giegold in April 2002 and again in November 2002.

First, respondent failed to turn over the deposit monies to the Mazzarellas at the closing. If she had really believed that she had not invaded the $70,000 deposit monies, then she surely would have appeared at the closing with a $70,000 check for her clients (which, of course, would have bounced). Yet, she showed up with no check.

Second, respondent provided no explanation to the Mazzarellas – or even to ethics authorities - for her failure to disburse the funds to the Mazzarellas at the closing. She disbursed the $70,000 two months following the closing, and then only after Arthur Mazzarella had called her and asked her when she would be sending him the funds.

The above leads to no other conclusion but that respondent knew that she was utilizing the Mazzarella deposit for her own purposes, rather thatn her reasonable belief that she had funds of her own in her trust account. Thus, respondent's use of the deposit monies prior to the closing, without the authorization of both the Mazzarellas and Royale Realty, constituted a violation of In re Hollendonner, supra, 102 N.J. at 21. Her use of the deposit monies after the closing, without the authorization of the Mazzarellas, constituted a violation of In re Wilson, supra, 81 N.J. at 451.

It matters not that respondent has not expressly admitted to misappropriating the monies. "An inculpatory statement is not an indispensable ingredient of proof of knowledge . . . . Circumstantial evidence can add up to the conclusion that a lawyer 'knew' or 'had to know' that clients' funds were being invaded." In re Johnson, 105 N.J. 249, 258 (1987). See, e.g., In re Roth, 140 N.J. 430 (1995) (attorney disbarred for knowing misappropriation of client funds based on circumstantial evidence involving the attorney's repeated invasion of funds); and In re Davis, 127 N.J. 118 (1992) (attorney disbarred for knowing misappropriation of client funds based on "overwhelming" circumstantial evidence involving the absence of deposits in the trust account to cover disbursements, the removal of a legal fee that exceeded the amount of the trust account deposit, and premature disbursements).

In this case, the circumstantial evidence clearly and convincingly establishes that respondent knew that she was invading the $70,000 closing deposit before and after the October 8, 2002 closing.

As to the Melis count, however, we are unable to agree with the special master's conclusion that respondent knowingly misappropriated the $112,000 received from Melis and his father.

In our view, the evidence falls short of the clear and convincing standard. Melis contended that the monies were deposits for the purchase of the Hampshire House co-op unit, while respondent asserted that Melis had decided against purchasing the unit in November 2002, and had authorized her to apply the $12,000 deposit to the balance of the $15,000 retainer. Moreover, respondent claimed, the sole purpose of the $100,000 payment (which was given to her after Melis's purported change of mind) was to reduce the $107,353 balance in unpaid fees owed by Hampshire House, the umbrella corporation.

The evidence established that, on November 15, 2002, Melis issued a $12,000 deposit check with the notation "Hampshire House," payable to respondent's trust account. The check clearly represented the payment of the deposit on the co-op unit, as it replaced a lost deposit check that Melis had written in September. The evidence also established that, on November 15, 2002, respondent drafted a time-of-the-essence letter to the buyer's attorney, setting a closing date of December 2, 2002. Finally, the evidence established that there was no closing on the Hampshire House co-op unit on December 2, 2002, or during the time that respondent represented Melis.

Melis vigorously testified that the closing was to go forward and that the $112,000 was to be used for that purpose. The documentary evidence that he offered in support of his claims, however, is of questionable authenticity. For example, in support of his position that he never changed his mind and that the transaction was alive, Melis relied on a memo purportedly written by respondent on December 2, 2002, referencing the November 15, 2002 time-of-the essence letter. But as respondent pointed out, it did not make sense for her to prepare a memo to Melis on the date of the closing (December 2, 2002), stating that she had sent the November 15, 2002 time-of-the-essence letter setting the closing date for December 2, 2002.

Other evidence on which Melis relied in support of his position, too, does not convince us of its authenticity. Specifically, Melis pointed to a purported exchange of e-mails between him and respondent.

We pause, at this juncture, to address a motion to supplement the record that respondent's counsel filed with Office of Board Counsel, two days before oral argument before us. Respondent's counsel requested that we consider the report of a computer forensic expert, William F. Moylan, issued just

two days earlier, on March 17, 2008. According to respondent's counsel, the report established that certain emails purportedly exchanged between respondent and Stephen Melis were forgeries.

Counsel asked us to remand this case to the special master for the limited purpose of determining the authenticity of the emails. The OAE objected to the motion, on the grounds that the emails had been produced to respondent during discovery, were marked into evidence at the hearing below, and were the subject of direct and cross-examination.

Although we permitted counsel to argue the motion, we determined to deny it for the same reasons expressed by the OAE: the emails were produced during discovery, were the subject of testimony during the hearing, which took place more than a year ago, and the motion raised the same issue raised at the hearing, namely that the emails were not authentic.

In any event, our independent review of the record leads us to question the reliability of the emails. For example, respondent purportedly sent an email to Melis on December 2, 2002, the alleged date of the closing, requesting funds for a closing that would take place on the day of the request. Typically, such request is made well in advance of the closing. Also, one of the emails that respondent allegedly sent to Melis

was interspersed with verbatim statements from a letter she had already sent to him.

We now return to respondent's defenses in this count. Respondent asserted that, on the date that the time-of-the-essence letter was drafted (November 15, 2002), Melis had decided against purchasing the Hampshire House unit. Therefore, she claimed, the letter was not sent; no closing date was scheduled; and no closing took place. Accordingly, with the consent of Melis, the $12,000 was applied to the balance of the retainer and the $100,000 was applied to the outstanding bills of "Hampshire House," the corporation.

Just as with the emails, we find that respondent's documents are of questionable legitimacy. She relied on bills that, as the special master noted, contained descriptions of work performed and mostly referred to "conferences" and "dictation." In addition, the bills were "grossly excessive," given the amount of time charged for simple tasks (such as tenant leases and minor controversies). Indeed, with respect to one particular bill, respondent charged two-and-a-half hours

for work allegedly performed on a day when she was not in the office.[11]

In short, because of the unreliability of each party's testimony and documents, we are unable to make a finding, to a clear and convincing degree, about the actual purpose of the $112,000 tendered to respondent. It is possible that Melis agreed to have the $12,000 deposit check applied to the retainer; it is possible that he did not agree to do so. It is possible that Melis's father paid the $100,000 to cover the substantial legal fees; it is equally possible that he did not.

An attorney cannot be disbarred because there is the possibility that client funds were misappropriated. In the face of conflicting evidence to support both scenarios, it cannot be clearly and convincingly established that respondent knowingly

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[11] Respondent testified, earlier in the proceeding, that she had neither prepared nor signed the September 12, 2002 $5000 check to Giegold, inasmuch as she had attended a "promotional ceremony" for one of her clients, who had been promoted from patrolman to captain. The ceremony had been followed by a celebration. In addition, that evening, she and her husband celebrated their wedding anniversary.

misappropriated Mel's funds. We, therefore, dismiss the charges contained in this count of the complaint.

In the Fekete count, respondent argued that her disbursement to Kosbab had not constituted an invasion of Fekete's funds because the funds were hers, not Fekete's. As mentioned above, respondent did not have a signed retainer agreement with Fekete, a circumstance that, Donohue reminded her, might have rendered her hourly fee arrangement with Fekete unenforceable. After the case was settled, respondent claimed that she was entitled to the $39,000 sum on a quantum meruit basis, apparently because she had obtained such a favorable settlement for Fekete.

The record does not reveal whether she informed Fekete of this critical development, that is, her claim of entitlement to the $39,000. Fekete testified that respondent had not presented him with a settlement statement, which would have given him notice of respondent's intent to keep the $39,000 as fees. It was only after Fekete kept asking respondent if respondent had received the $39,000 portion of the settlement, and Donohue had interceded on Fekete's behalf, that she sent Fekete a $9,000 check, a disbursement that she identified as a "refund," in an attempt to legitimize the character of the $39,000 as fees.

Much later, respondent sent an additional $18,000 to Fekete, but only after he had agreed to stop "badmouthing" her. At the time of this "agreement," respondent sent Fekete an accounting of the $39,000. The accounting showed a $27,000 disbursement to Fekete, a $5,000 disbursement to Donohue, a $5,000 fee payment to her, and a $1,400 check to the Division of Pensions. According to respondent, she considered the fee issue resolved. Two years later, in 2006, she revived her claim to the $39,000, ostensibly because Fekete had not kept his promise to cease "badmouthing" her.

As indicated earlier, between sending the $9,000 "refund" and the $18,000 "private settlement" check to Fekete, respondent disbursed $25,000 to Kosbab. That disbursement, respondent contended, had been funded by her own monies, at a time when she was convinced that the $39,000 rightfully belonged to her, as fees. Therefore, she concluded, there could not have been a knowing misappropriation of Fekete's funds; the monies were hers, not Fekete's.

The special master found that respondent had knowingly misappropriated Fekete's funds, by applying toward her fees a portion of the settlement, without first obtaining Fekete's consent or court approval.

That respondent was obligated to follow one of those two steps is unquestionable. RPC 1.15(c) provides that, when the lawyer and the client have a dispute over funds, the lawyer must segregate the funds until the resolution of the dispute. Respondent did not do so. She unilaterally regarded the $39,000 as her own monies and treated them as such.

Nevertheless, it is not so clear that, by doing so, respondent was guilty of knowing misappropriation:

> Attorneys who have taken their fees from their retainer agreement without the clients' consent have not been disbarred for knowing misappropriation. More simply stated, if the attorney is entitled to the fee, the attorney's unauthorized removal of the fee from the trust or escrow account has never been called knowing misappropriation. Instead, it is considered failure to safeguard funds, that is, failure to segregate funds in dispute. In fact, such unauthorized removal, without more, is ordinarily met with an admonition . . . .
>
> [In the Matter of Jack N. Frost, DRB 97-168 (January 5, 1998) (slip op. at 24.]

It appears, thus, that respondent's claim of entitlement to the funds might save her from a finding of knowing misappropriation of client's funds. Of course, it is always possible that an attorney's claim of entitlement may be trumped-up to hide an unauthorized disbursement that may lead to a charge of knowing misappropriation. Here, however, respondent

told Donohue, before "refunding" the $9,000 to Fekete, that she was entitled to the funds as fees. Her discussion took place before she disbursed $25,000 to Kosbab. It does not seem that her claim of entitlement was an afterthought. As wrong as she might have been that she was entitled to the $39,000, she asserted that claim before she decided to "refund" $9,000 to Fekete. Although the record does not reveal if she apprised Fekete of her belief that the $39,000 constituted fair compensation for her services, at least she so informed Donohue, who, presumably, relayed his and respondent's conversation to Fekete.

Because it does not seem that respondent's claim of entitlement to the $39,000 was fabricated to conceal a deliberate invasion of Fekete's funds and because, under established precedent, attorneys who fail to set aside funds under dispute are not guilty of knowing misappropriation, we do not find knowing misappropriation in the Fekete matter, but only a violation of RPC 1.15(c).

In conclusion, we find knowing misappropriation in the Mazzarella matter only and recommend respondent be disbarred under In re Wilson, supra, 81 N.J. 451 (knowing misappropriation

of client funds) and In re Hollendonner, supra, 102 N.J. 21 (knowing misuse of escrow funds mandates disbarment).

Member Lee Neuwirth 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 R. 1:20-17.

Disciplinary Review Board
William J. O'Shaughnessy
Chair

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

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Vincenza Leonelli-Spina
Docket No. DRB 07-309

Argued: March 20, 2008

Decided: May 20, 2008

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not participate
O'Shaughnessy	X						
Pashman	X						
Baugh	X						
Boylan	X						
Frost	X						
Lolla	X						
Neuwirth							X
Stanton	X						
Wissinger	X						
Total:	8						1

Julianne K. DeCore
Chief Counsel